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( 1901 — 1969 )

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SRINAGAR MUNICIPAL COUNCIL

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# INDIAN CASES.

## 1916.

## VOLUME XXXII.

CALCUTTA HIGH COURT.
CIVIL RULE No. 147 OF 1915.
June 30, 1915.
*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Roe.

ANANDA KUMARI DEBI—DEFENDANT—PETITIONER

*versus*

DURGA MOHAN CHUCKERBUTTY—PLAINTIFF—OPPOSITE PARTY.

*Court of Wards Act (B. C. IX of 1879), s. 51—Disqualified proprietor, suit against, when maintainable.*

A suit for recovery of money, alleged to be due from a deceased debtor, against his heiress who has been declared a disqualified proprietor under section 6 (*a*) of Act IX of 1879 (B. C.), where the inherited estate is in the hands of the Court of Wards and where in the suit she is not described as a Ward of Court or represented by the manager of the Court of Wards as her guardian and where the suit does not relate to the property not taken charge of by the Court of Wards, is in contravention of section 51 of the Act and not maintainable. [p. 2, col. 2.]

*Krishna Pershad Singh* v. *Gosta Behari Kundu*, 5 C. L. J. 434; *Dhanipal Das* v. *Raja Maneshar Baksh Singh*, 33 I. A. 118; 10 C. W. N. 849; 28 A. 570; 16 M. L. J. 292; 8 Bom. L. R. 491; 9 C. C. 188; 3 A. L. J. 495; M L T. 205; 4 C. L. J. 1; *Dhunpat Singh* v. *Shoobhudro Kumari*, 8 C 620; 11 C. L. R 285, distinguished.

Civil Rule against the judgment of the Small Cause Court Judge of Dacca, dated the 23rd November 1914.

Babu *Dwarkanath Chakravarty* (with him Babu *Prakash Chandra Pakrashi*, for the Petitioner.

Babu *Kshitish Chandra Neogi*, for the Opposite Party.

JUDGMENT.—The plaintiff, opposite party, brought a suit for recovery of a certain sum of money alleged to be due from the deceased husband of the petitioner. It appears that the petitioner was declared a disqualified proprietor under section 6 (*a*) of Act IX of 1879 (B. C.), which relates to females declared by the Court incompetent to manage their own property, and her estate which she inherited from her husband, is in the hands of the Court of Wards. She was not, however, described in the suit as a Ward of the Court nor was she sued as represented by the manager of the Court of Wards as her guardian, as required by section 51 of the Act. She objected to the frame of the suit on that ground, but her objection was overruled by the Small Cause Court Judge who held as follows:—"The contention of the defendant as to the frame of the suit, is not very fatal. There can be no difficulty to pass a decree against the assets of the deceased debtor. Whether his estate under the management of the Court of Wards, will be liable or not, will be matter for consideration in the Execution Department," and accordingly passed a decree against her. We are of opinion that the suit as framed, is in contravention of the provisions of section 51 of Act IX of 1879 and that she ought to have been described as a Ward of the Court and represented by the manager of the Court of Wards as her guardian. The opposite party in showing cause, has produced an affidavit, in which it is stated that there is one property belonging to the husband of the petitioner which was not taken charge of by the Court of Wards and of which the petitioner is in possession, and that under the circumstances, it was not necessary to sue her as a Ward of the Court. We were referred to certain observations in the case of *Krishna Pershad Singh* v. *Gosta Behari Kundu* (1), as supporting that

(1) 5 C. L. J. 434.

contention. It appears, however, that in that case the Court of Wards did not take charge of a portion of the estate which was sold in execution of a decree and the question was, whether the manager of the Court of Wards was entitled as a matter of right to act as guardian *ad litem* of the minor judgment-debtor in a litigation relating to the property which had been sold. It was held with reference to the provisions of section 35 of the Act that the Court of Wards was not in charge of the property sold, because possession had not been taken of it and, therefore, it could not deal with the property under section 5 of the Act, which authorises the Court to deal only with property which it took charge of, and that consequently, the provisions of section 51 of the Act had no application to the case.

We are also referred to the observations of the Judicial Committee in the case of *Dhanipal Das* v. *Raja Maneshar Baksh Singh* (2) and of Mr. Justice Field in the case of *Dhunput Singh* v. *Shoobhudra Kumari* (3). We are of opinion that both the cases are distinguishable from the present case.

In the first case, their Lordships were dealing with the provisions of Act XVII of 1876 (the Oudh Land and Revenue Act, 1876), and their Lordships held that the provisions of that Act were not intended to interfere with the personal status or rights of disqualified proprietors except as regards the management of their property unless they were idiots or lunatics and that although such disqualified proprietors might not without the sanction of the Court of Wards, create any charge upon their property, there was no prohibition in the act of the proprietors contracting debts or borrowing money. No question was raised as to how the Ward should be sued and their Lordships did not deal with that question. A disqualified proprietor was sued in that case upon a personal contract entered into by him and no question as to any portion of the estate not having been taken charge of by the Court of Wards, nor as to the manner in which a Ward should be sued in such a case, was either raised or decided in that case.

In the second case, it was held upon a construction of Regulation X of 1793 that a Ward of Court is not absolutely incapacitated from contracting but that the power of the Ward to contract is taken away so far as regards all property which under the provisions of the law, comes under the charge and control of the Court of Wards. It is true that the provisions of section 51 were referred to and there is an observation by Mr. Justice Field that it is a provision of procedure; but they held that the provisions of that section could not affect any liability which might be incurred by a Ward in respect of any contract entered into by him or her and do not operate to remove or destroy the personal liability of such a person. So in both these cases, there was a personal contract entered into by the ward. In the present case on the other hand, there was no personal contract by the petitioner, nor was there any personal liability against her. The plaintiff sought to recover a certain sum of money alleged to be due from the husband of the petitioner and the suit did not relate to the property which has not been taken charge of by the Court of Wards. Had the suit been so framed and had the plaintiff sought for recovery of money to be realised from the particular property in the possession of the petitioner which has not been taken charge of by the Court of Wards, the case would have come within the principle of the decision in the case of *Krishna Pershad Singh* v. *Gosta Behari Kundu* (1) cited above. As it is, the suit had no reference to the property which had been left out by the Court of Wards, and the decree was for money to be realised from the assets of the deceased debtor. That being so, section 51 is applicable to the case and the suit as framed, is not maintainable. It appears that the property which was left in the possession of the petitioner has been taken charge of by the Court of Wards subsequent to the decree passed in the suit.

The Rule is made absolute and the decree of the Court below is set aside. We think, however, that the plaintiff may be allowed to amend the plaint. We accordingly direct that the plaintiff, opposite party, be allowed

(2) 33 I. A. 118; 10 C. W. N. 849; 28 A 570; 6 M. L. J. 292; 8 Bom. L. R. 491; 9 O. C. 188; 3 A. L. J. 495; 1 M L. T. 205; 4 C. L. J. 1.

(3) 8 C. 620; 11 C. L. R. 285.

to amend the plaint by describing the defendant in accordance with the provisions of section 51 of Act IX of 1879; and the Court will try the suit after such amendment. The costs of this Rule will abide the result. We assess the hearing fee in this Court at one gold *mohur*.

*Rule made absolute.*

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MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 351 OF 1914.

December 6, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

N. C. KUPPUSWAMI IYENGAR AND ANOTHER—PETITIONERS—APPELLANTS

*versus*

N. C. NARAYANA IYENGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 115, scope of—Erroneous decision on point of law—Jurisdiction of High Court to interfere.*

An erroneous decision on a question of law relating to limitation by the Presidency Court of Small Causes, is not a ground for interference in revision by the High Court under section 115 of the Code of Civil Procedure, when no question of jurisdiction is involved.

*Ratnam* alias *Nanjunda Chetty* v. *Kolandai Ramasamy Chetti*, 31 Ind. Cas. 536; 2 L. W. 1115; *Naraya Heyde* v. *Vetla Prabhu*, 12 Ind. Cas. 75; 10 M. L. T. 281; 21 M. L. J. 1020; (1911) 2 M. W. N. 239; *Subramania Pattar* v. *Narayana Pattar*, 28 Ind. Cas. 189; 2 L. W. 230, dissented from.

*Shew Prosad* v. *Ram Chunder*, 23 Ind. Cas. 977; 41 C. 323, followed.

Appeal under clause 15 of the Letters Patent, against the judgment of Mr. Justice Hannay, in Civil Revision Petition No. 403 of 1913, reported in 25 Ind. Cas. 647, preferred against that of the Court of the Small Causes, Madras, in Full Bench Application No. 1 of 1913, in Suit No. 7221 of 1912.

Mr. *V. C. Seshachariar*, for the Applicants.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The learned Judge is right, in my opinion, as regards the scope of section 115 of the Civil Procedure Code. I regret that I am unable (with the greatest respect) to agree with the decisions (each by a single learned Judge of this Court) reported as *Ratnam* alias *Nanjunda Chetty* v. *Kolandai Ramasamy Chetti* (1), *Naraya Hegde* v. *Vetla Prabhu* (2) and *Subramania Pattar* v. *Narayana Pattar* (3). The case of *Shew Prosad* v. *Ram Chunder* (4), deals with the scope of section 115 of the Civil Procedure Code in a manner which appeals to my mind as enunciating the correct legal principles.

I would dismiss the appeal with costs.

NAPIER, J.—I agree both with the above ruling and also with the dissent from the cases referred to.

*Appeal dismissed.*

(1) 31 Ind. Cas. 536; 2 L. W. 1115.
(2) 12 Ind. Cas. 75; 10 M. L. T. 281; 21 M. L. J. 1020; (1911) 2 M. W. N. 239.
(3) 28 Ind. Cas. 189; 2 L. W. 230.
(4) 23 Ind. Cas. 977; 41 C. 323.

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CALCUTTA HIGH COURT.

CIVIL APPEAL No. 61 OF 1915.

November 29, 1915.

*Present*:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., and Justice Sir Asutosh Mookerjee, KT.

*In the matter of* GOBERDHONE SEAL, AN INSOLVENT.

RAJKISHORI DASI—RESPONDENT—APPLICANT

*versus*

LAKHYPRIA DASI—APPELLANT—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 10, applicability of, to appeal from order in insolvency—Security for costs from appellant—Presidency Towns Insolvency Act (III of 1909).*

Order XLI, rule 10, of the Civil Procedure Code, 1908, applies to an appeal from an order passed by a Judge of the High Court in its Insolvency Jurisdiction under Act III of 1909. [p. 4, col. 1.]

Mr. *B. K. Lahiri* (with him Mr. *K. N. Majumdar*), for the Applicant.

Mr. *N. Sircar* (with him Mr. *S. K. Chakravarty*), for the Opposite Party.

JUDGMENT.

WOODROFFE, J.—This is an application for security for costs in an appeal against a judgment passed by Chaudhuri, J., in Insolvency. It is unnecessary to recapitulate the facts which are set out in the petition. The application is opposed both on

grounds of law and fact. As regards the first question, the point is whether Order XLI, rule 10, applies to the case of an appeal from an order passed by a Judge in Insolvency under Act III of 1909. Section 8 (*b*) of that Act states that an appeal shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the Ordinary Original Civil Jurisdiction. The question then is, does the order apply to the latter case. No doubt, the case of *Sesha Ayyar* v. *Nagarathna Lala*(1), answers this question in the negative. This case was decided prior to the present Code and has not been referred to, nor followed so far as we are aware in this Court where the previous practice has been to entertain such applications. Under section 117 of the Code, its provisions apply to the High Courts save as provided in Parts IX and X. I am of opinion, therefore, that we have power to entertain and adjudicate this application under section 117 and Order XLI, rule 10, of the Code. This conclusion is in conformity with the previous practice under which such applications have been adjudicated. It cannot be reasonably held that this Court when sitting in appeal from a decision on the Original Side, is deprived of powers necessary to an effective jurisdiction admittedly existent on the Appellate Side of the same Court. For, if Order XLI, rule 10, does not apply, there is no other provision applicable and in such a case it would be necessary to invoke the provisions of section 151. On the facts stated in the petition, and in particular on the findings of the learned Judge there stated, I am of opinion that security should be required of the appellant. The applicant is entitled to the costs of this application.

SANDERSON, C. J.—I agree.

MOOKERJEE, J.—I agree.

(1) 27 M. 121 at p. 123; 13 M. L. J. 262.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 5 OF 1912-13 OF CAWNPORE DISTRICT.

July 25, 1913.

*Present*:—Mr. Baillie, S. M.

KALKA SINGH—DEFENDANT—APPELLANT

*versus*

DWARKA PRASAD—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), ss. 150, 153, 154, 158—Sale of proprietary rights—Reservation of certain area free from all payments—Rent-free grant—Right to hold free of revenue.*

Where a person sold his proprietary rights in a village reserving a certain area for himself free of any payment whatsoever:

*Held*, that the agreement constituted the area a rent-free grant acquired in consideration of a right previously vested in him, but that the vendor could not claim to hold it free of revenue, the agreement in this respect being contrary to law.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 11th December 1912, reversing that of the Assistant Collector, Cawnpore District, in the case of assessment of revenue under sections 150 and 156 of Act II of 1901.

JUDGMENT.—The position was not entirely correctly apprehended by the Commissioner, although the order he has passed, is in effect proper. The appellant was formerly proprietor of this village. He sold it to the predecessor-in-interest of the respondent reserving a right to hold the area now in question free of any payment whatsoever. This agreement, in my opinion, clearly constituted the area in question a rent-free grant given by the respondent to the appellant in consideration of rights previously vested in him. Section 158, in my opinion, fully applies and the respondent was justified in suing under that section to have it declared that the appellant was liable to pay revenue. It is urged that the agreement between parties is thereby invalidated. This is no doubt correct. The agreement was contrary to law which provides that no land should be held revenue free except in certain specified circumstances. The order declaring the appellant liable to pay the revenue, was correct.

The appeal is dismissed with costs on appellant.

*Appeal dismissed.*

RAMANATHAN CHETTY *v.* RAMASAMI CHETTY.

## MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 20 OF 1913.

November 4, 1915.

*Present*:- Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

K. S. RM. RAMANATHAN CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

T. K. V. RAMASAMI CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), ss. 54, 118—Unregistered deed of exchange—Acquiescence—Title, whether passes—Estoppel—Construction of Statute.*

Where the plaintiff and the defendant agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house sites, the agreement being reduced to writing though not registered, and the defendant having erected a wall on the land allotted to him, the plaintiff sued to recover the land:

*Held*, per *Chief Justice*, (*Seshagiri Aiyar, J.*, dissenting), (1) that the plaintiff, having acquiesced in the defendant's building the wall and having obtained a payment therefor, was estopped from claiming the land and could not recover it even though the original deed of exchange was unregistered and did not pass any title to the defendant; [p. 6, col. 2.]

(2) that if a man builds a house partly on his neighbour's lands and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it; [p. 7, col. 1.]

*MacManus* v. *Cooke*, 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708, followed.

(3) that the rule of law laid down in *Kurri Veerareddi* v. *Kurri Bapireddi*, 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153 that where there is no legal title equity will not interfere to supplement it, does not involve the proposition that where there is no registered document no amount of acquiescence on the part of the transferor will bar his right to get back the property within the statutory period. [p. 6, cols. 1 & 2.]

Per *Seshagiri Aiyar, J.*—(1) Where a Statute enjoins that title would pass only if certain formalities are complied with, conduct and action cannot be relied upon to supplement an inchoate title. [p. 8, col. 1.]

(2) The use of the word "only" in sections 54 and 118 of the Transfer of Property Act excludes the possibility of title being acquired by any other process than that laid down in these sections. [p. 8, col. 1.]

(3) The rule of estoppel is one of evidence and ought not to be allowed to prevail against a statutory right. [p. 8, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in Original Suit No. 94 of 1911.

FACTS.—Two Nattukottai Chetties in Ramnad District exchanged portions of the backyards attached to their respective houses for their mutual convenience by an unregistered instrument. One of them subsequently built a house on the site so got in exchange. After the completion of the building, the other Chetty instituted a suit to recover the site he had conveyed, on the ground that no title passed to the defendant as the document which was an exchange deed was not registered and that, therefore, he was entitled to recover the property. The defendant pleaded that the document was not a deed of exchange but an award and that the plaintiff was estopped by his conduct from seeking to eject him after he had built substantially upon the site.

The Subordinate Judge of Ramnad held that the document was an award and without deciding the question of estoppel, dismissed the suit, on the ground that as an award, it did not require registration. Hence this first appeal to the High Court by the plaintiffs.

Messrs. *S. Srinivasa Aiyangar* and *K. Rajah Aiyar*, for the Appellants.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

### JUDGMENT.

WALLIS, C. J. In this case, the parties by an unregistered agreement, Exhibit B, dated 4th March 1908, agreed for mutual convenience to an exchange of certain plots of land, forming part of their adjoining house sites. Exhibit B shows that the agreement was come to in the presence of mediators, and the effect of the oral evidence is that it was these mediators who settled the amount of the cash payment to be made by the 1st defendant to the 1st plaintiff to equalize matters, but Exhibit B is in terms an agreement signed by the parties and we see no sufficient reason for treating it, as the Subordinate Judge has done, as an award or proceeding and as such, it is exempt from the provisions of the Registration Act. It is, therefore, necessary to deal with the plaintiff's claim, that owing to this want of registration, he is entitled to recover back the land given by him in exchange to the defendant, even though the defendant has erected on the land one of the walls of his new house which has cost over Rs. 40,000 and the removal of the wall would bring down the house, and although nearly a year

after the exchange, when the defendant was beginning to build, the plaintiff objected to the extent of the land awarded to him in exchange and obtained a further payment of Rs. 525 from the defendant. The parties have since quarrelled and it is scarcely denied that the plaintiff's object in bringing the suit is rather to injure the defendant than to benefit himself. It is, however, argued that in default of registration, the land remained the property of the plaintiff as, under the Transfer of Property Act, the transfer could only be made by registered instrument and that the defendant is not entitled to the benefit of any of the equities which English Courts raise in such a case against the application of the Statute of Frauds. As observed in *Maddison* v. *Alderson* (1), that Statute did not make the transaction itself void whereas it is contended that was the effect of the Transfer of Property Act and the Full Bench decision of this Court [*Kurri Veerareddi* v. *Kurri Bapireddi* (2)] was relied on. It was held in that case, when the price had been paid and possession delivered but the sale-deed had not been registered, that the vendor was entitled to get back the property and that the contract to sell, afforded no defence even though the defendant's right to sue for specific performance, was not barred at the institution of the suit. White, C. J., arrived at this conclusion with some hesitation having regard to the observations of their Lordships of the Judicial Committee in *Immudipatam Thirugnana Kondama Naik* v. *Periya Dorasami* (3), and it may be necessary when the time comes to consider how far the decision of the Full Bench can be reconciled with the very general language used by their Lordships in the more recent case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (4), though no doubt the transaction there in question took place before the passing of the Transfer of Property Act and the effect of its provisions is not referred to in the judgment. But assuming *Kurri Veerareddi* v. *Kurri Bapireddi* (2), to be correctly decided, I am not prepared to hold that it involves the proposition that where there is no registered document, no amount of acquiescence on the part of the transferor will bar his right to get back the property within statutory period. Where a lessee for a limited term erects buildings on the land and the lessor stands by and says nothing, it was no doubt held in *Ramsden* v. *Dyson* (5) and *Beni Ram* v. *Kundan Lal* (6), that the mere acquiescence of the lessor, will not debar him from recovering the land at the expiry of the term. In *Immudipatam Thirugana Kondama Naik* v. *Peria Dorasami* (3), the plaintiff sued in the year 1895 for a declaration of his title and for redemption. The mortgage in 1882 by the plaintiff's father in favour of the mortgagees provided that on redemption, the property should be handed over to the contesting defendant; but their Lordships found, not only that there was no registered transfer as required by the Transfer of Property Act, but that it was not proved that there was any valid contract by the plaintiff's father to make the transfer to the defendants. If there had been such a contract, their Lordships were of opinion that it would have been a good defence as the defendants might call on the transferor's heir to supplement the contract and this, though the suit was brought more than twelve years after the date of the alleged transfer. The present case is undoubtedly much stronger. Not only was there a contract to exchange, but it was fully performed and long afterwards, the plaintiff stood by and acquiesced in the defendant's building and obtained a further payment from him. In these circumstances, putting aside the conveyance altogether, I think the plaintiff is estopped. Key, J., in *MacManus* v. *Cooke* (7) cited an old case *Anon* (8), which is both brief and apposite: "*Short* v. *Taylor*, in Lord Somer's time, was cited, which was, Short built a fine house; Taylor began to build another; but laid part of his foundation upon Short's land. Short seeing

(1) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(2) 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153.

(3) 24 M. 377; 28 I. A. 46; 5 C. W. N. 217.

(4) 28 Ind. Cas. 930: 2 L W. 258; 42 C. 801; 21 C. L J. 231; 28 M. L. J. 548; 19 C W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; (1915) M. W. N. 621; 17 Bom. L. R. 420.

(5) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

(6) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 25 I. A. 58; 7 Sar. P. C. J. 523.

(7) 35 Ch. D. 681; 56 L. J. Ch. 662; 56 L. T. 900 35 W. R. 754; 51 J. P. 708.

(8) 2 Eq. C. Ab. 522; 22 E. R. 440.

this, did not forbid him, but on the contrary very much encouraged it; and when the house was built, he brought an action; and Lord Somer granted an injunction." The plaintiff's conduct in this case has been far worse than that of Short. It is clear, observes Key, J., in *McManus* v. *Cooke* (7) citing this case, that if a man builds a house partly on his neighbour's land, and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it. Assuming *Kurri Veerareddi* v. *Kurri Rapireddi* (2), to be rightly decided, I do not think it prevents us from applying this rule in India, or obliges us to countenance a purely vexatious suit such as this. I may also refer to *Plimmer* v. *Mayor of Wellington* (9) and *Attorney-General of Southern Nigera* v. *Holt and Company* (10), which were cited before us as supporting the same view. I would, therefore, uphold the decree though on different grounds and dismiss the appeal with costs. In the result, the appeal is dismissed with costs.

SESHAGIRI AIYAR, J.—I have the misfortune to differ from the learned Chief Justice. The main facts are not in dispute. By a deed dated the 4th March 1908, there was an exchange of building sites between the 1st plaintiff and the 1st defendant. The 1st defendant erected a wall on the exchanged site and put up a substantial building. This suit was instituted in 1911 for recovery of the site after removing the building on it. The case for the plaintiff is that as the deed was not registered, no title passed to the plaintiff. The Subordinate Judge held that the document was not a deed of exchange and that the real exchange was effected by the award of arbitrators. Mr. Krishnaswami Aiyar, for the respondent, drew our attention to the evidence on this point. We feel no hesitation in holding that the document is a deed of exchange and that there is no satisfactory evidence to prove that the arbitrators gave an award as to the exchange. The evidence does not show that there was any antecedent dispute relating to the exchange. There is no reference in writing. On the evidence, it is clear that all the mediators were called upon who were to fix the price to be paid by the defendant as he was taking a larger extent than the plaintiff obtained from him. The evidence on the side of the plaintiff is clear and consistent and we accept that, as being more in accordance with the probabilities of the case. We cannot accept the finding of the Subordinate Judge on this point.

The question of law arising on these facts is whether the plaintiff is not entitled to recover possession, because of his conduct in allowing the 1st defendant to erect a substantial building at a great cost. There can be no doubt that the plaintiff has no merits and his conduct has not been above board. Still if the law is in his favour, the Court will not be justified in refusing him relief.

The Full Bench decision of this Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) lays down that if the party resisting possession has no statutory or prescriptive title, he cannot rely on equities to resist the suit. Mr. Krishnaswami Aiyar contended that this decision must be taken to have been overruled by the decision of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* (4). I am unable to agree with this contention. In the case before their Lordships, there was a compromise in a suit. The compromise with reference to certain portions of it, should have been registered. This was not done. But in pursuance of the terms, the parties were placed in possession and dealt with the properties as owners. Their Lordships held "that even although the *razinama* and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties has been such as to supply all such defects." Before the Transfer of Property Act, the law did not prescribe any formalities for conferring title. Under the old Registration Regulations and Acts, if a document of a particular description was in writing but not registered, it was not receivable in evidence. Therefore, the document commented upon by their Lordships, was not *ipso facto* invalid, only it was not receivable in evidence. To such a case, the decisions which construed the

(9) 9 A. C. 699; 53 L. J. P. C. 104; 51 L. T. 475; 49 J. P. 116.

(10) (1915) A. C. 599; 84 L. J. P. C. 98.

Statute of Frauds in England were held applicable. As pointed out by Mr. Srinivasa Aiyangar, the reference in the judgment of the Judicial Committee in *Maddison* v. *Alderson* (1) shows that their Lordships were not considering cases for which the Statute has prescribed a particular form for conferring title. The judgment of some of the noble Lords in that case would seem to show that the principle of equitable estoppel can apply only to executory contracts and not to executed contracts. See specially the judgment of Lord Blackburn. I do not think that the Judicial Committee intended to lay down that even where a Statute enjoins that title would pass only if certain formalities are complied with, conduct and acting can be relied upon to supplement an inchoate title. Section 54 of the Transfer of Property Act says that a "transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of reversion or other intangible thing, can be made *only* by a registered instrument." The second clause of section 118 is "A transfer of property in completion of an exchange, can be made *only* in the manner provided for the transfer of such property by sale." The use of the word "*only*" in these sections excludes the possibility of title being acquired within the statutory period by any other process. I feel no doubt that their Lordships of the Judicial Committee did not intend to override statutory requirements by their observations. Their Lordships have always held with reference to Indian enactments that "the essence of a Code is to be exhaustive." See *Balkishen Das* v. *W. F. Legge* (11); *Dhanipal Das* v. *Maneshar Bakhsh Singh* (12); *Gokul Mandar* v. *Pudmanund Singh* (13); *Webb* v. *Macpherson* (14); *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (15). I am, therefore, of opinion that *Kurri Veerareddi* v. *Kurri Bapireddi* (2) is unaffected by *Mahomed Musa* v. *Aghore Kumar Ganguli* (4).

The next branch of the argument of Mr. Krishnaswami Aiyar relates to estoppel. If I understood him aright, he does not claim that the conduct of the plaintiff has given him a title to the property; his position is that Courts should not afford relief to the plaintiff as he is not entitled to it by reason of his conduct. In other words, although in law the plaintiff has a title to recover, Courts should reject his claim on grounds of equity. Before I deal with the cases quoted by the learned Vakil, I shall refer to the principle which this contention seems to offend. The learned Vakil for the appellant invoked the aid of the well-known principle that there can be no estoppel against law. I shall state what, in my opinion, are the uses and limitations of this rule before applying it to the present case. The rule of estoppel is one of evidence. It ought not to be allowed to prevail against a statutory right. There are many instances in which parties have been held entitled to equities, using that term in the sense of estoppel although, as pointed out by Jenkins, C. J., in *Municipal Corporation of Bombay* v. *Secretary of State* (16), the two rights are distinct. Even against a Statute, equity may be relied upon in certain cases. The provision in the Statute may be directory and not mandatory. Equity will relieve against its strict enforcement. Certain penalties may be held *in terrorem* with a view to the prompt obedience of the statutory rule. Equity will help to relieve the rigour of the law in such cases. Under a rule of law, time may not be of the essence of the contract. Here is room for the application of equity. Apart from these and similar instances, in my opinion, no principle of equity or estoppel should be allowed to prevail against a plain and mandatory provision of law. Where the law says, as in the present case, that title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel. The effect of holding otherwise, would be to override legislation. Courts will then be creating a title which the Legislature has distinctly

(11) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153 (P. C.); 2 Bom. L. R. 523.

(12) 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 207; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 495; 10 C. W. N. 849; 16 M. L. J. 292; 33 I. A. 118.

(13) 29 C. 707; 4 Bom. L. R. 793; 6 C. W. N. 825; 29 I. A. 196.

(14) 31 C. 57; 5 Bom. L. R 832; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238 (P. C.).

(15) 17 Ind. Cas. 627; 37 B. 498; (1912) M. W. N. 1247; 12 M. L. T 652; 11 A. L. J. 7; 24 M. L. J. 6; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 40 I. A. 24.

(16) 29 B. 580; 7 Bom. L. R. 27.

negatived. Whatever may be the position in England before the Judicature Act, when equitable relief was given along with and often in opposition to common law remedies, I do not think the Courts in this country have power to nullify legislative provisions. The authorities in this country support this proposition. *Chidambara Chettiar* v. *Vaidilinga Padayachi* (17); *Dhiraj Chandra Bose* v. *Srimati Hari Dasi Debi* (18); *Jagadbandhu Saha* v. *Radha Krishna Pal* (19). Mr. Krishnaswami Aiyar referred to the dictum of Lord Kingsdown in the well known case of *Ramsden* v. *Dyson* 5). The actual decision in that case was that as no expectation was held out to the tenant, the landlord was not estopped. Lord Kingsdown dissented from the conclusion of the other noble Lords. The argument before the House of Lords was directed to showing that by the conduct of the landlord, an equity was created in favour of the tenant. No question of statutory command or prohibition had to be dealt with in that case. I do not think the pronouncements of Lord Kingsdown and of the other noble Lords are relevant to cases where the Courts are asked to act in direct contravention of enacted law. *Attorney-General of Southern Nigera* v. *John Kolt and Company, Liverpool* (10), is not really against this view. In that case, the respondents had acquired by a grant from the Crown certain lands of which the sea was the boundary. As a result of the erection of protective works by them, a strip of land accreted to that already possessed by them. The Crown claimed this accretion. It was conceded that ordinarily the accretion would go to the Crown; but it was contended that having agreed to give access to the sea by the original grant, the Crown was estopped from laying claim to this piece of land so as to derogate from the right already granted. This contention was upheld. At page 620, their Lordships say: "In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognized by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a license had been granted and duly accorded to the respondents to reclaim, as was done, that license would have been in entire accord not only with the right of the subject but with the duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* (20) and principally with the opinion of Fry, J., at the trial [*Attorney-General* v. *Tomline* (21)] and Cotton, L. J., in the Court of Appeal [*Attorney-General* v. *Tomline* (21)]." As I understand this judgment, the Judicial Committee were inclined to think that the grant of land implied a license to reclaim as well. The reference to *Lyon* v. *Fishmonger's Company* (22) and other cases shows that their Lordships were prepared to presume from the nature of the grant, a right in the respondents as grantees to erect walls in the foreshore in order that the benefits arising from the original grant may be properly enjoyed. One other observation may be made with reference to this case. No question of statutory title as in the present appeal, arose in it. *Sarat Chunder Dey* v. *Gopal Chunder Laha* (23) was much relied upon by the respondent. In that case, the title-deed was in the name of the mother. The son had allowed her to deal with the property. The son's property passed under the Court sale to the plaintiff and the defendant claimed title under the mother by virtue of another Court sale on the mortgage created by her. It was found that the mother was only a *benamidar* for the son. Their Lordships of the Judicial Committee held that the son would have been estopped from questioning his mother's dealings as she had the ostensible title in her to the property, and that consequently persons claiming under the son, were similarly estopped. I fail to see how this

(17) 30 Ind. Cas. 408; 38 M. 519.

(18) 29 Ind. Cas. 290; 19 C. W. N. 507; 28 M. L. J. 480; 2 L. W. 422; 42 C 765.

(19) 4 Ind. Cas. 414; 36 C. 920.

(20) 14 Ch. D. 58; 49 L. J. Ch. 377; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.

(21) (1878) 12 Ch D. 214 at p. 233; 47 L. J. Ch. 473.

(22) 1 A C. 662; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R 165.

(23) 20 C. 296; 19 I. A. 203 (P. C.).

case affords any help to the respondent. The estoppel pleaded, related to the claim as real owner against a person having *prima facie* the statutory title. The other cases quoted, do not require any detailed examination. I am of opinion that the plaintiff was not estopped from suing to recover the property. I further agree with the contention of the learned Vakil for the appellant that section 115, which has been held to be exhaustive of the law in India [*Asmatunnessa Khatun* v. *Harendra Lal Biswas* (24)], does not cover this case. However reprehensible the conduct of the plaintiff may be, there is no suggestion in the evidence that at the time the defendant erected his house on this land, he was aware that he alone had title to the property and not the defendant. The plaintiff has no doubt taken advantage of the infirmity in the defendant's title; but it is not shown that he was aware of this infirmity when building operations commenced and intentionally led the defendant into the belief that he had a valid title. The truth seems to be that until about the time of the suit, both parties believed that a good title had been secured by the document of 1908. In this view, the plaintiff cannot be said to be estopped from claiming the property. See *In re Barrow's* case (25).

The only other point is whether the plaintiff should be allowed to recover the property without paying substantial compensation to the defendant. Under the Transfer of Property Act, there is no question that the option should be given to the transferor to elect either to convey the property validly or to pay compensation. Mr. Srinivasa Aiyangar says that his client elects the latter alternative. He also contended that the Act in terms would not apply to the present case. Section 51 of the Transfer of Property Act speaks of the transferee of immoveable property making improvements. Without expressing any opinion whether the term 'transferee' would apply to persons who have obtained invalid transfers, I think the principle of the section governs the present case. The plaintff, in my opinion, must pay substantial damage before he is given a decree for possession. As the question has not been dealt with by the Court of first instance, the Subordinate Judge should be allowed to return a finding on the 4th issue in the view I have taken of the case. The proper course will, no doubt, be to appoint an expert Commissioner to determine the extent of the damage that is likely to accrue and to give an estimate of the compensation to be paid.

*Appeal dismissed.*

(24) 12 C. W. N. 721; 35 C. 904; 8 C. L. J. 29.

(25) 14 Ch. D. 432; 41 L. T. 755; 28 W. R. 270; 49 L. J. Ch. 498.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 7 OF 1912-13 OF CAWNPORE DISTRICT.

December 4, 1913.

*Present*:—Mr. Baillie, S. M.

DWARKA PRASAD--DEFENDANT—APPELLANT

*versus*

*Musammat* PHUL KUNWAR—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), ss. 157, (b), 158—Sale of zemindari—Reservation by vendor of certain area as rent free—Vendee, right of, to get revenue assessed.*

A person sold his share in a certain village but reserved to himself, rent-free in perpetuity, an area of some 17 *bighas*. In a suit by the vendee to have the area assessed to revenue and to have the vendor declared liable to pay the revenue so assessed:

*Held*, that the land had been acquired as a rent-free holding, within the meaning of section 151 (*b*) of the Tenancy Act, for a valuable consideration. [p. 11, col. 1.]

Second appeal from an order of the Commissioner, Allahabad Division, dated the 3rd April 1913, reversing that of the Assistant Collector, Cawnpore District, in the case of *muafi*.

JUDGMENT.—The inconsistency between sections 151 and 158 referred to by the Commissioner does not exist. Section 151 is the section which governs all subsequent provisions as to resumption or assessment of revenue. When any tenure comes within the exceptions mentioned in section 151, no subsequent section is in any way applicable.

There appears to me to be no doubt whatsoever that the exceptions in section 151 do apply to this land. It may be

doubted whether the judicial decision on which the Commissioner bases his decision, was one declaring a right to hold rent free, but there can be no doubt whatsoever that clause (*b*) applies in this case. The arrangement by which the respondents received this land free of rent, took place in 1852.

The consideration was that the sale price of the share sold by them was less as a consequence of the reservation of this area rent free. The right to hold rent free was undoubtedly acquired for valuable consideration. The period of suit for resumption at that time was 12 years and the 12 years expired in 1864. The right to resume had, therefore, been barred in that year. In my opinion, the plaintiff is not entitled to have it declared that this land is liable to pay revenue assessed on it. The argument advanced before me was that as the land in question was excepted from the property transferred by sale in 1852, it could not be considered to be a rent-free tenure, that the respondents' predecessor-in-interest having excepted this land from the sale, was an independent proprietor of it and liable to pay the revenue. The wording of the transaction and the subsequent history of the tenure are conclusively against this. A rent-free tenure was undoubtedly created and the predecessors-in-interest of the appellant undertook the responsibility for the revenue.

The appeal is dismissed with costs on appellant.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1609 OF 1912.

May 28, 1915.

*Present*:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

BAHADUR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

BHAGEL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Alienation—Remote collaterals, suit by, for declaration, when maintainable.*

The proper person to object to an alienation is the nearest reversionary heir, but if that person omits without sufficient cause to protect the estate, the remoter reversioners can take action. [p. 12, col. 1.]

Where, therefore, the collaterals of a vendor sued within one year after the sale effected by him for a declaration that the sale should not affect their reversionary rights or in default of being able to obtain such a declaration, claimed a decree for pre-emption, and there was a nearer collateral of the vendor who took no steps to protect the estate but subsequently brought a suit for pre-emption:

*Held*, that the plaintiffs as remote reversioners could under the circumstances maintain the suit for declaration. [p. 12, col. 1.]

*Khem Singh* v. *Biru*, 44 P. R. 1905; 111 P. L. R. 1905, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 31st May 1912.

Mr. *Moti Lal*, for the Appellants.

Mr. *Bhagwan Das*, for the Respondents.

JUDGMENT.—This case arises out of a sale by Baghel Singh to Khushal Singh and Dyal Singh in 1909. Baghel Singh sold 61 *kanals* 18 *marlas* of land for Rs. 1,000 on the 21st of June 1909. On the 11th of March 1910, the plaintiffs, who are the descendants of Baghel Singh's two uncles, instituted this suit claiming a declaration that the sale should not affect their reversionary rights, or in default of being able to obtain such a declaration, a decree for pre-emption. While that suit was pending, Fauja Singh, who is a nearer collateral, being the son of Baghel Singh's brother, lodged a suit claiming simply to pre-empt. This suit, however, was dismissed, Fauja Singh stating that he admitted that Bahadur Singh (one of the plaintiffs in the present case) had a preferential right to pre-empt and withdrawing from the case. In the suit brought by plaintiffs, the first Court held that the sale was binding on the reversioners only to the extent of Rs. 100 and gave them a decree declaring that the sale should not affect their reversionary rights except to the extent of Rs. 100. The learned Divisional Judge on appeal held that in the presence of Fauja Singh who was a nearer reversioner, the plaintiffs had no *locus standi* to challenge the alienation. He, therefore, set aside the decree of the first Court and remanded the case for decision of the alternative prayer for pre-emption. The Divisional Judge also pointed out that at

the time when this suit was brought Fauja Singh had not yet precluded himself from bringing a similar suit by himself suing to pre-empt.

The general rule, no doubt, is that the proper person to object to an alienation is the nearest reversionary heir, but if that person omits without sufficient cause to protect the estate, we think it is clear that the remoter reversioners can take action. See Rattigan's Digest, Article 67, and authorities quoted thereunder. In the present case, the reversioners waited for nearly nine months before they came into Court. Had they waited much longer, their subsidiary prayer to pre-empt would presumably have become time-barred. Fauja Singh had ample time within which to bring a suit. He not only neglected to take any steps, but, on the other hand, he subsequently lodged a suit for pre-emption, thereby precluding himself from contesting the validity of this sale. This action of his was no doubt subsequent to the institution of the present suit, but we regard it as additional evidence of Fauja Singh's attitude. It seems clear to us that Fauja Singh never had any intention of taking steps to protect the estate, and we are unable to see how in such a case the remoter reversioners are debarred from taking action on their own account.

The learned Divisional Judge relies on *Khem Singh* v. *Biru* (1). That, however, was a case in which the nearest collaterals had given their assent to the alienation, and that part of the judgment which lays down that the presence of the widow of the alienor's brother's grandson, is a bar to a suit brought by the remoter collaterals, seems to us to conflict with a large number of other rulings both earlier and later. See rulings quoted in Rattigan's Digest, Article 67, Remark 8.

We hold that the presence of Fauja Singh is no bar to the present claim for a declaration, and we accept this appeal, set aside the order of remand passed by the Divisional Judge (now District Judge) and return the case to him for decision on the merits. Stamp on appeal to this Court to be refunded, other costs of this appeal to be costs in the cause.

*Appeal accepted.*

(1) 44 P. R. 1905; 111 P. L. R. 1905.

## MADRAS HIGH COURT.

## FULL BENCH.

LETTERS PATENT APPEAL No. 50 OF 1914.

November 22, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice,
Mr. Justice Seshagiri Aiyar and
Mr. Justice Philips.

C. ETHIRAJULU NAIDU, DECEASED AND ANOTHER PLAINTIFFS—APPELLANTS

*versus*

C. GOVINDARAJULU NAIDU AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Property acquired by one member—No nucleus of joint property—Presumption—Separate property—Burden of proof.*

Property acquired by a member of a joint Hindu family, when there is no nucleus of joint property, is presumed to be his separate property, and the burden of proving that he threw it into the common stock is upon those who assert it. This burden is not discharged by the mere fact that he lived with his son in the same house and carried on business with him or even raised money for the purposes of the business by mortgaging that very property. [p. 15, col. 1.]

Appeal under clause 15 of the Letters Patent, against the following judgment, in appeal, dated 3rd February 1914, of the Hon'ble Sir Arnold White, Kt., Chief Justice, and the Hon'ble Mr. Justice Oldfield in Original Suit No. 80 of 1912, preferred against the decree of the Hon'ble Mr. Justice Bakewell, dated the 11th September 1912, in the Ordinary Original Civil Jurisdiction of this Court, in Civil Suit No. 316 of 1910:—

WHITE, C. J.—This is an appeal from a decree of Mr. Justice Bakewell dismissing a suit for partition, on the ground that the property which the plaintiff asks should be divided, is not joint family property. The findings of fact by the learned Judge are:—(1) That the family was joint and (2) that there was no nucleus as of ancestral property. I accept both these findings. The learned Judge finds with reference to the immoveable property that it was not acquired, as the plaintiff contended it was, by the joint exertions of the plaintiff and his deceased father, Ramaswami Naidu. There is no express finding by the learned Judge with reference to the moveable property. It is not suggested that there was any source from which the moveable property could have been acquired other than the profits of the business which, the plaintiff says, was carried on jointly by him and his father. The learned Judge came to the

conclusion that there was no evidence that the plaintiff took any important part in the business. The business appears to have been given up shortly before Ramaswami's death and no attempt was made by the plaintiff to carry on the business after his father's death. I think the Judge was of opinion, though he does not expressly say so, that the moveables as well as the immoveables were not acquired by the joint exertions of the plaintiff and his father. It seems to me that on the evidence this was the right view. Dealing with the case on the footing that the findings of fact are correct, we have had considerable argument with reference to the question on whom does the burden of proof lie. Mr. Rangachariar contended that it was for the defendant to show that the property in question was not joint family property. He referred us to the case reported as *Muniswami Chetty* v. *Maruthammal* (1). In that case, Mr. Justice Wallis remarks that the finding of the Subordinate Judge that certain properties, were not joint family properties, is based on the proposition that when members of a joint family acquired property by working together without the aid of ancestral property, they are to be presumed to acquire it as co-owners and not as joint family property, unless an intention to acquire it as joint family property is proved. The learned Judge observes that the onus is the other way and refers to the observations of Sir Bhashyam Aiyangar in the case of *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2). It seems to me, Sir Bhashyam Aiyangar's observation does not apply to a case like the present, where there is no finding that the property was acquired by the members of a joint family working together. It seems to me that in a case where the property was acquired by one member of the family and there was no pre-existing nucleus, it is for the party who alleges that the property is joint family property to prove it, see *Bhagubai* v. *Tukaram* (3). Though there may have been some divergence of view between this High Court and the High Court of Bombay in connection with this question, I think the proposition laid down in the Bombay case to which I have referred, is applicable to the facts of the case now before us, and I do not think it has been established that the property in question is joint family property.

I would dismiss the appeal with costs.

OLDFIELD, J.—This suit is for partition, and the question is whether the property specified in the plaint, is available for it, as assets of a joint family. The learned Judge held, and it is not disputed here, that plaintiff, his step-brother 1st defendant, and his father Ramaswami were joint but that they had no joint property, finding (1) that there was never a nucleus of ancestral property in Ramaswami's hands, (2) that the immoveable items claimed as joint, were acquired between 1866 and 1874, before the plaintiff who was born about 1863, could contribute to family funds, (3) that when he could do so, he is not proved to have taken any important part in Ramaswami's business or to have obtained any agreement from him that it should be carried on jointly.

It has been urged that on these findings the decision should have been in plaintiff's favour, and it is possible that it should have been as regards at least the moveable property, which is not alleged to have been acquired before he was capable of earning. But though the finding on this point is not, as I understand it, that plaintiff's exertions were insignificant and can be disregarded, it is so qualified later in the judgment that the learned Judge's meaning is uncertain. He has not at any point distinguished between the moveable and immoveable property. He has moreover in my opinion, overlooked certain admissions and practically uncontradicted evidence, which are material with reference to the incidence or transfer of the burden of proof. It is, therefore, necessary to deal with the case fully.

Accepting the finding that Ramaswami held no nucleus of ancestral property, I can respectfully agree with the learned Chief Justice that the plaintiff, alleging that

(1) 7 Ind. Cas. 176; 34 M. 211; (1910) M. W. N. 233; 8 M. L. T. 24; 20 M. L. J. 687.
(2) 25 M. 149; 11 M. L. J. 353.
(3) 7 Bom. L. R. 160.

the immoveable property acquired without his assistance has been thrown into the common stock, must prove it, and I would adopt a similar rule with reference to the participation in joint trade, which is relied on as supporting his claim to the moveables. The difficulty is, however, that such rules are so general as to be useless. Mayne's Hindu Law and Usage, 7th Edition, page 367. For it is not until the particular facts and probabilities, as admitted or established in the case under trial, have been enumerated that it is possible to assign the burden of proof finally on disputed points to either party or to estimate its weight. Reference must, therefore, be made at once to the admissions and probabilities now in question.

It is common ground that the family is joint, that the father Ramasami carried on a furniture business from before the date of his first acquisition in 1866 until six months before his death in 1905 and that plaintiff is his son by his first, 1st defendant his son by his second wife. Next, there is 1st defendant's evidence that the family had common meals, that plaintiff's marriage was celebrated at Ramasami's expense and that he lived throughout and even after his marriage, in the family house, leaving it only occasionally. The 1st defendant would connect these absences with quarrels arising from plaintiff's abstracting money belonging to the business and articles from the house. But this explanation, if true, would not affect the character of plaintiff's residence; and, as he was not cross-examined regarding any definite facts in connection with it, it may be disregarded. Lastly, plaintiff received these benefits, not merely during his youth and before he could earn, but until he was aged forty; and it is not suggested that they were derived from property admittedly belonging to the family or from any source except the property in suit and the profits of the business. It is an inference from these admitted facts that Ramasami's family house and income were treated by plaintiff for forty years as those of a joint family to which he belonged. It is a strong probability that Ramasami allowed this, because plaintiff assisted in the trade, when he could do so.

This probability is strengthened by another admitted fact. The trade was continued until within six months of Ramaswami's death; and, as he died at the age of eighty, it may fairly be assumed that for the last ten years at least, he did not work unassisted. The 1st defendant admittedly gave no assistance; and his explanation that it was given by *gumastahs*, is useless, since no *gumastah* has been called to support it. The alternative is that alleged by plaintiff that he, the adult son, to whom Ramasami would naturally look for assistance, gave it.

If these considerations do not transfer the burden of proof from plaintiff entirely, they go far towards doing so. The direct evidence that he took an important part in the business, was no doubt rejected by the learned Judge, mainly, so far as appears, on the ground that it was improbable. But the probabilities arising from the absence of proof of an agreement between plaintiff and Ramaswami to trade together, from the former's cessation of business after the latter's death and from the former's separate trade, seem to me unsubstantial or insufficiently established. As regards the last, the only evidence does not show that plaintiff's separate trade was such as to prevent his working with his father, as he alleges. His evidence is that he did so, sharing in the management and buying materials in the *mofussil*. And the learned Judge has not noticed that the witnesses who corroborate him, though of no special credit, are those who would naturally be well acquainted with his facts, 2nd, 3rd and 4th witnesses for plaintiff being relatives of Ramaswami, 5th and 6th witnesses for the plaintiff the occupants of the next and the opposite shops and 6th and 7th witnesses for plaintiff, persons with whom plaintiff and Ramaswami had trade transactions. The 1st defendant's own evidence is necessarily negatived. But it is defective, since it affords no explanation on the points already referred to. His witnesses include no member of Ramaswami's family. One of them has no special knowledge of its affairs or the trade; and the other, the brother of Ramaswami's second wife, 2nd defend-

ant, is not likely to be independent. With all deference to the learned Judge who tried the case, I am constrained to give weight to the superiority of plaintiff's evidence in these respects and to the probabilities in its favour and to find that he was, as he says, participating continuously in the trade with Ramaswami, his coparcener, and that, therefore, the suit moveables, acquired with the profits thus earned, are joint family properties. *Munusami* v. *Maruthammal* (1).

There is very little ground for a decision as to the immoveable property, except the presumption already drawn in favour of plaintiff from the manner in which he throughout with Ramaswami's acquiescence lived in it and benefited by it as a coparcener would. I return to the evidence regarding No. 82, Edayapoliam Street, and Exhibit III. That and other dealings with the property by Ramaswami alone lose their significance, when regard is had to the father's special portion and the possibility that plaintiff could not have disputed them successfully. On the other hand, probability is in favour of his evidence that they were concealed from him, for the encumbrancers would ordinarily have required plaintiff's signature as executant, if they thought the property was joint, or as attestor (to estop him from future objections), if they thought it was separate; yet they did not obtain it. One encumbrance was, as Exhibit II, shows in 1888, the other, Exhibit III, was in 1901. Both were, therefore, after 1st defendant's birth when motive for their creation to plaintiff's prejudice was available. And accordingly notwithstanding them, I would decide this part of the case in plaintiff's favour.

Plaintiff claimed that the house, No. 82, Edayapoliam Street, should be excluded from partition as his separate property. It was purchased in his name, and the burden of proof that it belonged to Ramaswami or the joint family is, therefore, on defendants. I cannot concur with the learned Judge accepting 1st defendant's evidence that Ramaswami raised the purchase-money by Exhibit III. For Exhibit II, the decree under which the sale took place was passed after contest by Ramaswami in a trial, which began after Exhibit III was executed. But there is in defendants' favour, the evidence of 8th witness for plaintiff. There are also the facts that defendants produced the sale certificate and that plaintiff did not obtain exclusive possession from Ramaswami, which are not satisfactorily explained. Plaintiff's own account of his possession of separate funds is uncorroborated and indefinite. Defendants, therefore, in my opinion, proved sufficient, I should find necessary that this item also is available for division.

For the foregoing reasons, I would allow the appeal with costs and set aside the learned Judge's decision, remanding the suit for the passing of a partition decree for the suit property, including No. 82, Edayapoliam Street.

BY THE COURT—The result is the appeal must be dismissed with costs.

Messrs. *T. Rangachariar* and *C. Narasimhachariar*, for the Appellants.

Mr. *W. V. Rangaswamy Aiyangar*, for the Respondents.

JUDGMENT.—The appellant is dead and one of the alienees has been brought on and allowed to support the appeal, which has otherwise abated, as regards the item in which he is interested. That item consists of a house which was purchased by his father when he was a small boy and, as there was no nucleus of joint family property, must be taken to have been the father's separate property at that time. The question then is, did the father subsequently throw it into the common stock. The burden in such a case is on those who assert this: Mayne, section 278, and assuming according to the appellant's case that the father lived with his son in the house and supported and married him and carried on business with him elsewhere, and even raised money for the purposes of the business by mortgaging this house, that would not, in our opinion, be enough to discharge the onus, for the father's conduct would be consistent with an intention to retain the house as his separate property, and on the other hand, we have the evidence in the father's Will it was treated as his separate property. As regards this item, therefore, the appeal fails and is dismissed with costs.

*Appeal dismissed.*

PALA SINGH v. LACHHMI.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 309 OF 1913.
June 2, 1915.
*Present*:—Mr. Justice Shah Din and
Mr. Justice LeRossignol.
PALA SINGH—PLAINTIFF—APPELLANT
*versus*
*Musammat* LACHHMI AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Custom—Succession—Self-acquired property, gift of, to daughter*—Akali Nihangs *of Tarn Taran—Proof.*

Where a property has not been proved to be ancestral, a gift by an *Akali Nihang* of his self-acquired property to his daughter is valid. [p. 17, col. 1.]

Custom cannot be proved established or extended by logical process, it can be proved only by instances. [p. 16, col. 2.]

First appeal from the decree of the Subordinate Judge, first Class, Amritsar, dated the 22nd November 1912.

Bhagat *Gobind Das* and Lala *Hukam Chand*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The property with which this case is concerned, comprises houses and land. The parties are *Akali Nihangs* of Tarn Taran and the plaintiff sues as real brother and co-disciple of the last male owner, Man Singh, for a declaration that the widow of Man Singh was incompetent to gift the property to her daughter and that the gift shall not affect plaintiff's reversionary rights.

The main issue debated before us, is whether the property is ancestral *qua* the plaintiff.

We have had great difficulty in extracting from his Counsel what precisely is his basis of claim, but with much diffidence Counsel finally decided that he relied mainly on the fact that plaintiff was a co-disciple (*gurbhai*) of Man Singh and failing in that, on the fact that he is Man Singh's real brother.

Counsel's line of argument was that, these *Akali Nihangs* were at the outset devoted to celibacy and that under these conditions, their property descended according to spiritual relationship from *guru* to *chela*, that now these *Nihangs* have fallen away from their ideal, take wives and beget children, with the result that when a *Nihang* has no *chela*, his bodily heirs succeed.

He enlarges this theory by stating the proposition that just as a son takes the place of a *chela*, so a brother and co-disciple have a similar standing.

In propounding these theories, learned Counsel forgets that custom cannot be established or extended by logical process; custom can be proved in one way only, *i. e.*, by instances, for all practical purposes; the only exception to this is in favour of certain statements of custom which have been declared by Statute to be authoritative.

NAINA SINGH

| Narain Singh. | Handal Singh. | Mangal Singh. | Charat Singh, | Jodh Singh. |
|---|---|---|---|---|

Bhup Singh,

Ram Singh.

We have traced the land in suit through the record back to 1852 and are satisfied that it is a portion of a holding held jointly at that date by the five *chelas* of Naina Singh.

As for the house property, no evidence on the record has been pointed out to us, which would justify the conclusion that it came down from Naina Singh.

Man Singh was a Subedar in the Army and it is quite possible, even probable, that he had resources other than ancestral.

Charat Singh, Bhup Singh, Ram Singh were no doubt the spiritual descendants of Naina Singh, but what we know of their dispositions of this landed property, does not support the plaintiff's contention that it must be regarded as ancestral property.

In 1881, Bhup Singh by *deed of gift* conveyed to Ram Singh, his disciple, the land in suit, also a *bunga* at Tarn Taran not apparently in suit, and in addition much land and house property situate in Amritsar.

He describes his act as a gift for charity, and particularly mentions that his relatives shall have no claim to the property gifted. In 1901, Ram Singh by Will devised all his property to Man Singh and Pala Singh describing them as his real brothers and co-disciples.

On Ram Singh's death, his two brothers succeeded in equal shares.

By Will dated May 1903 Man Singh bequeathed his entire moveable property

to his daughter's son, but the legatee predeceased the testator.

In that Will Man Singh described his property as self-acquired.

An attempt has been made to show that Bhup Singh was the real uncle of Ram Singh, but the evidence on the point is extremely meagre and of no real value.

*Akalis* in their choice of *chelas* are not restricted to any caste, and there is no presumption that Bhup Singh, Charat Singh and Naina Singh were blood relations.

The position then is that this landed property has been devised by Will and gift, and it is not ancestral *qua* the plaintiff.

Ram Singh obtained it by gift from Bhup Singh who has not been shown to be a blood connection and must, therefore, be regarded as a stranger, and Ram Singh by Will bequeathed it to his two brothers who were not his *chelas*.

The plaintiff in order to succeed is bound to show that among *Akalis* there is a custom which in respect of property so acquired gives him a right superior to that of the daughter of the last owner.

We hold that plaintiff has entirely failed to show that the land is ancestral to him or that he has a claim to it superior to that of the donee, and we dismiss the appeal with costs.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 15 OF 1912-13

OF FARRUKHABAD DISTRICT

December 13, 1913.

*Present*:—Mr. Baillie, S. M.,

and Mr. Tweedy, J. M.

ZALIM—DEFENDANT APPLICANT

*versus*

SRI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), ss. 59, 60—Non-deposit of decretal amount—Sufficient cause—Service of notice by affixation—Service, when insufficient.*

A plea by a tenant that he could not deposit the amount of a decree within the time fixed by the notice issued under section 60 of the Agra Tenancy Act on account of illness is not an unreasonable plea. [p. 17, col. 2.]

In the service of notices under section 60 the utmost care should be exercised. [p. 18, col. 1.]

Where a notice was served by affixation and the process-server reported that the whereabouts of the judgment-debtor were not known:

*Held*, that there was no due and reasonable diligence in effecting a personal service and that, therefore, there was no service at all of the notice. [p. 17, col. 2.]

Application for revision of the order of the Assistant Collector, Farrukhabad, dated the 21st January 1913, in the case of ejectment under section 59 of Act II of 1901.

JUDGMENT.

BAILLIE, S.M. (*December 6th*, 1913.)—The present applicant applied for review of an order of ejectment dated 20th September, on the ground that the notice under section 0 had not been served upon him. The Assistant Collector made some sort of enquiry and records his opinion that "no good case is made out for the delay. The plea of illness is so unreasonable that no amount of oral evidence can make it acceptable." It does not appear that any enquiry was made on the subject as to whether there had been due legal notice. Apparently he assumes that the notice was duly served and called upon the applicant to explain why he did not appear within 15 days.

I entirely disagree with the Assistant Collector's view that illness is in such cases an unreasonable plea. A cultivating tenant is not a person who has attorneys at his disposal. What he has to do, he must do himself. It is, however, unnecessary to prosecute the enquiry in this respect, as in my opinion the endorsement on the notice does not show that there was a proper legal service It says that the notice was served by affixation. The process-server records that it was not known where the judgment-debtor was. I do not consider that there could have been in these circumstances due and reasonable diligence in endeavouring to effect a personal service. It is improbable in the highest degree that after due diligence the whereabouts of the tenant could not be discovered.

I would, on the ground there was no legal service of this notice, cancel the order of ejectment, dated 20th September, and direct that the proceeding be restored to the file of the Assistant Collector for disposal after issue of a fresh notice.

BISHEN DAS *v.* RAM LABHAYA.

TWEEDY J. M.—I entirely agree. It is high time Courts learnt that the utmost care must be exercised in the service of notices under sections 59 and 60 and that if the law is not complied with in all its strictness the ejectment is liable to be set aside.

*Application allowed.*

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PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 573 OF 1912.
June 5, 1915.
*Present*:—Mr. Justice Rattigan and
Mr. Justice Leslie Jones.
BISHEN DAS—DEFENDANT—APPELLANT
*versus*
RAM LABHAYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 6—Judgment, validity of, passed after death of defendant—Joint tort-feasors, survival of claim against one—Compensation, suit for, right of—Fatal Accidents Act (XIII of 1855)—Judgment and evidence in criminal trial, whether admissible in civil suit—Admission to Police Officer in criminal trial, whether admissible—Evidence Act (I of 1872), ss. 17, 18, 21, 33, 42—Compensation, brother joint with deceased, whether entitled to—Amount of compensation, how estimated.*

Where a defendant dies after the hearing of the suit but before the judgment is delivered, the decree passed by the Court has the same force under Order XXII, rule 6 of the Civil Procedure Code, 1908, as if it has been passed in his life-time. [p. 19, col. 2.]

The liability of joint tort-feasors is joint and several and consequently on the death of one the cause of action survives against the other. [p. 19, col. 2.]

A judgment of the Criminal Court is inadmissible as a piece of evidence in the civil proceedings and the facts alleged by the plaintiffs in the civil case should be proved independently of such judgment. [p. 20, col. 1.]

The depositions of witnesses taken in the criminal trial are inadmissible in civil proceedings. [p. 20, col. 1.]

Though an admission of guilt made by a defendant to a Police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an *admission* under sections 17, 18 and 21 of the Evidence Act. [p. 20, col. 2.]

A brother of a murdered man is not a person entitled to claim compensation under the provisions of Act XIII of 1855 and the mere fact that the two brothers were members of a joint Hindu famiiy does not entitle him to claim compensation in respect of the death of his brother. [p. 21, col. 1.]

In awarding compensation in a suit for compensation for causing the death of a person, the amount should be fixed considering the members of the family left by the deceased. [p. 21, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Jhelum Division, at Sialkot, dated the 11th March 1912.

Mr. *Manohar Lal*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—This is a second appeal from the decree of the Additional Divisional Judge, Jhelum Division, dated the 11th March 1912, but the case is somewhat curious and in order to understand the legal points involved it is necessary to refer briefly to the facts.

In January 1906 one Ladha Mal, a *Khatri*, aged about 35, left his shop in *Mauza* Jalalpur Jattan, Gujrat District, with the object of visiting various places for purposes of trade. According to the evidence, he took with him 50 sovereigns, Rs. 250 in cash and some 50 pairs of *pashmina* sheets. After visiting Allahabad, where he met present appellant, Bishen Das, and other places, he proceeded with Bishen Das to Faridkot where the two put up at a *serai*. There they met Badri Nath, defendant No. 2 in the case, who was at that time employed as a compounder in a dispensary. The allegation is that Bishen Das and Badri Nath thereafter conspired together with the object of murdering Ladha Mal; that they purchased aconite (*mitha telia*) from one Milkhi Ram, a druggist; that the aconite was administered to Ladha Mal and caused his death; that the two defendants hurriedly effected the cremation of the body; that they robbed the deceased of the cash and *pashmina chadars*

that he had with him and disposed of a number of the latter to various persons such as Shib Dial, Arura Mal and Harnam Singh; that the defendants were tried and convicted by the Sessions Court at Faridkot of the murder of Ladha Mal and sentenced each to transportation for life, and that after the expiry of about three years they were released (in conjunction with various other prisoners) at the time of the Imperial Durbar.

Plaintiffs, who are (1) the minor son of Ladha Mal and (2) Ladha Mal's brother, have brought the present suit claiming (*a*) Rs. 4,000 as compensation for the death of Ladha Mal, this part of the claim being admittedly based on the provisions of Act XIII of 1855; and (*b*) Rs. 1,000 as representing the cash and value of goods belonging to deceased but alleged to have been appropriated by the defendants after his death. The total value of the cash and goods was about Rs. 1,400, but it is admitted that goods to the value of about Rs. 400 have since been recovered from Harnam Singh, Shib Dial and Arura Mal.

The District Judge held that there was no sufficient proof that the defendants had caused the death of Ladha Mal and that the judgment of the Sessions Court at Faridkot was inadmissible for the purpose of proving facts alleged in the present case. The learned Judge referred to the evidence of Milkhi Ram, but held that death by poisoning was not proved and could not be assumed in the absence of medical evidence to the effect that Ladha Mal actually died of aconite poisoning. Obviously, evidence of that kind could not be adduced in the present case inasmuch as Ladha Mal was cremated very shortly after his death. The District Judge accordingly dismissed the claim for compensation, but he held that plaintiffs were entitled to the Rs. 1,000 claimed by them on account of value of goods which he found had been taken by the defendants.

The Additional Divisional Judge, after remanding the case for further enquiry, has given plaintiffs a decree for Rs. 2,000 as compensation for the death of Ladha Mal and has upheld the decree for Rs. 1,000 granted by the District Judge.

Defendant Bishen Das has preferred a second appeal to this Court and the points urged on his behalf are as follows:—

(*a*) It is alleged that Badri Nath defendant died pending the appeal in the lower Appellate Court, that no application to bring his representatives on the record was made and it is consequently urged that the decree passed by the Additional Divisional Judge was mere nullity, the whole suit abating on the death of Badri Nath.

There does not appear to be any force in this objection. We find from the record that Badri Nath's agent was present when arguments were heard in the lower Appellate Court and as he said nothing about the death of his principal, it may be assumed that the latter was then alive. Unfortunately judgment was not delivered until some three or four months after the date when arguments were heard and it appears that Badri Nath died in the interval. In these circumstances the provisions of Order XXII, rule 6, Civil Procedure Code, are applicable and the decree passed by the lower Appellate Court has the same force as if it had been passed in the life-time of Badri Nath It is, moreover, to be remembered that the liability of Bishen Das and Badri Nath as joint tort-feasors was joint and several and that consequently the cause of action would survive on Badri Nath's death as against Bishen Das alone.

(*b*) It is contended that the lower Appellate Court has decided the case practically on the judgment delivered by the Sessions Court of Faridkot and on copies of depositions of witnesses who were examined in the criminal trial, and it is argued that the copy of the judgment placed on the record is not in accordance with the provisions of section 86 of the Indian Evidence Act inasmuch as it is not attested by any British officer and that in any event the judgment of the Sessions Court is inadmissible as evidence in the present suit.

We find it unnecessary to deal with the question whether the copy of the judgment was or was not duly certified, as in our opinion the judgment in question should not have been received in evidence for the purpose of proving that defendants caused the death of Ladha Mal, there being ample

authority for holding that the judgment of a Criminal Court is inadmissible as a piece of evidence in civil proceedings [see *Shumboo Chunder* v. *Modhoo Kyburt* (1), *Aghore Nath Roy* v. *Radhika Pershad Bose* (2), *Gogun Chunder Ghose* v. *Empress* (3) and *Raj Kumari Debi* v. *Bama Sundari Debi* (4)] and that the facts alleged by the plaintiffs in the civil case must be proved independently of that judgment [see *Ram Lal* v. *Tula Ram* (5), *Nittyanund Surmah* v. *Kashinath Nyalunker* (6) and *Bishonath Neogy* v. *Huro Gobind Neogy* (7)].

The learned Additional Divisional Judge was of opinion that the judgment was relevant under section 42 as relating to a matter of a public nature, inasmuch as a trial for murder is a matter in which the public at large is interested. We cannot agree with this construction of section 42 or hold that the morbid interest of a section of a public in the details of a murder trial constitutes such trial "a matter of a public nature" within the meaning of section 42.

On very similar grounds we must rule out as inadmissible the depositions of witnesses taken in the Faridkot Court. There is (as the District Judge rightly observed in his judgment of the 23rd May 1910) no proof that all the witnesses in question were dead or could not be found or were incapable of giving evidence or were kept out of the way by defendants or that their presence could not be obtained without an unreasonable amount of delay or expense. Moreover, though the defendants had presumably the right and opportunity to cross-examine the witnesses in the first proceedings, those proceedings were not between the plaintiffs and defendants. Section 33 of the Indian Evidence Act is, therefore, in terms inapplicable, and we must hold that the depositions in question were not admissible in evidence in the present suit. It was in order that those witnesses should, if possible, be examined in the present proceedings that the Additional Divisional Judge remanded the case for further enquiry by his order dated 2nd March 1911, and it was then found that Shib Dial was dead and that Arura Mal could not be traced; but apparently no effort was made to obtain the evidence of the other witnesses who gave evidence in the trial (Dana, sweeper, Lachi and Lalu).

But even if we eliminate the evidence of Shib Dial, Arura, Dana, Lachi and Lalu, there is ample material on the record to support the findings of the Additional Divisional Judge. Milkhi Ram proves that appellant and Badri Nath purchased aconite from him, and as the District Judge remarks in his judgment, "it is an admitted fact that both defendants were present at the time of Ladha Ram's death and made arrangements for his obsequies." It is also proved by the evidence of Harnam Singh that Badri Nath left certain goods with him which belonged to the deceased.

And finally we have the evidence of the two Police officers Ahmad Ali and Ganga Ram and the two witnesses Gobinda Mal and Dharam Singh, to the effect that appellant Bishen Das admitted to them that he had had a hand in the murder of Ladha Ram. As this admission was made to a Police officer, it would obviously not be receivable in evidence as a "confession" as against Bishen Das, had he been on his trial as an accused person (section 25 of the Indian Evidence Act). But there is no reason why it should not be accepted in a civil suit as an *admission* under sections 17, 18 and 21 of the Act. [See *Queen Empress* v. *Tribhovan Manekchand* (8) and *Bhagat Ram* v. *Emperor* (9) and Wigmore on Evidence, Volume I, paragraph 815, where numerous American authorities are cited to support the proposition that the rule excluding confessions made under undue influence, etc., applies only to the confession of a person on trial in a criminal case.] On the other hand, an admission of this kind, made under such circumstances, cannot be regarded as conclusive and it is open to the person who made it to explain it away. In the present case, however, Bishen Das has made no attempt to explain the admission, nor indeed has he ventured to go into the witness box to deny the truth of the statements made by

(1) 10 W. R. 56.
(2) 14 W. R. 339.
(3) 6 C. 247; 7 C. L. R. 74; 3 Shome L. R. 31 Cr.
(4) 23 C. 610.
(5) 4 A. 97; A. W. N. (1881) 143.
(6) 5 W. R 26.
(7) 5 W. R. 27.
(8) 9 B. 131 at p. 134
(9) 11 Ind. Cas. 584; 96 P. L. R. 1911; 50 P. W. R. 1911 Cr; 12 Cr. L. J. 400.

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the four witnesses above mentioned. We must take it, therefore, that this evidence which stands unrebutted is true and that Bishen Das actually admitted complicity in the murder of Ladha Mal; upon this assumption we have no hesitation in finding that there is on the record ample ground to support the conclusions of the lower Appellate Court.

(c) Mr. Manohar Lal next argues that Kirpa Ram, the brother of the deceased Ladha Mal, was not a person entitled to claim compensation under the provisions of Act XIII of 1855, and that it is only in virtue of those provisions that a claim of this kind can be bro ght. In our opinion there is force in this contention and the mere fact that Kirpa Ram and Ladha Mal were members of a joint Hindu family, cannot entitle the former to claim compensation in respect of the death of the latter. We must accordingly hold that Kirpa Ram's claim should have been dismissed from the very outset.

It is then argued that the lower Appellate Court could not possibly have intended to award a sum of Rs 2,000 as compensation to plaintiff Ram Labhaya alone, and that consequent upon our holding that Kirpa Ram has no claim, the amount of damages should be reduced very considerably, if not indeed by one-half. We do not agree. It appears to us that the Additional Divisional Judge in making the award had in view the fact that there were many members of Ladha Mal's family to whom his death must necessarily have caused serious pecuniary loss. We find that at the time of the murder his wife, two daughters, his mother and a son were all alive and we cannot regard Rs. 2,000 as excessive compensation for them.

As we have already pointed out, the decree against Bishen Das and Badri Nath was joint and several, and the fact that Badri Nath is dead, does not affect the existence of the decree standing against him; at the same time it will be open to plaintiff to execute the decree against Bishen Das alone if he is so advised.

(d) The final argument of Mr. Manohar Lal was that there was no sufficient proof that the goods and cash taken by the defendants from Ladha Mal after his death amounted to Rs. 1,000 in value. Upon this point there is the concurrent finding of the Courts below and we do not propose to discuss it in second appeal.

The result then is that we accept the appeal so far as to dismiss Kirpa Ram's claim, but we leave him and defendants to bear their own costs throughout. The appeal stands dismissed with costs so far as the claim of plaintiff Ram Labhaya is concerned.

*Appeal partly accepted.*

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## CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3561 OF 1911.

July 21, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

ATIMANNESSA BIBI—PLAINTIFF—APPELLANT

*versus*

ABDUL SOBHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law*—Wakf, *private and public*—Mutwalli - *Sole surviving descendant of founder, right of, to office*—*Religious endowment, succession to*—*Regulation IV of 1793, s. 15*—Qadi, *functions of, who can exercise*—*Civil Procedure Code (Act V of 1908), s. 92*—*District Judge, whether* qadi—*Subordinate Judge, powers of* - Mutwalli *appointed under s. 92*—*Suit to be declared* mutwalli *in Subordinate Judge's Court, maintainability of.*

A descendant of the founder of a *wakf* has a preferential claim to the office of *mutwalli*, but he does not become *mutwalli* by right of inheritance. he has to be appointed such by the *qadi*, who may supersede him if he is not qualified. [p. 23, col. 2.]

No right of inheritance attaches to a religious endowment. It is by appointment that one officer succeeds to another appointment either by the original appropriator or by his successor or executor or by the superintendent for the time being, or failing all these, by the Ruling Power. [p. 23, col. 2.]

*Sayad Abdula Edrus* v. *Sayad Zain*, 13 B 555, followed.

The appointment of a *mutwalli* to a *wakf* is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793 and must be determined with regard to the provisions of the Muhammadan Law on the subject. [p. 28, col. 2.]

*Kudratulla* v. *Mohini Mohan Shaha*, 4 B. L. R. 134 at page 169; 13 W. R. 21 (F. B.), followed.

A Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. [p. 28, col. 2.]

ATIMANNESSA BIBI *v.* ABDUL SOBHAN.

In respect of *wakfs* created for public purposes of a religious nature, a District Judge may be assumed to have been authorised, by virtue of section 92 of the Civil Procedure Code of 1908, to discharge the functions of a *qadi*. [p. 28, col. 2.]

Per *Mookerjee, J.*—In respect of private *wakfs* even a District Judge has no authority to exercise the functions of a *qadi*, the Local Government should authorize either District Judges or Subordinate Judges or even judicial officers of a lower grade to exercise the functions of a *qadi* [p. 28, col. 2.]

On the allegation that a certain *wakf* was a private one, the plaintiff instituted a suit for declaration of her title as *mutwalli* and for an injunction to restrain the defendants, one of whom had been appointed *mutwalli* by a District Judge in a suit under section 539, Civil Procedure Code of 1882 (to which, the plaintiff was not a party) from interfering with her possession of the endowed properties. The Subordinate, Judge who tried the suit, found that the *wakf* constituted a public trust, but he decreed the suit holding that the plaintiff as the sole surviving descendant of the founder had a superior claim to the office of *mutwalli*. On an appeal by the defendants, the District Judge held that the *wakf* was a public one, but dismissed the plaintiff's suit on the ground that so long as the decree in the suit under section 539 remained in force, no relief could be awarded to the plaintiff:

*Held*, that the plaintiff's suit was rightly dismissed inasmuch as the Subordinate Judge had no authority to appoint the plaintiff as *mutwalli* in supersession of the order made in the suit under section 539 Civil Procedure Code of 1882 [p. 28, col. 2.]

*Held*, further, that as the *wakf* was declared to be a public trust, the plaintiff's remedy was to proceed under section 92, Civil Procedure Code, 1908, and get herself appointed *mutwalli* on the ground that as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*, she had the preferential right to the office. [p. 29, col. 1.]

Second appeal against the decree of the District Judge of 24-Parganas, dated the 18th September 1911, reversing that of the Subordinate Judge, first Court, Alipore, dated the 9th March 1911.

Babus *Umakali Mookerjee*, *Tarakisor Choudhury*, Moulvi *Muhammad Mustafa Khan* and Babu *Satis Chandra Mookerjee*, for the Appellant.

Mr. *Arthur Caspersz* and Moulvi *Wahid Hossain*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal consists of immoveable property dedicated as *wakf* in or about the year 1836 by a Muhammadan named Azimuddin Mistri. A mosque was erected by the founder on a portion of the land and income for its maintenance is derived from the remainder, which is in the occupation of tenants. Azimuddin constituted himself the first *mutwalli* and acted as such so long as he was alive. He appointed his grandson Imamuddin as the next *mutwalli*; the latter executed a *tawliatnama* on the 13th March 1854 whereby he appointed one Sekandar as his successor in the office of *mutwalli* with authority to appoint a successor. On the 1st December 1892, Sekandar, in exercise of the power vested in him, appointed his daughter Sobran Bibi as *mutwalli*; she performed the duties of the office for over seven years and died in the year 1900 without appointing anyone as *mutwalli*. Two brothers of Sobran, Yakub, Yasin by name, however, took possession of the *wakf* properties and administered them for a term of seven years. On the 22nd February 1907, Yakub and Yasin executed a deed of relinquishment in favour of the plaintiff Atimannessa Bibi, daughter of Imamuddin, the grandson of Azimuddin. In this deed they admitted that as the sole surviving descendant of the founder she had a preferential claim to the office of *mutwalli*. Immediately after this, there was a scramble for the possession of the *wakf* properties and on the 22nd July 1907, a suit was instituted with the consent of the Advocate-General, under section 539 of the Civil Procedure Code of 1882, in the Court of the District Judge by persons who claimed to be interested in the due administration of this religious trust. The assistance of the Court was sought, as it could only have been sought, on the allegation that the trust had been created for public purposes. The three sons of Sekandar were originally joined as defendants. The present plaintiff subsequently applied to be made a defendant, but as she alleged that the *wakf* constituted a private trust not affected by section 539, her application was refused on the authority of the decision in *Budh Singh Dudhuria* v. *Niradbaran Roy* (1). As the original defendants did not deny that the trust was a public one within the meaning of section 539, the suit as against them was tried in due course, and one Abdus Sobhan who had married the daughter of Kariman; a son of

(1) 2 C. L. J. 431.

Sekandar, was appointed *mutwalli* on the 28th May 1908. The District Judge, however, expressed the opinion that he had a very strong suspicion that the suit was purely collusive and had been brought to defeat Atimannessa. On the 16th March 1910 she commenced this suit for declaration of her title as *mutwalli* of this trust which, she alleged, was a private *wakf*, and also for an injunction to restrain the defendants (in which category she included Abdus Sobhan) from interfering with her possession of the endowed properties. The Subordinate Judge held, that the *wakf* constituted a public trust, contrary to the allegations of the plaintiff, but that as the sole surviving descendant of the founder she had established a claim to the office of *mutwalli* superior to that of any stranger; in this view, he decreed the suit. On appeal, the District Judge affirmed the view of the trial Court as to the public nature of the *wakf*, but dismissed the suit on the ground that so long as the decree in the suit under section 539 remained in force, no relief could be awarded to the plaintiff. The plaintiff has now appealed to this Court. On an analysis of the elaborate arguments addressed to the Court on both sides, the following two points emerge for consideration, namely, *first*, did the plaintiff as the sole surviving descendant of the founder become *mutwalli* by operation of law when the last *mutwalli* died without appointing a successor; and *secondly*, can the plaintiff be appointed *mutwalli* in this suit instituted in the Court of the Subordinate Judge and relief granted to her on the basis of such appointment?

As regards the first ground, it is plain that the plaintiff did not by operation of law become the *mutwalli* by right of inheritance on the death of the last *mutwalli*. The rule on the subject is thus stated by Neil Baillie in his Treatise on Muhammadan Law (Volume 1, page 593): "When the superintendent has died and the appropriator is still alive, the appointment of another belongs to him and not to the Judge; and if the appropriator be dead his executor is preferred to the Judge. But if he has died without naming an executor the appointment of an administrator is with the Judge. In the Asul it is stated that the Judge cannot appoint a stranger to the office of administrator, so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him. When the appropriator has made it a condition that the superintendent shall be of his children and children's children, and the Judge appoints another than one of these without any malversation, is the person so appointed the superintendent? Boorhanood Deen has said 'No'." It is obvious from this statement of the law that though a descendant of the founder has a preferential claim to the office of *mutwalli*, he does not become *mutwalli* by right of inheritance but has to be appointed such by the *qadi* who may supersede him if he is not qualified. This view is confirmed by two texts from works of recognised authority on Muhammadan Law, translated in the judgment of this Court in the case of *Salimulla* v. *Abdul Khayer Mohammed Musta.a* (2). One of these texts is from the Isaf of Al-Tarabulusi (Cairo Edition, page 42) and the other is from the Fatawa Alamgiri (Calcutta Edition Volume II, page 507) (see other texts translated by Ameer Ali in his Muhammadan Law, Volume I, 4th Edition, pages 451, 759, 760, 763 and 765. See also Anglo-Muhammadan Law by Sir Ronald Wilson, paragraph 328 and Tyabji on Muhammadan Law, page 414). Indeed it may be taken as a settled doctrine of Muhammadan Law that no right of inheritance attaches to a religious endowment. As Parsons, J., observed, with the concurrence of Sargent, C. J., in *Sayad Abdula Edrus* v. *Sayad Zain* (3 , it is by appointment that one officer succeeds to another appointment, either by the original appropriator or by his successor or executor or by the superintendent for the time being, or failing all these, by the Ruling Power. This is laid down distinctly by Macnaughten in his Muhmamadan Law (Chapter X on Endowments, paragraphs 5 and 6; Precedents of Endowments, Cases IX and

(2) 3 Ind. Cas. 419; 37 C. 263; 14 C. W. N. 497; 11 C. L. J. 304.

(3) 13 B. 555.

X). Consequently, the position cannot be sustained that the plaintiff became by operation of law the *mutwalli* of his *wakf* as the sole surviving descendant of the founder when the last *mutwalli* died without having appointed his successor. This conclusion is in accord with the decision in *Moohummud Sadik* v. *Moohummud Ali* (4 and *Shahoo Banoo* v. *Aga Mohomed Jaffer Bindaneem* (5). The first contention of the appellant must accordingly be overruled.

As regards the second ground, the question arises whether in the present suit, instituted in the Court of the Subordinate Judge, the plaintiff can be appointed *mutwalli* of the *wakf*. As is obvious from the texts already mentioned, where, as here, the appropriator is dead and has not left an executor, the power of appointment rests with the *qadi*. The problem thus requires solution, who is the judicial officer in the British Indian system of law who corresponds to the *qadi* under the Muhammadan Law and can exercise his functions in relation to *wakfs*. The question has never been fully investigated, but it was assumed in the cases of *Shama Churn Roy* v. *Abdul Kabeer* (6), *In the matter of Wazatunnessa Bibee* (7) and *In re Halima Khatun* (8) that the Civil Court of superior jurisdiction, in the locality where the *wakf* properties are situated, is vested, generally speaking, with the powers exercised by the *qadi* under the Muhammadan *regime*. On the other hand, in *Nemai Chand* v. *Golam Hossein* (9), it was observed that if a District Judge or a Judge of this Court in its original jurisdiction could exercise the functions of a *qadi*, there was no apparent reason why a Subordinate Judge who has jurisdiction over the *wakf* property should not be deemed equally competent to discharge those functions. As the question is of paramount importance, I have investigated the position of a *qadi* under the Muhammadan Law, a problem which, so far as I am aware, has been treated historically only in the valuable lectures on the History of Moslem Legal Institutions delivered by Dr. Abdullah-al-Mamun Suhrawardy as Tagore Professor of Law in the University of Calcutta. No assistance in the solution of this question has been derived from an examination of the legislative enactments and judicial decisions relating to the powers and duties of a *qadi* appointed under the Anglo-Indian system of law. Amongst these may be mentioned Bombay Regulation XXVI of 1827 repealed by Act XI of 1864 (Act XII of 1880 ; Harrington's Analysis of the Bengal Regulations, Volume I, 2nd Edition, pages 67, 219, 223; Colebrooke's Supplement of Digest of Regulations, pages 1, 14, 19; Morley's Digest, Introduction, pages 30, 31, 34, and title Kazi; *Muhammad Yusub* v. *Sayad Ahmed* (10), *Jamal* v. *Jamai* (11), *Daudsha* v. *Ismalsha* (12), *Baba Rakaji Shet Shimpi* v. *Nassaruddin* (13), *Advocate-General of Bombay* v. *Abdul Kadir* (14). It is necessary, therefore, to examine the original texts on the subject. The following texts illustrate the position of the *qadi* under the Muhammadan Law.

(Translation of Text I.)

If the executor or the *mutwalli* is appointed by the Judge (*hakim*), the safest course is that he (the Judge should write in the judicial records and registers that he (the executor) is the executor appointed by a Judge possessing the authority of appointing the executor and the *mutwalli*. For if he (the Judge limits himself to his statement "and he is the executor appointed by the Judge," he (the executor) may sometimes happen to be (appointed) by a Judge not possessing the authority of appointing the executor and the *mutwalli*. For the *qadi* does not possess the power of appointing the executor and the *mutwalli*, except when mention of the administration of *wakf* properties and orphans is

(4) (1798) 1 Mac. Sel. Rep. 22; 6 Ind. Dec. (o. s.) 17.

(5) 34 I. A. 46; 34 C. 118 (P. C.); 11 C. W. N. 297; 4 A. L. J. 20; 5 C. L. J. 134; 9 Bom. L. R. 85; 17 M. L. J. 52; 2 M. L. T. 49; 4 L. B. R. 66.

(6) 3 C. W. N. 158

(7) 1 Ind. Cas. 5 2; 36 C. 21.

(8) 7 Ind Cas. 33; 37 C. 870.

(9) 3 Ind. Cas. 353; 37 C. 179 at p. 187; 14 C. W. N. 535; 11 C. L. J. 317.

(10) 1 B. H. C. R. Ap. 18.

(11) 1 B. 633.

(12) 3 B. 72.

(13) 18 B. 103.

(14) 18 B. 401.

expressly made in the Royal Letters Patent (Manshur) of his (*qadi's*) appointment. Thus it becomes like the rule regarding the deputy *qadi* (*naib qadi*), for it is indispensable therein to mention that *qadi* so and so is permitted to have a deputy to guard against this notion supposition doubt Jami-al-Fusulayn by Shaykh Mahmud C. Ismail, better known as Ibn Qadi Samawah, Cairo Edition, Volume II, page 15).

(Translation of Text II.)

Here there is a point to which attention should be called (*anbih*) and which is indispensable and it is —What is meant by the *qadi* who possesses the power of appointing the executor and the *mutwalli* and has the supervision of *wakf*? I say it is the chief *qadi* (*qadi* of *qadis*) and not every *qadi*, because of what is stated in the 27th Chapter of Jami-al-Fusulayn (Text I is quoted here). There is no doubt that the Sultan's saying "I appointed the chief *qadi*" is like expressly mentioning these things in the Letters Patent, as is expressly stated in the Khulasah in connection with the question of the *qadi*'s power of appointing his substitute or successor. According to this, in their (jurists') statement regarding obtaining a loan with the sanction of the *qadi*, by *qadi* the chief *qadi* is meant, and in every place where the *qadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement "When the order, or judgment of a *qadi* is brought before him, is referred to him, he executes it," for this is general, (*i.e.*, here the word *qadi* is used in a general sense) (Bahr-al-Raiq, Cairo Edition, Volume V, page 252).

(Translation of Text III.)

(He was questioned) regarding a registered *wakf* set aside by a deputy *qadi* who relied on the absence of its bindingness according to the Great Imam, "Has the deputy the power of setting it aside for the reasons mentioned or is the power of setting it aside peculiar to the original *qadi*"? (He answered): It is stated in the Bhar-al-Rai (Text II is quoted here as far as "*wakf* affairs").

Thus it (*i.e.*, Bahr-al Raiq) is explicit regarding that the deputy *qadi* has not the power of setting aside the *wakf* and that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this although our master Shaykh Muhammad b. Sirajal-Din-al-Hanuti has examined, criticised, discussed it; because of the difference of opinion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age.

And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically, and God knows best (Fatawa Khayriyah, Volume I, page 118, 2nd Edition, Government Press Gulaq, Cairo).

(Translation of Text IV.)

"Here there is a point, etc." Al-Ramtit says—I say, in the collection of *fatwas* of our master Muhammad b. Siraj-al-Din-al-Hanuti there is a question with regard to their (jurists') statement that the *istibdal* (exchange) can be effected by the *qadi* when there is no stipulation of the *waqf* (to that effect). Is the chief *qadi* meant thereby or it is not peculiar to him, and is it a condition that it should be written in his Letters Patent?

The answer: We have not seen any one restricting it to the condition that it should be in his Letters Patent as they (jurists) have restricted it with regard to the power of giving minor girls in marriage and with regard to (the *qadi's* power of appointing) his substitute, successor. Therefore, it should be acted upon in an unrestricted general sense. And amongst those which indicate that (the power of effecting) *istibda'* does not peculiarly belong to the

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* The author of the Radd-al-Muhtar quoting this passage reads the word translated "difference of opinion" as *ikhtilal*—confusion, disorder, tumult. See below Texts IV and V.

† Author of Fatawa Khayriyah.

chief *qadi* but rather it (*istibdal*) can be as much effected by his deputy as by himself, is the fact that it is not lawful for him to appoint his deputy as his substitute, successor, unless the power of doing so is delegated to him by the Sultan. And when the power of doing so is delegated to him (*qadi*) then the authority of his deputy is based on the permission of the Sultan, and he (the deputy) stands in the stead of the person appointing him his deputy, *viz.*, the chief *qadi*, as they (jurists) have expressly laid it down regarding the question of appointing a successor. Therefore, what is understood by their (jurists') statement is that when in the Letters Patent of the *qadi*, the power of giving minor boys and girls is stipulated he (*qadi*) has that power and then the person appointed by him. So they (jurists) have made the permission of the Sultan to the *qadi* as to giving in marriage sufficient with regard to his *qadi's* conducting it as well as (with regard to) the person appointed by him (*qadi*) because of his standing in his (*qadi's*) stead. And when the conducting of marriage is lawful for the deputy with their (jurists') express declaration that it should be stipulated for the *qadi* in his Letters Patent, then how without it? The text of Ibn-al-Hammam regarding the order of succession of matrimonial guardians is as follows:—"Then the Sultan, then the *qadi* if the (power of) giving in marriage of minor girls and boys is stipulated in his patent of office, then the person appointed by the *qadi*." Thus he (Ibn-al-Hammam) has made the stipulation, I mean, his statement, "if . . . stipulated in his patent of office," refer to the *qadi* only and not to him and to the persons appointed by him, because he (Ibn-al-Hammam) has not put it (the stipulation) after both of them (*i.e.*, after the word *qadi* and "the person appointed by him"). Yes, it is true that in the writings of some of them (jurists) is to be found that he Ibn-al-Hammam) has put the stipulation after the word *qadi* as well as "the person appointed by him." Thus the text is capable of being made to refer to the *quadi* as he is the original (incumbent) or to both of them. Finis. But he (Al-Ramti) has stated in the Khayriyah (collection of his *fatwas*, see Text III) towards the commencement of the chapter of *wakf*, the text of the Bahr-al-Raiq mentioned here. Then he says, "Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the deputy *qadi* had not the power of setting aside the *wakf* and that that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be placed upon this, although our master Shaykh Muhammad b. Sira-al-Din-al-Hanuti has examined, criticised, discussed it; because of the confusion* with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes, and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically, and God knows best (Manhat-al-Khaliq, marginal gloss on the Bahr-al-Raiq by Ibn Abidin the author of the Radd-al-Muhtar, Volume V, Cairo Edition.)

(Translation of Text V.)

"Then the power of appointment is for the *qadi*."

"For the *qadi*":—In the Bahr-al-Raiq, he has restricted it to the chief *qadi*, relying on the passage from the Jami-al-Fasulayn quoted by us one leaf back. Then he (the author of the Bahr-al-Raiq) states, "According to this their (jurists') statement regarding obtaining a loan with the sanction of the *qadi*, by *qadi*, the chief *qadi* is meant and in every place where the *qadi* is mentioned regarding *wakf* affairs. This is contrary to their (jurists') statement, 'when the order or judgment of a *qadi* is brought before him, is referred to him, he executes it.' For this is general.' It is stated in the Khayriyah, "Thus it (*i.e.*, Bahr-al-Raiq) is explicit regarding that the Depaty *qadi* has not the power of setting aside the *wakf* and that that is peculiar to the original (*qadi*) in whose letter of appointment the Sultan has mentioned the appointment of *mutwallis* and executors and to whom he has delegated the affairs of *wakf*. And reliance should be

*The word translated confusion here is *ikhtilal* in the original, while in Text III the word used is *ikhtilaf*, difference of opinion.

placed upon this although our master Shaykh Muhammad b. Sira.-al-Din-al-Hanuti has examined, exercised, discussed it, because of the confusion (*ikhtilal*) with regard to the application in an unrestricted sense of the like of it to the deputies in this age. And there is no special text with regard to this question so far as our research goes and similarly so far as the research of our above-mentioned master and that of Shaykh Zayn, author of the Bahr-al-Raiq, goes. And verily he (the author of the Bahr-al-Raiq) deduced it juristically." And he (the author of the Fatawa Khayriyah, Khayr-al-Din-al-Ramti) has quoted, in his marginal gloss on the Bahr-al-Raiq, the text of his master al-Hanuti *in extenso* and has confirmed it (See Text IV). And of it (the text) is—And amongst what indicates that (the power of effecting) *istibdal* of *wakf* is not peculiar to the chief *qadi* but rather is lawful to his deputy as well, is the fact that his deputy is his *locum tenens*. Therefore, what is understood by their (jurists') statement is that when (the power of) giving minor girls and boys is stipulated in his Letters Patent that (power) belongs to the person appointed by him. The text of Ibn-al-Hammam as to the order of succession of matrimonial guardians is, "Then the Sultan, then the *qadi* if that is stipulated in his patent of office, then the person appointed by the *qadi*." End of the quotation in substance. (Note) but he (the author of the Arfa-al-Wasail) has stated that the governance of the *wakf* is for the *qadi* even though the Sultan has not stipulated it in his investiture and has not ascribed, assigned it to anyone. And this is contrary to what is reported, quoted in the Jami-al-Fasulyan (Radd-al-Muhtar, Volume III, page 635, Edition Constantinople).

(Translation of Text VI.)

"If the *qadi* associates with the *mutwalli* a reliable person." It is stated in the Bahr-al-Raiq (Text II is quoted here) (Al-Tahawi's commentary on the Durr-al-Mukhtar, Volume II, page 567, Government Press, Gulaq Cairo).

(Translation of Text VII.)

He was questioned: Is the *qadi's* appointment of another person as *mutwalli* valid even if he is not the chief *qadi* or does it depend upon his being that, and what is meant by the chief *qadi*?

He answered:—When the *mutwalli* dismisses himself, resigns his office before, in the presence of, the chief *qadi* and he (the chief *qadi*) appoints another as *mutwalli* it is valid. Similarly when the (news of) dismissal, resignation, reaches the *qadi*, he becomes dismissed, otherwise not. By the chief *quadi* is meant the person who is expressly authorised by his Letters Patent to have the administrations of *wakf* properties and orphans, or to whom the Sultan says, "I have made the chief *qadi*." It is stated in the Bahr-al-Raiq (Text II is quoted here) (Fatawa Mahdiya, Volume II, page 575, Cairo Edition.)

(Translation of Text VIII.)

When the Sultan says to a man "I made thee a *qadi*," he has not the power of appointing a substitute, successor except when he (Sultan) permits him to do that expressly or by implication by saying, "I made thee chief *qadi*," because it is the chief *qadi* who acts as he pleases respecting *qadis* as regards investiture or dismissal. Thus it is laid down in the Dhakhirah. (Fatawa Alamgiri, Volume III, page 388, Calcutta Edition.)

(Translation of Text IX.)

And the *qadi* cannot appoint as successor, substitute a deputy except when (the authority to do so) is delegated to him expressly, like, "appoint whomsoever thou likest;" or implicitly, like, "I made thee chief *qadi*." And here the implication is stronger, for in the explicit stated above, he possesses the power of appointing a successor, not that of dismissal. And in the implicit he possesses both, like his (Sultan's) saying, "Appoint whomsoever thou likest, supersede (substitute) whomsoever thou likest," for it is the chief *qadi* who acts as he pleases respecting them (*qadis*) as regards investiture or dismissal (Durr-al-Mukhtar, page 529, Edition Calcutta).

(Translation of Text X.)

The appointment of a *qadi* is not valid unless the person appointed combines in himself the conditions of evidence (quali

fications of witness) according to the Hidayah, *viz.*, Islam, Taklif, Freedom, etc. (Fatawa Alamgiri, Volume III, page 378 Calcutta Edition.) *Cf.* Hamilton's Hedayah, Grady's Edition, Book XX, page 534.

(Translation of Text XI.)

It is stated in Multaqa "And Islam is not a condition in him, *i.e.*, in the Sultan who invests (a person with the office of *qadi*). Thus it is laid down in the Jatarkhaniyah" (Fatawa Alamgiri, Volume III, page 379, Calcutta Edition).

(Translation of Text XII.)

It is valid to accept the investiture of office of *qadi* from a just Sultan and from a tyrant even though an infidel (it is stated by Miskin and others) except when he prevents him from doing justice, what is right; then it is unlawful (Durr-al-Mukhtar, page 524, Edition Calcutta).

(Translation of Text XIII.)

And qualified for it (office of *qadi*) is one who is qualified for being a witness. This is contrary to the statement of al-Zaylai in the (chapter on) Arbitration to the effect that the investiture of an infidel with the office of *qadi* in order to decide between non-Moslems under Moslem protection (Ahl-al-Dhimmah) is valid" (Durr-al-Mukhtar, page 521, Edition Calcutta)

It is clear from an examination of these texts that, under the Muhammadan Law, that *qadi* alone was competent to exercise authority in respect of *wakfs* who was so expressly authorised in his Letters Patent. There was some difference of opinion upon the question, whether such express authority was needed when a person was explicitly appointed the chief *qadi*; but even here the balance of opinion of jurists favours the view that power should be expressly conferred on the chief *qadi* to validate the administration of *wakfs* by him. There is also authority to show that the supreme authority in the State, by whom the *qadi* is appointed, need not be a Muhammadan, and although there is some divergence of opinion, there is also authority to show that the office of *qadi* may be held by a non-Moslem for the decision of disputes between non-Moslems under Moslem protection. As this is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793, the rights of the parties must be determined with regard to the provisions of the Muhammadan Law on the subject [*per* Peacock, C. J., in *Kudratulla* v. *Mohini Mohan Shaha* (15)]. It follows accordingly that a Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf. Whether a District Judge has implied authority to exercise the functions performed by a *qadi* under the Muhammadan Law is doubtful. In respect of *wakfs* which may be described as trusts created for public purposes of a religious nature within the meaning of sub-section (1) of section 92 of the Civil Procedure Code, 1908, the District Judge may be assumed to have been authorised to discharge the functions of a *qadi*. The real difficulty arises in the case of private *wakfs*; it is desirable that to cover such cases the Local Government should authorise either District Judges or Subordinate Judges or even judicial officers of a lower grade, if it be thought desirable, to exercise the function of a *qadi*. When authority has been so conferred, a question may arise whether the assistance of the Court is to be invoked by a suit or by an application [see *Mahamed Haji Zakeria* v. *Ahmadbhai Habibbhai* (16)]. The case before us, however, is reasonably free from difficulty. The Courts below have concurrently found that the *wakf* was public and have thus negatived the fundamental allegation of the plaintiff. The District Judge had jurisdiction under section 539 of the Civil Procedure Code of 1882 to appoint the defendant as *mutwalli*. The Subordinate Judge had no authority to recall that order and to appoint the plaintiff as *mutwalli*. [*Saiyad Ali* v. *Ali Jan* (17).] It might have been otherwise if the suit had been instituted by a person already appointed *mutwalli*, for example by a testamentary instrument, *Muhammad Abdul Majid Khan* v. *Ahmad Saeed Khan* (18). The

(15) 4 B. L. R. 13 at p. 169; 13 W. R. 21.
(16) 25 B. 327; 3 Bom. L. R. 365.
(17) 18 Ind. Cas. 573; 35 A. 98; 11 A. L. J. 25.
(18) 20 Ind. Cas. 37; 11 A. L. J. 673; 35 A. 159.

remedy of the plaintiff obviously is to proceed under section 92 of the Code of 1903 and to get herself appointed *mutwalli* on the ground that she had the preferential right to the office as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*. In fact, she would have been so appointed in the suit mentioned, if she had not asserted at the time that the *wakf* was private. It would be open to her now, however, to accept the decision in this suit that the *wakf* is public and to proceed on that basis under section 92

The inference follows that in the present suit as framed, the plaintiff cannot be appointed *mutwalli* and the suit has consequently been rightly dismissed. The appeal is accordingly dismissed with costs.

BEACHCROFT, J.—I agree that this appeal must be dismissed for the reasons given by my learned brother. I express no opinion as to the position of the District Judge with reference to private *wakfs*.

*Appeal dismissed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No 453 OF 1912.

June 10, 1915.

*Present*:—Mr. Justice Chevis and
Mr. Justice LeRossignol.

AMIN CHAND—DEFENDANT—APPELLANT

*versus*

BUJHA—PLAINTIFF—RESPONDENT.

*Custom—Alienation—Property inherited by adopted son from adoptive father, whether ancestral—Ancestral property, what is*—Status *of son of adopted son to challenge alienation—Custom, how established*

A property which is ancestral in the hands of an adoptor does not become ancestral *qua* the adoptee and a son of the latter cannot challenge his disposal of it. [p. 30, col 1.]

Ancestral property is that which has descended to the holder from a male ancestor. [p. 29, col. 2 ]

Custom cannot be extended by logical process; it must be established inductively, not deductively; in the absence of any authoritative statement of the custom, it can be established only by instances, and not by *a priori* methods. [p. 30, col. 1.]

Second appeal from the decree of the Divisional Judge, Jullundur Division, dated the 21st January 1913.

Lala *Balwant Rai*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondent.

JUDGMENT.—This appeal and Nos. 454, 455, 456 of 913 arise out of one suit brought by Bujha *alias* Kartar Singh for possession of land alienated by his late father Milkhi.

The Court below has, with some slight modification as to conditions, affirmed the first Court's decree giving the plaintiff possession, and these four appeals have been laid by four sets of alienees. The land with which these appeals are concerned is land situate in Bhagwanpur and Tajpur villages, and it is common ground that whilst Milkhi inherited land in Shankar from his natural father, the Bhagwanpur and Tajpur lands were inherited by him from his maternal grandfather, one Muhabbat, who adopted him.

The appellant's first and main contention is that the lands of Bhagwanpur and Tajpur are not ancestral *qua* the plaintiff, that Milkhi was not next heir to Muhabbat and that he obtained these lands solely by virtue of his adoption, and *Mehra* v *Mangal Singh* (1) is cited as concluding the matter.

For the respondents, Counsel admits that Milkhi was not the next heir to Muhabbat, but contends that *Mehra* v. *Mangal Singh* (1) is based on incorrect principles, that an adoptee cannot renounce his adoption, and may consequently be gravely prejudiced by losing his property in his natural family and also in that of his adoptive father, if the latter is to be free to dispose of his property without control.

The learned Counsel's cardinal proposition is that what property was ancestral in the hands of the adoptor, by the adoption becomes ancestral *qua* the adoptee.

In our opinion this view is opposed to all principle and authority. for ancestral property is that which has descended to the holder from a male ancestor.

*Jhunda* v. *Sahiba* (2) and *Mana* v. *Abdulla* (3) are cited, but neither case covers the point under discussion.

Further, we must here once more repeat

(1) 27 Ind. Cas 393; 99 P. R. 1914; 8 P. W. R. 1915; 71 P. L. R. 1915.
(2) 15 P. R. 1877.
(3) 98 P. R. 1882.

that custom cannot be extended by logical process; it must be established inductively not deductively; in the absence of any authoritative statement of the custom, it can be established only by instances, and not by *a priori* methods.

In this case no instances have been adduced, nor is it suggested that any such are known. The land obtained by Milkhi under the adoption he would not have obtained but for that adoption; it was his self-acquired property and his son cannot challenge his disposal of it.

We, therefore, accept the appeal, and modify the lower Appellate Court's decree by dismissing all that portion of the suit which concerns the alienations of the appellants. Plaintiff must pay appellant's costs throughout.

*Appeal accepted.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 329 OF 1914.

November 1, 1915.

*Present:*—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RANGA AIYANGAR AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

NARAYANA CHARIAR *alias* CHAKRAVARTI VIJAYARAGHAVA CHARIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Suit for recovery of mortgage-money—Decree allowing defendant-mortgagor to obtain possession on payment not executed—Subsequent suit by mortgagor for redemption—* Res judicata.

In a suit brought by a mortgagee against his mortgagor's sons for recovery of the mortgage amount, the decree passed in favour of the mortgagee provided that the defendants were entitled to obtain possession of the land in execution through Court after satisfying the decree. The decree was not executed by the other party and 40 years afterwards the mortgagor's sons sued to redeem the same mortgage:

*Held*, that as in the former suit an executable decree was passed in favour of the plaintiffs, granting them substantially the same reliefs as they now claimed, they were barred by the rule of *res judicata* from maintaining the suit. [p. 31, col. 2.]

*Vedapuratti* v. *Vallabha Valiya Raja*, 25 M. 300; 12 M. L. J. 128; *Adipuranam Pillai* v. *Gopalasami Mudali*, 18 M. L. J. 259; 31 M. 354, followed.

*Rama Tulsa Mahar* v. *Bhagchand Motiram*, 27 Ind. Cas. 249; 16 Bom. L. R. 687; 39 B. 41, dissented from.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 750 of 1912, preferred against that of the Court of the District Munsif of Tiruvadi, in Original Suit No. 473 of 1911.

FACTS appear from the judgment.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellants.—The former decree was merely declaratory of the equity of redemption. There is no bar by *res judicata*. The portion of the decree for sale permitting the mortgagor to redeem within a fixed time, in default of which the property was directed to be sold, ought not to be construed as extinguishing the right for redemption or even as a decree in favour of the mortgagor. He relied on *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1) and *Adipuranam Pillai* v. *Gopalasami Mudali* (2), as also on the Privy Council decision in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa Ramachandra Razu* (3) The language of sections 60 and 67 of the Transfer of Property Act also shows that a suit for redemption subsequent to a decree for sale is permissible. The causes of action differ entirely and there is a distinction between a right to redeem and a liability to pay. A permissive decree could not foreclose the equity of redemption. Ghose on Mortgages, page 617, also *Sundar Koer* v. *Rai Sham Krishen* (4).

Messrs. *C. V. Ananthakrishna Aiyar* and *K. R. Rangaswami Aiyangar*, for the Respondents, relied on the dictum of Sir Bhashyam Aiyangar, J., in *Vedapuratti* v. *Vallabha Valiya Raja* (5), and also on analogy based on sections 88 and 89 of the Transfer of Property Act, and contended that *Rama Tulsa Mahar* v. *Bhagchand Motichand* (1) was wrongly decided.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. The first plaintiff's father,

(1) 27 Ind. Cas. 249; 39 B. 41; 16 Bom. L. R. 687.
(2) 31 M. 354; 18 M. L. J. 259; 3 M. L. T. 281
(3) 19 M. 249 (P. C.); 23 I. A. 32; 6 M. L. J. 53.
(4) 34 C. 1:0 at p. 61; 9 Bom. L. R. 304; 17 M. L. J. 43; 11 C. W. N. 249; 4 A. L. J. 104; 34 I. A. 9 (P. C.); 5 C. L. J. 106; 2 M. L. T. 75.
(5) 25 M. 300; 12 M. L. J. 128.

Sreenivasa Aiyangar, mortgaged the plaint properties with possession to the defendants' ancestor, Sreenivasa Chariar in 1864. The *othi* deed contained also a covenant by the mortgagor to pay the mortgage-money personally. The defendants' ancestor brought a suit against Sreenivasa Aiyangar's sons in 1867 for recovery of the *othi* amount of Rs. 136 on the charge of the mortgaged property. (The plaint itself was not filed in the records but the suit might be taken as having contained the usual prayers for sale on default and for recovery of the balance, if any, from the defendants therein to the extent of their ancestral properties.) In April 1872, the decree, Exhibit A, was passed, of which the operative portion is as follows: "The plaintiffs obtain from the defendants the suit amount and all the costs of the suit, that the *othi* property be sold in order to satisfy the decree in case the decree amount be not paid within six months from this day, that the plaintiff is entitled to obtain interest on costs at 12 per cent. per annum from this day *and that the defendants are entitled to obtain possession of the* othi *land in execution* through Court (* * * *) after satisfying the decree." This decree, passed in favour of the present defendants' ancestor primarily but in which the present plaintiffs were also granted a right to redeem the property and to obtain the possession of it from the present defendants' ancestor in execution on payment of the amount decreed, was not executed by either of the parties to that decree. The present suit was brought nearly 40 years after the date of the former decree for the redemption of the same mortgage. (The plaintiffs Nos. 1, 2 and 3 in this suit were the defendants Nos. 4, 5 and 6 in the former suit of 1867. The plaintiffs Nos. 4, 5 and 6 in this suit are the sons of the deceased Aravamudu Aiyangar who was the first defendant in the former suit. The 7th plaintiff in this suit is the son of the second defendant in the former suit. I shall hereafter for the sake of brevity make no distinction between the plaintiffs and their ancestors or between the defendants and their ancestors.)

The sole question in this case is, whether the present suit is barred as *res judicata* by the decree in the former suit. Both the lower Courts decided the question in the affirmative and hence this second appeal.

It seems to me clear that, if in the former suit there was a decree in favour of the present plaintiffs (though they were the defendants in the former suit) and if it was an executable decree and if that decree granted them substantially the same reliefs as they now claim in this suit, they are barred by *res judicata* from maintaining the suit, and notwithstanding the strenuous and able arguments of Mr. T. M. Krishnaswami Aiyar who appeared for the appellants before us, I have come to the conclusion that the finding of the lower Courts was correct on the question of *res judicata*.

In the *first* place, I dissent from his contention that the decree, Exhibit A, of 1872 merely declared the present plaintiffs' right to get possession of the properties on payment of the mortgage amount and did not give them any right to obtain possession in execution in that suit. The *Tamil* word (* * *) at least in the Tanjore District is always used to mean "the obtaining of possession in execution through Court", and I think that the decree, Exhibit A, did give the plaintiffs (who were the defendants in the suit of 1867) the right to obtain possession of the mortgaged properties through Court in execution of the provisions of that decree on their payment of the mortgage amount.

In order to clear the ground further, it has to be remarked that the decree, Exhibit A, of 1872 was passed long before the Transfer of Property Act and the present Civil Procedure Code were passed. The decree Exhibit A, as I said before, gives the present plaintiffs who were the defendants in that suit, a right to obtain possession of the plaint land through the Court in execution on condition of their satisfying the decree passed in the present defendants' (then plaintiffs') favour. In *Vadapuratti* v. *Vallabha Valiya Raja* (5), there occur several *dicta* in the long and exhaustive judgment of Sir Bhashyam Aiyangar, J. At page 321 he says: "whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional decree for redemption

in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed." "Decrees for specific performance, decrees respecting rights of easement and similar decrees are often made conditional, but they are not the less 'final judgments' having the force of *res judicata*. This, I venture to state, is equally so under the English Law and *all decrees whether conditional or unconditional are to be worked out and enforced in execution.*" I entirely and respectfully agree with these observations. No doubt, the learned Judge was referring to decrees for sale and for redemption passed under the Transfer of Property Act, but his observations apply to this decree of 1872 also which contains a conditional decree in favour of the mortgagors for redemption, though it was a mortgagee's suit for sale. In *Adipuranam Pillai* v. *Gopalasami Mudali* (2), the following passage occurs at page 360: "The reason on which is based the decision of the Full Bench in *Vedapuratti* v. *Vallabha Valiya Raja* (5), renders it at least doubtful *whether a suit for redemption could be maintained by a mortgagor who has failed as defendant in a suit for sale on the same mortgage.*" It seems to me that the doubt so expressed is (if I may say so with respect) a very proper doubt and I think that the reasoning of the decision in *Vedapuratti* v. *Vallabha Valiya Raja* (5) does prevent a mortgagor, who as defendant in the mortgagee's decree for sale got a conditional decree for redemption, from afterwards maintaining a suit of his own for redemption and possession of the mortgaged property instead of executing the conditional decree for redemption passed in the first suit. A decree for redemption is almost invariably a conditional decree whether it is passed in a mortgagee's suit for sale or a mortgagor's suit for redemption. No doubt where it is passed in a mortgagee's suit for sale, it is not usually passed on the invitation of the mortgagor (defendant) and in the language used in *Adipuranam Pillai* v. *Gopalasami Mudali* (2), "the defendant is a decree-holder in spite of himself, an involuntary decree-holder:" but I do not see how this could, on principle, make any difference in the decision of the question whether the mortgagor-defendant who has been given such a decree is entitled only to execute that decree or whether he is entitled to bring a fresh suit for redemption despite the doctrine of *res judicata*.

As I said before, the decree of 1872 is a decree in favour of the mortgagor also, as it empowers him to recover possession of the property in execution. The Legislature in Act IV of 8-2 has enacted that decrees passed in mortgage suits, whether brought by the mortgagor or mortgagee, should (if necessary) be made to contain a direction that the mortgagee shall put the mortgagor in possession of the mortgaged property on the mortgagor paying up the amount mentioned in the decree as due to the mortgagee. [See sections 86, 88 and 89 of the Transfer of Property Act, now repealed by the Civil Procedure Code which, however, re-enacts very similar provisions in Order XXXIV, rule 2, clause (c), rule 4, clause 1 and rule 5, clause 1 (c).] The decree of 1872 contains the same direction. Mr. Krishnaswami Aiyar laid much stress upon what, he argued, was a material difference between the language of section 60 of Act IV of 1882 which deals with the right of the mortgagor to redeem and the language of section 67 which refers to the right of the mortgagee to obtain an order for foreclosure or sale. In section 67, the right of the mortgagee to obtain an order for foreclosure or sale is restricted to the period "before a decree has been made for the redemption of the mortgaged property." These words "before a decree has been made for the redemption of the mortgaged property" or the correlative words "before a decree has been made for sale of the property" do not appear in section 60 He, therefore, argued, if I understood him aright, that a decree for sale in a mortgagee's suit, though it may also contain a decree for redemption in favour of the defendant-mortgagor, does not bar a separate suit by the mortgagor for redemption whereas a decree for redemption in a mortgagor's suit will bar a separate suit by the mortgagee for sale afterwards. I do not think that the insertion of the words 'before a decree has been made for redemption of the mortgaged property' in section 67 and the absence of corresponding words in section 60 necessarily lead to any such conclusion as is contended for by the learned

Vakil. These words had to be inserted in section 67 in order to indicate that the power given under section 93 of the Transfer of Property Act to the mortgagee as defendant to apply for sale of the property in a mortgagor's suit for redemption *ought* to be exercised in the same suit by the defendant mortgagee, if he wants a sale of the property for realising his amount, and that he could not reserve it for a fresh suit as an optional remedy which he might or might not take advantage of in the mortgagor's suit. It will be seen that under section 93, paragraph 2 [Order XXXIV, rule 8, clause (4)] the order for sale at the instance of the mortgagee-defendant is not an order passed as a part of the decree but an order passed on a separate application on the mortgagor (plaintiff) committing default, whereas section 89 read with sections 86 and 88 makes the order for redemption in the defendant-mortgagor's favour in the mortgagee's suit for sale a part of the original decree itself. So being made in the latter case a part of the decree itself, it was unnecessary to state in section 60 that when a decree has been made for redemption or for sale, the mortgagor has no right to again redeem the mortgaged property after the passing of such a decree, as his said right had been adjudicated upon in the suit itself and has become *res judicata* whether the suit was a suit by the mortgagor for redemption or by the mortgagee for foreclosure or sale.

No doubt the case of *Rama Tulsa Mahar* v. *Bhagchand Motiram* (1) quoted by the appellant's learned Vakil is in his favour. But with the greatest respect, I am unable to agree with that decision. As said in the critical notes on pages 7 and 8 of 29 M. L. J., "In the words of section 11, Civil Procedure Code, has not the matter directly and substantially in issue in the 2nd suit—*viz.*, the plaintiff's right of redemption—been so in issue, and also heard and decided, in the former suit? What new point, right or question has the Court to hear or decide in the second suit? It will be impossible to contend that for the application of the rule of *res judicata* to suits (as distinguished from 'issues') the persons should on both occasions be arranged alike, whether as plaintiffs or as defendants." The mortgagor was entitled in the former suit itself (of the mortgagee) to redeem the property not only within six months given in the decree to pay up the decree amount, but he was entitled under the Civil Procedure Code [as decided in *Adipuranam Pillai* v. *Gopalasami Mudali* (2)] to pay it up, even after the six months and at any time before a sale in execution and so prevent a sale. The Courts need not be solicitous to help a negligent mortgagor at any cost. The fact that the mortgagee has to bring a suit for sale within twelve years of the date when the mortgage money became payable, whereas a mortgagor has got 60 years under Article 148 for his suit for redemption, is not a sufficient or logical ground for allowing the mortgagor to obtain a fresh decree for redemption in his own suit after he had obtained one decree already in the mortgagee's suit for sale.

In the result I would dismiss the second appeal with costs.

NAPIER, J.—I agree. In *Vedapuratti* v. *Vallabha Valiya Raja* (5), the late Chief Justice stated the proposition thus. The matter in issue in a redemption suit is, aye or no. Is the mortgagor entitled to the decree which, if he succeeds, the Court is required under section 92 to make. In my view the same matter is in issue in a mortgagee's sale suit, whether the suit be under English Law or the Transfer of Property Act and whatever difference in form has been made by the provisions in the new Code. In that view this suit is *res judicata* and the appeal must be dismissed.

*Appeal dismissed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1619 OF 1913.

June 10, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

*Musammat* BUDHAN—PLAINTIFF—APPELLANT

*versus*

RADHA KISHEN—DEFENDANT—RESPONDENT.

*Hindu Law—Maintenance, daughter-in-law, if entitled to—Joint family property.*

SEVUGAN CHETTI *v.* RUNGAMMAL.

A Hindu widow is entitled to receive maintenance from her father-in-law when the latter lived with his son as a member of a joint Hindu family and had considerable ancestral property and on his death took by survivorship all his rights in the joint family property.

Second appeal from the decree of the Additional Divisional Judge, Amritsar, at Jullundur, dated the 14th February 1913.

Lala *Dharam Das Suri*, for the Appellant.

JUDGMENT.

JOHNSTONE, C. J.—In this case a widowed Hindu lady sues her father-in-law for a maintenance allowance for self and minor son, for a sum of money to defray the marriage expenses of her daughter and for quarters in defendant's house in Amritsar. The first Court allowed her Rs. 10 per mensem allowance, Rs. 350 for marriage expenses and two rooms in the said house; but the lower Appellate Court, while agreeing with the first Court that the plaintiff's husband was joint with his father up to the day of his death, went on to hold that "it is settled law that a daughter-in-law has no *legal* claim on her father-in-law for maintenance except to the extent of her share in ancestral property," that it is not proved that defendant owns any property except the Amritsar house, which plaintiff has not shown is ancestral property, defendant having acquired it by auction-purchase in 1883. That Court, therefore, dismissed the suit with costs throughout.

Plaintiff has appealed here and we think the appeal must succeed, the lower Appellate Court having ignored admitted facts and also having laid down a legal proposition of doubtful correctness. Before us defendant has frankly admitted that he inherited from his father shop property in Kasur and Ferozepore, that he sold one lot years ago and bought the Amritsar house—he is a petition-writer at Amritsar—and that his share in the remaining shop has been usurped by co-sharers. He also admits he has spent Rs. 800 lately on the marriage of another son, which shows that he is a well-to-do man.

The facts, then, are that defendant and his deceased son were co-parceners in a joint Hindu family, that there was considerable ancestral property, whatever may have become of it in the hands of defendant, and that the deceased man, were he alive, would undoubtedly be entitled until partition to live with defendant and enjoy the family income along with him. In these circumstances, according to all just views of Hindu Law—*Cf.* p. 621 *et seq.* of Mayne's Hiudu Law and Usage, 8th edition—inasmuch as defendant, on his son's death, took by survivorship all that son's rights, the latter's widow is entitled to maintenance. Further, before us defendant flatly refused to take plaintiff into his house and support her there.

In the circumstances we do not think it desirable to allot quarters for plaintiff in defendant's house, the state of feeling between the parties being such as it is; nor is anything required in the way of contribution to her daughter's marriage expenses, the marriage being now a thing of the past. But defendant must maintain his daughter-in-law and grand-child in decent comfort and we think Rs. 10 per mensem a reasonable figure.

For these reasons we accept this appeal, set aside the judgment and decree of the learned Additional Divisional Judge and grant to plaintiff a decree for maintenance at Rs. 10 per mensem to continue until her death or re-marriage and to begin from date of this decree. Defendant to pay plaintiff's costs throughout.

*Appeal accepted.*

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MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 407 OF 1914.

October 26, 1915.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

SEVUGAN CHETTI, MINOR, BY NEXT FRIEND, CHOCKALINGAM CHETTY—DECREE-HOLDER—APPELLANT

*versus*

RUNGAMMAL—CLAIMANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 59—Claimant to attached property not adducing any evidence as to possession—Court, whether can decide on title.*

UMAR BAKHSH v. BALDEO SINGH.

Where in an enquiry under Order XXI, rule 59 of the Civil Procedure Code a claimant to an attached property does not adduce any evidence as to possession, the Court is justified in confining itself to the question of title.

Appeal, under clause 15 of the Letters Patent, against the judgment, reported in 29 Ind. Cas. 228, of the Hon'ble Mr. Justice Sankaran Nair, in Civil Revision Petition No. 531 of 1912, presented against the order of the Court of the District Munsif of Namakkal, in Execution Appeal No. 482 of 1912 (Execution Petition No. 343 of 1912 in Original Suit No. 480 of 1909.)

Mr. *K. R. Subramania Sastri*, for the Appellant.

Mr. *N. S. Rangaswami Aiyangar*, for Mr. *T. Narasimha Aiyangar*, for the Respondent.

JUDGMENT.—This appeal arises out of a claim preferred under the provisions of the Civil Procedure Code. It appears that the 1st defendant was the judgment-debtor and the property which was attached stood in the name of himself and his nephew, one Rajam Aiyangar. Rajam Aiyangar is dead and his widow, the claimant, is in possession of the property. The District Munsif dismissed the petition holding that the title to the property vested both in the 1st defendant and his nephew in equal moities, and there was no deed of sale or of release in favour of the claimant of the uncle's share of the property. He also observed that even if the petitioner's husband had alone been in enjoyment of the property, he had not acquired any right by prescription, that is to say, he proceeded upon the evidence of title that was before him. No evidence was adduced on the question of possession as required by rule 59 of Order XXI of the Code of Civil Procedure, which says that "the claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached." The claimant did not attempt to prove that she or her husband was in exclusive possession of the property attached in her or his own right. It was her duty to have adduced evidence of such possession if she wanted to resist the attachment on the ground of possession. It is not shown that evidence of such possession was offered before the District Munsif and refused by him; he was, therefore, bound to proceed only upon the evidence of title that was before him. Sankaran Nair, J., however, thought that the District Munsif was bound to enquire into the question of possession and if he found that the petitioner was in exclusive possession of the property, to allow the claim. It does not appear to have been brought to his notice that, as a matter of fact, no evidence of possession was tendered, and if no evidence of such possession was adduced, the District Munsif was entirely justified in confining himself to the question of title. That being the state of the facts, we are bound to hold that the District Munsif's order was right. We allow the appeal and restore the order of the District Munsif. The respondent must pay the costs of this appeal. The revision petition is dismissed with costs.

*Appeal allowed; Petition dismissed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2046 OF 1912.

April 23, 1915.

*Present*:—Justice Sir Donald Johnstone, KT., and Mr. Justice LeRossignol.

UMAR BAKHSH—DEFENDANT - APPELLANT

*versus*

BALDEO SINGH—PLAINTIFF—RESPONDENT.

*Registration Act (III of 1877), s. 17 (d)—Lease for indefinite period, if requires registration—Adverse possession by tenant—Non-payment of rent, whether establishes adverse possession—Limitation Act (IX of 1908), Sch. I, Art. 139—Suit by landlord against tenant holding over—Limitation.*

It is only where a lease is a lease for more than a year or from year to year in express terms that it is compulsorily registrable, but where the lease is to last for an indefinite period and can be terminated by either party at the end of any month, registration is not necessary. [p. 37 cols. 1 & 2.]

Mere non-payment of rent by a tenant does not establish his adversity of possession, but each case must be decided on its own particular features. [p. 38, cols. 1 & 2.]

Where rent was never paid at all by the tenant for nearly thirty years and no serious attempt was ever made to recover rent and where defendant denied on oath that he ever intended to pay rent or regarded himself as a lessee:

*Held*, that this was sufficient to establish adverse possession. [p. 38, col. 2.]

*Dadoba* v. *Krishna*, 7 B. 34; *Prem Sukh Das* v. *Bhupia*, 2 A. 517 (F. B.), referred to.

A tenancy on sufferance is not a tenancy contemplated by Article 139 of the Limitation Act and on the expiry of a tenancy for a fixed term, time begins to run against the landlord unless there is evidence that there was a novation and that tenancy for a fixed term was succeeded by a tenancy-at-will. [p. 38, col. 2.]

UMAR BAKHSH *v.* BALDEO SINGH.

*Kantheppa Raddi* v. *Sheshappa*, 22 B. 893, followed. *Adimulam* v. *Pir Ravuthan*, 8 M. 424; *Pusa Mal* v. *Makdum Bakhsh*, 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584, disapproved.

Second appeal from the decree of the Divisional Judge, Gujranwala, at Lahore, dated the 27th November 1912.

Mr. *Fazl-i-Hussain*, for the Appellant.

Messrs. *Beechey* and *Balwant Rai*, for the Respondent.

JUDGMENT.

LeRossignol, J—In this appeal we dispose of two cases in which the facts are very similar. The plaintiff brought these two suits for possession of certain house property in Wazirabad. The story told by the plaintiff is as follows:— About 1885, Ali Muhammad and Muhammad Bakhsh, brothers, who are defendants in one of these cases, found themselves indebted to the plaintiff in the sum of about Rs. 12,000. In order to liquidate that debt they executed a mortgage-deed of the property in dispute for Rs. 5,000 and they also induced Umar Bakhsh, their brother, the defendant in the second case, to execute a mortgage-deed of his property for Rs. 3,000. These documents were executed on the 17th January 1884, possession was given to the plaintiff, and subsequently on the 21st January 1884 each set of defendants executed a lease. It is alleged that the lease executed by defendants Ali Muhammad and Muhammad Bakhsh has been lost and was replaced by a deed, dated May 1888, executed by Ali Muhammad alone. The plaintiff further alleges that the defendant Umar Bakhsh never paid any rent and that the two defendants in the other case paid only Rs. 96 and he asks for their ejectment and possession of the leased property in both the cases.

The first Court dismissed both the suits with costs. In the case of Umar Bakhsh it held that the lease of 1884 required registration and being unregistered was inadmissible in evidence, that the relationship of landlord and tenant, therefore, had not been established and that the defendant had been in adverse possession since the date of execution of the lease propounded by the plaintiff. In the case of Ali Muhammad and Muhammad Bakhsh the first Court held that as the lease of 1888 had been executed by Ali Muhammad alone, his brother Muhammad Bakhsh was in no way affected thereby and stood on exactly the same footing as Umar Bakhsh in the connected case. As regards Ali Muhammad, it held that as the lease of May 1888 was a lease for one year, the tenancy determined in May 1889, that since that date Ali Muhammad had been in adverse possession and the suit was consequently time-barred.

The learned Divisional Judge in the case of Umar Bakhsh found that the defendant's plea that he had never paid any rent was correct, that the document executed in 1884 was not a lease, that if it was a lease it was not a lease from year to year, and, therefore, was admissible in evidence without registration. The learned Judge then proceeded to hold that mere non-payment of rent did not establish adversity of possession on the part of the defaulting tenant and that the defendant had failed to prove that the relationship of tenant and landlord had determined more than 12 years before suit. On these grounds he accepted the appeal and decreed possession to the plaintiff. In the case of Ali Muhammad and Muhammad Bakhsh, the learned Divisional Judge came to the conclusion that although the lease, Exhibit P.2, was for a year certain and terminated on the 5th May 1889, the defendants must be regarded as tenants holding over and that if there exists even slight evidence that the plaintiff acquiesced in the continued occupation of the property by the tenants after the termination of the lease and considered them his tenants-at-will, the defendants in such case must be regarded not as trespassers but as tenants on sufferance. Proceeding to enquire whether such slight evidence of acceptance by the landlord of the defendants as his tenants-at-will existed, the learned Judge found that the defendants made a payment of Rs. 96 on account of rent on the 20th *Poh Sambat* 1944=1890 A. D. This payment had not been accepted as proved by the first Court, but the Divisional Judge saw no reason to hold the evidence on the point unreliable. Beyond this he also accepted oral evidence that rent had been demanded by the plaintiff of the defendants, and taking into consideration these two facts, *viz.*, the payment and acceptance of rent for one year and subsequent demand, he held that there was sufficient evidence to show that a

plaintiff had assented to the retention of possession by the defendants as tenants-at-will. On the point whether Muhammad Bakhsh was bound by the lease of the 5th of May 1888 executed by his brother Ali Muhammad alone, the learned Divisional Judge held that Muhammad Bakhsh was not bound by his brother's action. He, therefore, regarded Muhammad Bakhsh as holding the same position as his brother Umar Bakhsh, the defendant in the other case, and accepted the appeal, giving plaintiff a decree against both the brothers Ali Muhammad and Muhammad Bakhsh.

From these two decrees a second appeal has been preferred to this Court, and we proceed to dispose of Umar Bakhsh's appeal first. The *first* point urged before us on behalf of the appellant is that a tenancy never existed, that the lease of 1884 was fictitious in the sense that it was inoperative and was never intended by the parties to be enforced. The *second* point is that the rent-deed being a lease for more than one year required registration and being unregistered is inadmissible in evidence. Exception was taken to the finding of the Divisional Judge that this document of 1884 is not a deed of lease, and it is pointed out that it was never one of the contentions of the plaintiff, that there was a previous oral contract and that the Divisional Judge went beyond the pleas in holding that the rent-deed of 21st January 1884 is not a lease. After a careful examination of the contents of the deed and of the pleadings of the parties, we hold that this argument must prevail. The plaintiff in fact accepted it as a lease and came into Court reciting it and asking for relief against his tenants on the strength of it. The deed is obviously a lease, as a lease is generally understood in the Punjab. It starts with the recital that the defendant has taken the house on lease and continues with an undertaking to pay rent monthly and in any case to settle up all the arrears of payment at the end of a year. No doubt the parties contemplated, and, indeed, the language of the document suggests, that the lease was to last for an indefinite period, but we are clear that there is nothing in the language of the lease which would have precluded the plaintiff from ejecting the defendant at the end of any month, or would have prevented the defendant from quitting the house by terminating the lease at the end of any month. It is only when a lease is a lease for more than a year, or from year to year, in express terms that it is compulsorily registrable. We hold that such is not the case here and, therefore, we consider that the lease of May 1884 is admissible in evidence. It follows that we hold the tenancy proved.

The next question for decision is whether the tenancy created in 1884 is subsisting now, and, if not, when did it determine. Having regard to the facts that there is no proof whatever that Umar Bakhsh ever paid rent for any period under this deed of lease, that he denies on oath that the lease was intended to be operative and that till this suit was brought in 1911, *i. e.*, for over 25 years, the plaintiff made no serious attempt either to recover the rent or to oust defendant, we must hold that Umar Bakhsh had been in adverse possession for over 12 years at the date of the institution of the suit.

Turning now to the second case, *i. e.*, against Ali Muhammad and Muhammad Bakhsh, we are clear that the lease dated the 5th May 1888 superseded the lease dated the 21st January 1884. The lease of 1884 covers exactly the same property as that included in the 1884 deed, but whereas the lease of 1884 was executed by Ali Muhammad and Muhammad Bakhsh jointly, that of 1888 was executed by Ali Muhammad alone. The other respect in which the lease of 1888 differs from its predecessor is, that whereas the former fixed no period for the termination of the lease, the latter fixed the period of the lease at one year. The question, then, for decision is whether the lease of 1888 determined on the 5th May 1889. The learned Divisional Judge held that it did so terminate, but as before noted, he proceeded to hold that after that date the tenant for a fixed term became a tenant on sufferance, in other words, a tenant-at-will; and he based his finding on this point on the alleged payment of a sum of rent which was credited to Ali Muhammad and Muhammad Bakhsh's joint account. This payment and some oral evidence of subsequent demand were the material on which he arrived at this finding. Unfortunately, however, his conclusion is vitiated by the fact that he misapprehended the significance of the aforesaid payment. He was under the impression that the payment was made in 1890, *i.e.*, after the execution of the second lease of 1888. As a fact that payment was made on the 8th of *Har Sambat* 1942=

June 1885 and was credited in the year 1943, corresponding with 1886 A.D. Consequently, the most important portion of the evidence on which the learned Divisional Judge based his conclusion must be discarded in determining the question whether the defendants were accepted as tenants-at-will after the termination of the lease for one year in May 1889. Owing to the discovery of this misapprehension on the part of the learned Divisional Judge, it has been necessary for ourselves to consider the oral evidence in the case, and a study of it has not led us to the conclusion that it is sufficient to support a finding that the defendants became tenants-at-will after May 1889. It follows from this that Ali Muhammad has been in adverse possession since 1889, *i.e.*, he had been in adverse possession for more than 12 years at the date of the institution of the suit. Muhammad Bakhsh did not execute a second rent-deed, consequently two positions have to be considered—either Ali Muhammad in executing the deed acted on behalf of his brother, or acted without consulting him. In either case the plaintiff is entitled to no relief against Muhammad Bakhsh.

It may be noted here that the oral evidence of subsequent demand of rent and promises by the defendants to pay is of a very unsatisfactory and unconvincing nature.

With two exceptions, the witnesses live at Amritsar, whilst the defendants live either at Wazirabad or at Jammu, and the gist of their evidence is that they carried oral messages of demand from plaintiff's manager in Amritsar to the defendants at Jammu.

The value of the evidence may be gathered from the statement of one of the witnesses, Mul Raj, who says: "Ganga Ram at Jammu asked me to ask Ali Muhammad to pay rent and execute a lease. I did so and Ali Muhammad admitted he was a tenant and promised to pay rent and execute a deed. *This he said in Ganga Ram's presence.*"

One wonders whether Ganga Ram was dumb. This evidence, if it is worth anything at all, shows that rent and an admission of the tenancy were demanded and that both demands were refused in effect.

In conclusion we shall now refer to the authorities cited before us for the view that mere non-payment of rent by a tenant does not establish his adversity of possession. [*cf. Dadoba* v. *Krishna* (1), *Prem Sukh Das* v. *Bhupia* (2).]

At this abstract proposition we are not disposed to cavil, but we think that each case must be decided on its own particular features. In the case of Umar Bakhsh we find that rent was never paid at all for nearly 30 years, that no serious attempt was ever made to recover rent and over and above this we have defendant's denial on oath that he ever intended to pay rent or regarded himself as a lessee.

In the case of Ali Muhammad and Muhammad Bakhsh, we find a tenancy established for a fixed period, and the defendant-appellant has referred us to Article 139 of the Limitation Act. The plaintiff-respondent has quoted *Adimulam* v. *Pir Ravuthan* (3) and *Pusa Mal* v. *Makdum Bakhsh* (4), but we approve of *Kantheppa Ratdi* v. *Sheshappa* (5) to the effect that a tenancy on sufferance is not a tenancy contemplated by Article 139 of the Limitation Act, and that on the expiry of a tenancy for a fixed term, time begins to run against the landlord, unless there is evidence that there was a novation and that the tenancy for a fixed term was succeeded by a tenancy-at-will.

As above remarked, we can find no reliable evidence of any such novation.

For these reasons we accept the appeals and dismiss the suits, but as the defendants on their own pleas are shown to deserve no consideration, we direct parties to pay their own costs throughout.

*Appeal accepted.*

(1) 7 B. 34.
(2) 2 A. 517 (F. B.).
(3) 8 M. 424.
(4) 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584.
(5) 22 B. 893.

BALAJI RAO *v.* HARIRAMA CHETTY.

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 122 OF 1914.

October 1, 1915.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

C. BALAJI RAO SAHIB—DEFENDANT No. 4—APPELLANT

*versus*

HARIRAMA CHETTY—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage-decree passed before the new Code—Final decree, whether necessary before execution—Application for execution within 12 years of decree—Limitation Act (IX of 1908), Sch. I, Art. 182.*

There is nothing in Order XXXIV, rules 4 and 5, of the Code of Civil Procedure which expressly says that mortgage decrees passed before the new Code came into operation must be regarded in the nature of preliminary decrees and that, therefore, it would be necessary to have a final decree passed before there can be any further execution. [p. 39, col. 2]

*Mahammad Husain Saib* v. *Abdul Karim Saib*, 29 Ind. Cas. 237; 17 M. L. T. 424, followed.

A decree-holder in such a case is, therefore, entitled to get an order absolute for sale within a period of 12 years from the date of the decree. [p. 39, col. 2.]

Such a case is governed by Article 182 and not Article 181 of the Limitation Act. An application for execution made within 12 years from the date of decree and within three years from the date of the last application is not, therefore, barred by limitation. [p. 40, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in Appeal Suit No. 96 of 1914, preferred against the order of the Court of the District Munsif of Arni in Revision Execution Petition No. 286 of 1913 (Original Suit No. 201 of 1902).

Messrs. *T. R. Ramachandrier*, *A. Ramachandra Aiyar* and *C. Sitaramiah*, for the Appellant.

Mr. *L. Venkataraghava Aiyar*, for the Respondent.

JUDGMENT.—In this case, the decree, execution of which is sought, is dated 7th November 1902. It appears that the first application for execution was made on the 7th July 1905. Then there was a second application in 1906 and a third application in 1908 and after the new Civil Procedure Code came into force, an application was made on the 18th April 1911. There were some more applications thereafter, one on the 4th July 1912, another on the 22nd October 1912, the last one being on the 8th May 1913.

The question raised before us by the learned Vakil for the appellant is whether the effect of Order XXXIV, rules 4 and 5, of the new Civil Procedure Code is that the decree-holder must apply for a final decree under the provisions of the new Code before there can be any execution. The decree in the case was made long before the passing of the new Code and there had also been several applications in execution before the Code came into force. The contention of the appellant's learned Vakil amounts to this: that what was originally a decree executable under the ordinary process of execution must, by reason of the new enactment, *i. e.*, the Civil Procedure Code of 1908, be taken to have ceased to become executable. There is nothing in the language of the rules to which we have been referred which expressly says that mortgage decrees passed before the new Code came into operation must be regarded in the nature of preliminary decrees and that, therefore, it would be necessary to have a final decree passed before there can be any further execution. If we acceded to the arguments of the appellant's Vakil, the result would be that what was originally a decree capable of being executed would cease to be executable and that is not a position which we should give effect to unless we were compelled to do so by the express language of the Code. Section 48 of the new Code lays down that a decree shall remain in force for 12 years and we may, therefore, take it that this decree is still in force. That being so, the fact that the application that was made after the new Code came into operation did not pray expressly for a final decree but asked for execution, could not affect the decree which was already in force and alter its nature. This point is not explicitly covered by any of the decisions that we have been referred to, though, in several of the cases cited before us, there are expressions of opinion which support the view we have taken. It will be sufficient to refer to the case of *Mahammad Husain Saib* v. *Abdul Karim Saib* (1). This is a recent decision wherein it was laid down that to a case of this nature section 48 of the new Civil Procedure Code applies and that the decree-holder

(1) 29 Ind. Cas. 237; 17 M. L. T. 424.

would be entitled to get an order absolute for sale within a period of 12 years from the date of the decree. We are of opinion that Article 182 of the Limitation Act, and not Article 181 as contended for the appellant, governs the case and as the application for execution in question was made within 12 years of the decree and 3 years of the last application it was rightly granted. The appeal is dismissed with costs.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 801 OF 1912.

May 5, 1915.

*Present*:—Mr. Justice Shah Din and Mr. Justice LeRossignol.

CHIRAGH DIN—DEFENDANT—APPELLANT

*versus*

BHAGWAN DAS—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. II, r. 3—Jurisdiction—Combined suit on different causes of action each separately cognizable by Small Cause Court, whether cognizable by such Court—Pro-note—Burden of proof—Consideration—Special circumstances.*

Order II, rule 3, of the Civil Procedure Code permits a plaintiff to combine in one suit against a defendant several causes of action and the value of that suit for the purpose of jurisdiction is the aggregate value of all the causes of action comprised therein. [p. 40 col. 2.]

Therefore, a suit based on three pro-notes, the claim in respect of each of which is less than Rs. 500, is to be regarded as one single suit and is not cognizable by a Small Cause Court. [p. 40, col. 2.]

When a defendant admits execution of a pro-note but pleads absence of consideration, the initial onus is almost invariably upon the plaintiff to prove that consideration did pass but when the defendant, who is a man of business and has a good knowledge of English executes a promissory note comprising the expression "for value received" and further admits that at any rate some portion of the consideration reached him, the onus is shifted to him. [p. 40, col. 2.]

*Wazir Singh* v. *Jai Gopal*, 17 P. R. 1888, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 1st April 1912.

Messrs. *Dina Nath* and *Dhanpat Rai*, for the Appellant.

Mr. *Moti Lal*, for the Respondent.

JUDGMENT.

LEROSSIGNOL, J.—In this case the only two points which call for decision are (1) whether the onus of proof of consideration was correctly placed in the ultimate stage upon the defendant, and (2) whether the learned Divisional Judge was correct in holding that the Subordinate Judge had jurisdiction in respect of the three pro-notes the claim in respect of each of which amounted to less than Rs. 500.

On the point of jurisdiction we make no doubt that the learned Divisional Judge's finding is correct. The matter appears to be one of first impression and we have been referred to no direct authority on the point. Section 16 of the Small Cause Courts Act refers to a *suit* cognisable by a Court of Small Causes. Order II, rule 3, of the Civil Procedure Code permits a plaintiff to combine in one suit against a defendant several causes of action and the value of that suit for the purpose of jurisdiction is the aggregate value of all the causes of action comprised therein. It is no part of a Court's duty to scrutinize every item included in a suit in order to determine whether any portions of that suit were triable by a Court of Small Causes. In this case the suit was properly framed and included several causes of action against the same defendant. That suit regarded as one single suit was certainly not cognizable by a Court of Small Causes and the Subordinate Judge had jurisdiction in respect of every part of the suit.

On the question of onus we make no doubt that when a defendant admits execution but pleads absence of consideration, the initial onus is almost invariably upon the plaintiff to prove that consideration, did pass. It is impossible to lay down any hard and fast rule determining the point at which the onus shifts but when, as in the case now before us, we find that the defendant, who is a man of business and has a good knowledge of English, has executed a promissory note comprising the expression "for value received" and more than that has admitted that at any rate some portion of the consideration had reached him, we hold that the onus which originally lay upon the plaintiff is shifted to the defendant. A case of this kind is very widely different from the case considered in *Wazir Singh* v. *Jai Gopal* (1).

From the foregoing it follows that on these two points we agree with the learned

(1) 17 P. R. 1888.

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Divisional Judge. At the same time we are quite unable to believe that the plaintiff who carries on a money-lending business of an extensive kind has no regular books of account.

In his plaint he mentions certain payments on account of interest and we are quite unable to believe that he recited these payments from memory.

The defendant's explanation of the transaction, however, is just as unsatisfactory as the plaintiff's refusal to produce his accounts.

The case is one which it is difficult to settle on regular lines, and we think that it is one which calls for an equitable settlement.

We are inclined to believe that interest was deducted by plaintiff in advance, and accepting the appeal we reduce the decretal amount to Rs. 2,580 only, carrying interest at Rs. 6 per cent. per annum from date of decree to date of realization.

We also direct that parties should bear their own costs throughout.

*Appeal accepted.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 260 OF 1912.

November 16, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

SUBBIAH AIYAR—PLAINTIFF—APPELLANT

*versus*

MUTHUKUMARASWAMIA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 63 (1)—Property under attachment in execution of decrees of two Courts—Sale by Court of lower jurisdiction, whether valid*—Bona fide *purchaser without notice, rights of—Burden of proof—Notice—Test.*

Where property is under attachment in execution of the decrees of two separate Courts, a sale by the Court of lower jurisdiction is irregular but not invalid, and a purchaser will take an indefeasible or a defeasible title according to whether he does or does not know of the irregularity. [p. 41, col. 2; p. 42, col. 1.]

The burden of proof is upon such purchaser to show that he made the purchase *bona fide* and without notice of the pre-existing attachment. [p. 42, col. 1.]

In order to determine whether a purchaser had notice or not the test to be applied is, whether he acted in good faith without being aware, whether by direct and formal notice or otherwise, that his title was liable to be questioned by reason of the superior Court's attachment. [p. 42, col. 1.]

*Abdul Karim* v. *Thakordas*, 22 B. 88, followed.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 638 of 1910, preferred against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 483 of 1908.

FACTS.—There were two decrees against the same judgment-debtors and their properties were attached by the Sub-Court of Tinnevelly and then by the Munsif's Court of Tinnevelly. In the execution of one of the decrees the respondent purchased in the Court auction held by the Court of the District Munsif the properties on which there was a subsisting attachment by the Sub-Court. The appellant then bought the same properties in a Court auction held by the Sub-Court. The District Court of Tinnevelly held that it was for the purchaser under the later sale to prove that the respondent, the purchaser under the earlier sale, had notice of the earlier attachment and that he had not proved it and so disallowed his claim. Hence the present appeal against the decree of the District Court.

Messrs. *S. Srinivasa Aiyangar* and *S. Ramaswami Aiyar*, for the Appellant.

Messrs. *M. D. Devadoss*, *S. T. Srinivasa Gopalachariar* and *N. Ramachandra Aiyar*, for the Respondents.

This second appeal coming on for hearing on the 8th February 1915 and having stood over for consideration till the 16th February 1915, the Court (Ayling and Tyabji, JJ.) delivered the following

JUDGMENT.—The only point argued in this appeal turns on the meaning and effect to be given to section 285 of the old Code of Civil Procedure. It is admitted that when the Court sale (relied on by the plaintiff) in Original Suit No. 268 of 1905 on the file of the Court of the District Munsif of Tinnevelly was held, the property was under the attachment of the Court of the Subordinate Judge of Tinnevelly: and the question is whether the said sale is invalid.

We entirely concur in the view expressed by Farran, C. J., in *Abdul Karim* v. *Thakordas* (1). The sale by the Court of lower jurisdiction being irregular and not invalid,

(8) 22 B. 88.

'the purchaser will take an indefeasible or a defeasible title according to whether he knows or does not know of the irregularity. If he buys *bone fide* and without notice, his title will be perfect and he will not be affected by the irregularity of the proceedings resulting in the sale. If he purchases with notice he runs the risk of his purchase being set aside".

The word 'notice" in the above passage may be open to misconstruction: but reading the judgment as a whole we feel no doubt that the learned Judge used it in no technical sense but intended that the test to be applied was, whether the purchaser acted in good faith without being aware, whether by direct and formal notice or otherwise, that his title was liable to be questioned by reason of the superior Court's attachment.

The learned District Judge does not seem to have applied his mind to this point: but rather to the question of the legal effect of the notice, Exhibit Q, given to the Court by plaintiff's witness No. 4. It is for the 4th defendant to prove that he was a *bona fide* purchaser without knowledge: and we can find nothing in the judgment which could be construed into a finding to this effect.

We must, therefore, call for a finding on the following issue on the evidence on record:- Was the 4th defendant a *bona fide* purchaser at the Court sale without knowledge of the pre-existing attachment by the Court of the Subordinate Judge of Tinnevelly?

The District Judge should submit his finding within two months from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the District Judge of Tinnevelly submitted the following

FINDING.—A finding has been called for on the following issue:—

Was the 4th defendant a *bona fide* purchaser at the Court sale without knowledge of the pre-existing attachment?

I would answer it in the affirmative.

2. The point has been considered in paragraph 3 of my predecessor's judgment and I have really nothing to add to what he has said in it. No doubt, an application (Exhibit C) was made to stop the sale, but it was disposed of summarily without issue of notice to the parties concerned and there is no ground for concluding that the 4th defendant must have been aware of it. Exhibit Q, again, contains no admission of knowledge of the attachment before the sale. Nor does it by any means follow that because he knew of the encumbrance (*vide* Exhibit VI), he must also have been aware of the attachment.

The oral evidence establishes nothing more against him. Defendants' 1st witness denies knowledge. Plaintiff's 4th witness imputes it to him and his master, on the ground (*a*) that he told them (*b*) that they owned the adjoining land. The second ground is a *non-sequitur*. As for the first, the time when he told them is uncertain. His words are, "I have told them about this also. Muthukumaraswamy Pillai then filed Exhibit Q." Strictly construed this means that he told them after the sale. In cross-examination he admits that he did not see defendants' 4th witness before the sale.

3. Defendants' 4th witness has paid the purchase-money and there being nothing to show that he was aware of the attachment, I find that he was a *bona fide* purchaser without notice.

This second appeal coming on for final hearing this day, after the return of the finding of the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—The order of this Court was perfectly clear that it was the 4th defendant who had to prove that he was a *bona fide* purchaser at the Court sale without knowledge of the pre-existing attachment of the plaintiff. The plaintiff in his plaint in paragraph 10 imputed knowledge of the attachment to the defendant. That allegation does not appear to have been clearly denied in the written statement of the defendant. He did not go into the witness-box himself. There is no evidence that the 4th defendant purchased the property without knowledge of the pre-existing plaintiff's attachment. The learned District Judge in submitting his finding seems to have thrown the onus on the plaintiff to show that the 4th defendant was aware of the attach-

ment. He says in paragraph 3 of his finding that the 4th defendant has paid the purchase-money "and there being nothing to show that he was aware of the attachment, I find that he was a *bona fide* purchaser without notice." The 4th defendant has clearly failed to prove that his purchase was *bona fide*, without knowledge and without notice. The result is that the suit will be decreed and the 4th defendant will have to pay the plaintiff's costs throughout.

*Appeal allowed; Suit decreed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 980 OF 1913.

May 8, 1915.

*Present*:—Mr. Justice Chevis and
Mr. Justice Shadi Lal.

*Musammat* KAHAN DEVI—PLAINTIFF—APPELLANT

*versus*

*Musammat* NIHAL DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Decree—Attachment—Objections*]—Res judicata—*Limitation to contest order on objection—Party neglecting to contest within time, effect of.*

A decree for a sum of money with lien on mortgaged property by attachment and sale is not a decree under the Transfer of Property Act or under Order XXXIV of the Civil Procedure Code, 1908, and the decree-holder in such a case can ask for the attachment of the mortgaged property and objections to attachment can also be made. [p. 43, col. 2; p. 44, col. 1.]

A decision *inter partes* as to the non-liability of certain property to attachment in execution of a decree against a mortgagor bars further attachment of the same property in another decree against the same mortgagor. [p. 44, col. 1.]

An executing Court has to decide an objection to an attachment although the value of the property might greatly exceed the value of the decree. [p. 44, col. 1.]

An order passed on an objection to an attachment if not contested by regular suit within the year, becomes final and a party who is dissatisfied with the order but neglects to contest it by regular suit within the year, cannot evade it by the simple device of getting another decree and making a fresh attachment. [p. 44, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore, dated the 4th February 1913.

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *Ganga Ram*, for the Respondents.

JUDGMENT.

CHEVIS, J.—Mela Ram mortgaged a house to Shankar Das. In 1903 Shankar Das's widow, *Musammat* Kahan Devi, got a decree for rent against Mela Ram and in execution attached the house now in suit. *Musammat* Nihal Devi, who is, we learn, widow of the brother of Mela Ram's grandfather, objected that the house was hers. The objection was allowed and the house was released. No suit was brought to contest the order passed on this objection.

In 1910 *Musammat* Kahan Devi sued for the mortgage-debt and on 30th November 1910 obtained a decree for Rs. 3,152-8-0 "with lien on the mortgaged property by attachment and sale of the mortgaged property and other property and personal liability of the mortgagor." In execution the decree-holder again applied for attachment of the house and it was again attached. *Musammat* Nihal Devi again objected, and her objection was allowed, reference being made to the decision in the former objection case. *Musammat* Kahan Devi then brought this regular suit, which the lower Courts have dismissed, holding that the decision in the earlier objection case is still in force and is binding. *Musammat* Nihal Devi appeals to this Court. On her behalf it is pleaded that objections can only be lodged in cases where a money-decree is obtained and not in cases where the decree itself directs sale. In the latter class of decree it is urged that no attachment is necessary. Several authorities are quoted. But the decree of 30th November 1910 is not a decree under the Transfer of Property

Act, or under Order XXXIV of the Civil Procedure Code of 1908. It does not *order* sale. It gives a decree for a sum of money with lien (*kifalat*) on the mortgaged property by (*baziria*) attachment and sale. This points to attachment as well as sale, not to sale without attachment. So the decree-holder very properly asked for attachment, and attachment followed. There being an attachment the opportunity for objections at once followed. We overrule the plea that in such a case there can be no objections.

Then it is urged that the result of the first objection covers only the decree for rent, and that the Munsif who decided those objections had no jurisdiction in the latter case which related to the mortgage-debt. But there was a decision *inter partes* as to the liability of certain property to attachment in execution of a decree against Mela Ram, and if it is not liable for attachment in execution of one decree on the ground that it did not belong to him, how can it be liable to attachment in execution of another decree? In such cases the value of the property may greatly exceed the value of the decree, but the executing Court still has to decide the objection [see *Kadambini Dasi* v. *Dayaram Das* (1)]. The order passed on the objection, if not contested by regular suit within one year, becomes final, and a party who is dissatisfied with the order but neglects to contest it by regular suit within the year, cannot evade it by the simple device of getting another decree and making a fresh attachment. It is urged that it was not worth *Musammat* Kahan Devi's while to bring a regular suit regarding a small money decree for rent. But the decision passed on the first objection was a bar to her taking any future proceedings against the house, so she certainly ought to have brought a regular suit to contest the decision.

We agree with the lower Courts that the order passed on the objection in 1903 is final and conclusive and that the matter is now *res judicata* and that the decision on the second objection is, therefore, correct.

The appeal is dismissed.

*Appeal dismissed.*

(1) 5 Ind. Cas. 573; 11 C. L. J. 478.

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 99 OF 1914.

August 17, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THANDAVAROYA MUDALI, MINOR, BY NEXT FRIEND, MUNISAMI MUDALI—DEFENDANT No. 2—RESPONDENT—APPELLANT

*versus*

SUBRAMANIA GURUKKAL—PLAINTIFF—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 35—Decree-holder put in possession—Obstruction by third person on behalf of judgment-debtor—Second application for possession, whether sustainable.*

A decree-holder is not entitled to file a second application for possession under Order XXI, rule 35, of the Civil Procedure Code, after he has been put in possession in accordance with an order passed on an application filed under the same Order and rule. [p. 44, col. 2.]

*Gopal Das* v. *Than Singh*, 4 A. 184; A. W. N. (1882) 4, followed.

*Govind Bidiraji Bhukta* v. *Akella Venkata Sastrulu*, 17 M. L. J. 598, referred to.

Appeal against the order of the District Court of North Arcot, dated the 16th April 1914, in Appeal Suit No. 37 of 1914, preferred against that of the District Munsif, Ranipet, in Execution Petition No. 382 of 1913, in Original Suit No. 195 of 1911.

FACTS.—The plaintiff obtained a final decree for redemption and applied under Order XXI, rule 35 of the Civil Procedure Code, 1908, for actual possession of the land in dispute. The plaintiff got possession and granted delivery receipt. Thereafter a third person on behalf of the judgment-debtor caused certain obstructions. The plaintiff again applied in execution for possession. The first Court dismissed the application, but the lower Appellate Court allowed it and remanded the case for disposal according to law. The defendant appealed.

Mr. *N. Rajagopalachari*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondent.

JUDGMENT.—Following *Gopal Das* v. *Than Singh* (1) and the *ratio decidendi* in *Govind Bidiraji Bhukta* v. *Akella Venkata Sastrulu* (2), we hold that the decree-holder is not entitled to file a second application for possession under Order XXI, rule 35, Civil Procedure Code, after he had been put in possession in accordance with an order

(1) 4 A. 184; A. W. N. (1882) 4.
(2) 17 M. L. J. 598.

passed on a previous application filed under the same Order and rule.

The District Judge's order is set aside and that of the District Munsif restored with costs in all Courts on the respondent. We decline to allow the respondent to treat his petition as a suit at this late stage.

*Order set aside.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 464 OF 1912.

November 10, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri.

PARAT VEETTIL SEETHI—PETITIONER

*versus*

AMBALATH VEETTIL KOLATHUR AHMAD—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Mere payment of money, if enough—Application to set aside sale, if to be in writing—Amendment, when allowed—Revision—Amendment.*

Mere payment of money under Order XXI, rule 89, of the Code of Civil Procedure without an application to set aside the sale is not sufficient. [p. 45, col. 2.]

*Sarvoi Begam* v. *Haider Shah*, 13 Ind. Cas. 404; 9 A. L. J. 12, followed.

It is not necessary that an application to set aside the sale should be in writing. [p. 45, col. 2.]

*Mariappa Annam* v. *Hari Hara Iyer*, 22 Ind. Cas. 291; 14 M. L. T. 534; (1914) M. W. N. 62, followed.

Where a petition is put in stating that the petitioner has paid the money into the treasury and the object of the petitioner is to have the sale set aside though the petition contains no formal prayer to that effect, the Court can allow the petitioner to amend it by adding a formal prayer. [p. 45, col. 2.]

*Kunchapudy Anantha Venkata Veeraraghava Charyulu* v. *Mallikarjuna Prasada Naidu*, 25 Ind. Cas. 883; 2 L. W. 665, followed.

But a High Court will not in the exercise of its revisional jurisdiction allow an unstamped memorandum, filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition and to be amended by containing a prayer to set aside the sale under Order XXI, rule 89, Civil Procedure Code, nearly 15 months after the application is barred. [p. 46, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Malabar, in Civil Miscellaneous Appeal No. 29 of 1911, preferred against that of the District Munsif of Chowghat, in Miscellaneous Petition No. 1454 of 1911 in Original Suit No. 416 of 1908.

Mr. *C. V. Anantha Krishna Aiyar*, for the Petitioner.

Mr. *K. P. M. Menon*, for the Respondent.

This petition coming on for hearing on the 12th November 1914 and having stood over for consideration till the 27th November 1914, the Court delivered the following

JUDGMENT.—The petitioner whose property was sold in execution of a decree paid the decree amount and 5 per cent. as required by Order XXI, rule 89, of the Code of Civil Procedure within 30 days. He did not put in a formal petition to set aside the sale within that period. It is argued that it was sufficient if the amount was paid in 30 days, but I am of opinion that mere payment without an application to set aside the sale is not sufficient. *Sarvoi Begam* v. *Haider Shah* (1).

It is, however, not necessary that the application to set aside the sale should be in writing. In Civil Revision Petition No. 579 of 1913 Justices Oldfield and Seshagiri Aiyar held that an oral application was sufficient. A similar view was taken by Justice Tyabji in *Mariappa Annam* v. *Hari Hara Iyer* (2). In Civil Revision Petition No. 106 of 1912, Justice Sankaran Nair was of opinion that it was open to the Judge to treat the application to deposit money as an application to set aside the sale if a request was made to him to do so.

In the present case it appears that a petition was put in by the petitioner on the 6th June 1911 stating that he had paid the money into the treasury and though the petition contains no formal prayer to set aside the sale, there can be little doubt that this was the object of the petitioner. This petition, if it had contained a formal prayer, would have been in time if it was filed on 6th June as petitioner had the benefit of the summer vacation intervening. There is nothing to prevent the Court from allowing the petitioner to amend the petition by adding a formal prayer. This course was adopted by Justices Sadasiva Aiyar and Napier in *Kunchapudy Anantha Venkata Veeraraghava Charyulu* v. *Mallikarjuna Prasada Naidu* (3) in an analogous case.

I direct the District Munsif to submit findings on the following points:—

(1) Whether any oral application was made by petitioner, either at the time of the deposit of the money or at any time within 30 days from the sale, to set aside the sale.

(1) 13 Ind. Cas. 404; 9 A. L. J. 12.
(2) 22 Ind. Cas. 291; 14 M. L. T. 534; (1914) M. W. N. 62
(3) 25 Ind. Cas. 883; 2 L. W. 665.

(2) Whether the application, dated 6th June 1911, was filed by petitioner onthe day the Court re-opened.

The findings should be submitted within one month from this date; and seven days will be allowed for filing objections. The application dated the 6th June 1911 will be sent to the High Court with the findings.

[In compliance with the order contained in the above judgment, the District Munsif of Chowghat submitted findings which appear from the judgment below.]

This petition coming for final hearing on the 26th October 1915, after the return of the findings of the District Munsif on the issues referred by this Court for trial and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—For the reasons given in my order, dated the 27th November 1914, I called for findings as to (1) whether any oral application was made by petitioner either at the time of the deposit of the money or at any time within 30 days from the sale to set aside the sale and (2) whether the application, dated the 6th June 1911, was filed by the petitioner on the day the Court re-opened. The District Munsif has submitted findings to the effect that no oral application was made and that the application, dated the 6th June 1911, was presented on the date the Court re-opened. I accept these findings.

The Vakil for the petitioner requests that the application of the 6th June 1911 may be allowed to be amended by adding a prayer for setting aside the sale and that it may be treated as an application to set aside the sale.

I do not think I ought to allow it in revision. The application was simply a statement filed by the petitioner intimating the fact of the deposit. The word "petition" is wrongly printed at page 2 and does not appear on the original. It is not stamped as a petition and was never intended to be a petition. No application was made either to the District Munsif or to the District Judge on appeal to amend the application of the 6th June. The amendment, if allowed now, would prevent the counter-petitioner from contending that the application is barred. My attention has been called to cases where amendments have been allowed even after the period of limitation has expired and to cases where the Court refused to allow an amendment, as it would deprive a party of the right to plead limitation.

Each case must depend on its own merits. I do not think I ought in a petition filed under section 115 of the Civil Procedure Code allow an unstamped memorandum, filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition and to be amended by containing prayers to set aside the sale under Order XXI, rule 89, nearly 15 months after the application was barred.

I dismiss the petition with costs.

*Petition dismissed.*

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## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 136 OF 1914.

November 25, 1915.

*Present:*—Mr. Justic Sadasiva Aiyar and Mr. Justice Napier.

CHOKKALINGA MUDALI AND ANOTHER—PLAINTIFFS NOS. 2 AND 3—APPELLANTS

*versus*

GOPALATHATHACHARIAR AND OTHERS—DEFENDANTS NOS 1 AND 3 AND PLAINTIFFS NOS. 1 AND 4—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 144, O. XXI, r. 35—Application for restitution—Delivery of actual possession—Subsequent application, if barred.*

Where on an application for restitution, a Court directed delivery of actual possession under Order XXI, rule 35, of the Civil Procedure Code and the applicant accepted such delivery as satisfying his claim, on a subsequent petition being filed praying for execution in restitution:

*Held*, that the final order of the Court on the previous application could not be treated as a nullity and that the second application was barred as the process for delivery issued on the order passed on the first application had been carried out. [p. 47, col. 2.]

*Thandavaroya Mudali* v. *Subramania Gurukkal*, 32 Ind Cas. 44; 29 M L. J. 504, followed.

Appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 11 of 1914, preferred against that of the Court of the District Munsif of Ranipet, in Civil Miscellaneous Petition No 224 of 1913 in Original Suit No. 14 of 1908.

RUTHERFORD *v.* ACTON-ADAMS.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellants.

Messrs. *L. A. Govindaraghava Aiyar* and *S. Varadachariar*, for the Respondents.

JUDGMENT.—The defendants (the contesting respondents) did once before apply to obtain possession of the plaint land through Court as restitution decree-holders. Their first petition for possession in execution was filed under section 144, Civil Procedure Code, in the beginning of 1911, and it prayed for *khas* possession of the lands. It was filed as Execution Petition No. 166 of 1911, and the prayer of that petition was granted on the 11th April 1911. On the 12th April 1911 (See Exhibit G) warrant of delivery was entrusted to the *Nazir* directing him "to put the defendants in possession of the lands" and authorizing him "to remove any person bound by the decree who may refuse to vacate the same." It is clear that the delivery directed by the warrant was delivery of actual or *khas* possession under Order XXI, rule 35 and not the "formal" delivery under Order XXI, rule 36. The *Amin* gave delivery accordingly on the 14th April 1911, and the defendants Nos. 1 to 3 accepted such delivery as satisfying their claim for restitution (Exhibits F, G and H). The Court on the 8th June 1911 recorded as concluding order on Execution Appeal No. 166 of 1911 as follows :—

"Delivery effected, proceedings closed," which means that full satisfaction of the decree in restitution had been obtained by the defendants. The defendants filed on the 26th March 1913 (about two years after they had accepted the delivery in satisfaction of their claim for restitution) the present petition (also filed under section 144, Civil Procedure Code, though section 151 is also added) praying for execution in restitution, for the very same relief which they had claimed in Execution Appeal No. 166 of 1911 against the same parties, and which relief they were declared by the order of Court of 8th June 1911 to have obtained in final satisfaction.

I think the principle of the decision of the Bench in *Thandavaroya Mudali* v. *Subramania Gurukkal* (1) precluded the defendants from maintaining a second application for delivery in execution after one application had been granted, and the process for delivery issued on the order passed on that application had been carried out.

But it is argued that though the *Amin* and the defendants themselves and the Court treated the process for delivery as completely carried out and the claim on restitution as satisfied, the process was really not carried out and hence a second application is maintainable.

I do not think that the final order of a Court on an execution petition, recording that delivery had been effected in execution and satisfaction had been drawn, could be treated as a nullity by the party who filed such execution application praying for such delivery. Until that final order which negatives the defendant's right to obtain any further relief in restitution is vacated by a review or by proceedings taken in appeal or revision, a second application for the same relief already granted and recorded as obtained by the defendants is not maintainable.

The present application of 1913 being such a second application and not an application for review of any order passed on the former application of 1911 is, therefore, not maintainable.

If we could treat this application as an application in review of the former order of June 1911, the petition would be clearly barred by limitation and we do not think that the case is a fit one for the further indulgence of excusing the long delay in the presentation of the application.

The appeal is allowed and the Munsif's order is restored, but the parties will bear their respective costs throughout.

*Appeal allowed.*

(1) 32 Ind. Cas. 44; 29 M. L. J. 504.

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## PRIVY COUNCIL.

APPEAL FROM THE COURT OF PPEAL OF NEW ZEALAND.

July 8, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Parker and Lord Sumner.

RUTHERFORD—DEFENDANT—APPELLANT

*versus*

ACTON-ADAMS—PLAINTIFF—RESPONDENT.

*Contract—Vendor and purchaser—Specific perform-*

RUTHERFORD *v.* ACTON-ADAMS.

*ance—Court of Equity—Principle—Deficiency in property to be purchased—Compensation.*

In exercising its jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract. [p. 48, col. 2.]

If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get, and to have a proportionate abatement from the purchase-money. This right applies only to a deficiency in the subject-matter described in the contract, but not to a claim to make good representation about that subject-matter made not in the contract, but collaterally to it, in which case the remedy is recission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract. [p. 48, col. 2; p. 49, col. 1.]

Appeal from a judgment of the Court of Appeal of New Zealand, dated January 31st, 1914.

Messrs. *Cave, K. C.*, and *P. F. Wheeler*, for the Appellant.

Messrs. *G. Wallace, K.C.*, and *J. M. Paterson*, for the Respondent.

JUDGMENT.

VISCOUNT HALDANE.—The real question in this case is whether the appellant, the purchaser of a large tract of land, can, after entering into possession and taking a conveyance, claim compensation for misrepresentation as to the mileage of fencing on the land. The contract was silent as to the fencing, but it is contended that on this subject the respondent's agent made a material misrepresentation as to the mileage which induced the appellant to enter into the contract. Their Lordships will proceed on the assumption that this was so. As, shortly after the payment of the deposit, the purchaser entered into possession and has taken profits, recission is now impossible. It is equally true that, as there is no charge made of fraudulent misrepresentation, no claim can be made for damages for deceit. The only possible remedy open to the appellant as purchaser is to claim compensation against the vendor for the deficiency in the mileage of fencing by invoking the well-known jurisdiction of a Court of Equity in cases of specific performance to order compensation for discrepancy between what was agreed to be conveyed and what can be conveyed.

But their Lordships are in agreement with the majority of the learned Judges of the Court of Appeal of New Zealand in thinking that the case is one to which this remedy has no application. Under the agreement the balance of the purchase-money was to be paid on June 30th, 1912, and upon payment the vendor was to convey. The purchase-money had all been paid excepting two sums of £3,400 and £170 (being interest), which had been retained by the purchaser to meet his claim for compensation for the deficiency. The purchaser's solicitors had written a letter, dated July 1st, 1912, in which they proposed that, on payment of the rest of the purchase-money remaining unpaid, the vendor should convey without prejudice to his right of action for the two sums referred to, and they tendered the conveyance for execution without prejudice to their client's claim for shortage of fencing. The proposal was carried out. The result was, in their Lordships' opinion, that the vendor had under the contract a valid claim at law for payment of the £3,400 and the £170. They are further of opinion that the purchaser cannot counter-claim for compensation. They have examined the cases on the point decided both in this country and in the Courts of New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. In exercising its jurisdiction over specific performance, a Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and the Court refuses it, unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all that he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a

deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter, made not in the contract, but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract.

Their Lordships have arrived at the conclusion that, as recission cannot now be asked for, and as there is no such collateral contract as has been referred to, the claim of the purchaser, the appellant, fails. They cannot find in the letter which they have mentioned anything which gives him a new or different right. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the Appellant:- Messrs. *Steavenson* and *Couldwell*, Agents for Messrs. Lane and Neave, Christchurch, New Zealand.

Solicitors for the Respondent:— Messrs. *Hawes*, *Wood* and *Ware*, Agents for Messrs. George Harper, Son and Pascoe, Christchurch, New Zealand.

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 117 OF 1914.

December 1, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

FATMATUS SUGHRA BEGAM—PLAINTIFF—APPELLANT

*versus*

MARIAMUNNISA BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts. 62, 97—Vendor and purchaser—Contract to sell—Suit for specific performance of contract—Return of purchase-money.*

A contract to sell a village was made on the 27th of April 1908. A portion of the consideration was paid as earnest money at once and the balance was paid on the 18th of June 1908. The sale was not completed. The plaintiff sued for specific performance with an alternative claim for the return of the purchase-money in April 1913:

*Held*, that the suit was barred by limitation.

First appeal from the decision of the Additional Subordinate Judge of Aligarh, dated the 29th January 1914.

Mr. *C. C. Dillon*, for the Appellant.

Mr. *Abdul Raouf*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff alleges that on the 27th of April 1908, she agreed with one *Musammat* Najmunnisa for the purchase of a village called Dunka. It is alleged that the price was Rs. 5,110, that Rs. 4,500 was paid as earnest money at once and that the balance was paid on the 18th of June 1908. It is alleged that Najmunnisa never completed the sale but shortly before her death made a gift of the property in favour of her daughter. The plaintiff claims proprietary possession of the property and in the alternative a refund of the purchase-money. The Court below has held that the suit is barred by limitation and further that the alleged payments are fictitious. On these findings the suit was dismissed. The plaintiff appeals.

It seems to us that on the allegations contained in the plaint the only relief which the plaintiff was entitled to (had the suit been brought within time) was a decree for specific performance or a return of the purchase-money. The very form in which relief (*a*) is concluded rather suggests that it was an attempt to get over the plea of limitation. Treating the suit, however, as a suit for specific performance with an alternative claim for the return of the purchase-money, we think that the view taken by the Court below was correct. On the allegations contained in the plaint the contract was at latest to have been performed upon the 18th of June 1908. The present suit was not instituted until April 1913. A suit for specific performance must be brought within three years of the date upon which the contract was to be performed. Again, assuming that the plaintiff really did pay the money which she alleges she paid, her claim to a return of the purchase-money is governed for the purposes of limitation either by Article 62 or Article 97 of the Limitation Act. If Article 62 applies, the suit should have been brought within three years from the date when the money was received by the deceased lady. If Article 97 applies, it seems to us that the date of failure must be taken to be the 18th of June 1908 and that the suit was barred after the expiration of three years

from that date. It is unnecessary for us to go into the questions of fact. We dismiss the appeal with costs including in this Court fees on the higher scale.

*Appeal dismissed.*

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 203 OF 1910.

October 25, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

K. M. DORAISAMI REDDI—PLAINTIFF—APPELLANT

*versus*

MUTHULINGA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Will—Certified copy given by Court under ordinary copyist rules—Presumption—Evidence Act (I of 1872), s. 114—Compromise between widow and next reversioner, whether binding on later reversioners—Party accepting conveyance from legatee, whether can contest Will—Estoppel by conduct.*

Certified copies of a Will made and given under the authority of a Court, while the Will was in the custody of the Court, and signed under the ordinary copyist rules, not only by the copyist but also by the examiner, whose duty it is to compare the copy with the original, may be presumed under section 114 of the Evidence Act to be correct copies of the original Will. [p. 52, col. 1.]

A compromise between the next reversioners to a widow's estate at the time and the widow as to their claim to be the next reversioners is not binding on the subsequent reversioners. [p. 52, cols. 1 & 2.]

*Venkatanarayana Pillay* v. *Subbammal*, 29 Ind. Cas. 298; 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555; 38 M. 406 at p. 411, distinguished.

*Bahadur Singh* v. *Mohar Singh*, 24 A 94; 4 Bom. L. R. 233; 6 C. W. N. 169; 29 I. A. 1 (P. C.), followed.

Where in a suit to recover certain property as the next reversioner of the last male owner, one of the defendants claimed to succeed to the property as legatee under a Will of the last male owner and it appeared that the plaintiff accepted for himself and his wife a certain portion of the property on the footing that the Will was genuine and that the said defendant was entitled to all the properties of the deceased under it and that the plaintiff's father compromised a suit which he had brought to contest the Will:

*Held*, (1) that the plaintiff was estopped from claiming the lands in the possession of the defendant as he had by his conduct led him to believe that his title was recognized by the plaintiff; [p. 52, col. 2.]

(2) that the fact that the plaintiff's father withdrew his suit indicated that he was satisfied as to the genuineness of the Will and the plaintiff not having contested during his father's life-time could not do so now. [p. 53, col. 1.]

Appeal against the decree of the District Court of South Arcot, in Original Suit No. 29 of 1907.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *G. S Ramachandra Aiyar*, for the Appellant.

Messrs. *S. Srinivasa Aiyangar*, *A. Krishnaswami Aiyar*, *T. Gopala Desikachariar* and *C. Padmanabha Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This is a suit brought by the plaintiff as next reversioner against defendants Nos. 1 and 2 who also claim to be next reversioners and against the 3rd defendant who claims under an alleged Will of the late Muthuselva Reddi, who died in October 1887. The plaintiff alleges that Muthuselva was not the last male owner, but a posthumous son of his who lived only a short time. The plaintiff claims to have become entitled to possession on the death of Muthuselva's mother Adilakshmi on the 13th April 1905. The 1st and 2nd defendants put the plaintiff to the proof of all allegations not expressly admitted, and the 3rd defendant claims the suit properties in his possession under the Will of Muthuselva and denies that any posthumous child was born to him. He also pleads that the plaintiff's father brought Original Suit No 12 of 1888 to contest the Will and entered into a compromise which is binding on the plaintiff. In the alternative he pleads that the alienation thereby effected in his favour was binding on the reversioners as an alienation by the mother of the last male owner with the consent of all the next reversioners. Lastly, the 3rd defendant pleads that in 1898 the plaintiff took a conveyance from him in favour of himself and his wife, or 50 *cawnies* of the lands devised to him by the Will and thereby admitted his title and is estopped from questioning it.

As regards the 1st issue we agree with the District Judge that the plaintiff has failed to prove that he is a nearer reversioner than defendants Nos. 1 and 2 by reason of the fact that their grandfather was adopted by his eldest brother Ramalinga Chetty. I think no legal adoption is proved, and that Exhibit

II shows that what happened was that one share was allotted to Ramalinga's two widows, and it was arranged that Muthuselva's grandfather should succeed to one of the widows and the grandfather of defendants Nos. 1 and 2 to the other widow.

I also agree with the District Judge that a posthumous son was not born to Muthuselva, and that the unqualified admission in the 2nd defendant's written statement of the allegations in paragraph 3, clause 7, of the plaint is a mere Pleader's slip in view of the refusal to admit the allegations in paragraph 3, clauses 4 and 6, where the existence of the posthumous son is expressly pleaded. The oral evidence is discrepant and unsatisfactory, and the fact that the plaintiff's father said nothing about the birth of such a son when attacking the Will in 1888 is almost conclusive.

The District Judge has found in favour of the Will and I am not prepared to differ from him though, as might be expected, the oral evidence of execution which is forthcoming twenty-two years after execution is not very strong. A few months after Muthuselva's death, the 3rd defendant was sued by a creditor as his representative by reason of the Will (Exhibit XI series) though the plaintiff alleges the suit was collusive. It is, however, more significant that the plaintiff's father did not press the suit brought by him in July 1888 to contest the Will and was a party to the compromise under which half the properties sued for went to the other reversioners, defendants Nos. 1 and 2, who claimed that the properties thereby allotted to them had been mortgaged by them to Muthuselva, and half to the 3rd defendant by virtue of his claim under the Will while all that the plaintiff's father got was a recognition that a mortgage executed by Muthuselva in his favour should be binding on all the suit properties. Whether the compromise is binding on the plaintiff will be considered later, but there is nothing to show that it was dishonest or fraudulent on the part of the plaintiff's father, nor did the plaintiff ever contest it as he might have done during his father's life-time or during the life-time of the testator's mother Adilakshmi whose granddaughter he married; and the most probable explanation of the conduct of the plaintiff's father would appear to be that he had satisfied himself, as he well may have done, that the Will was genuine. The suit was instituted only nine months after Muthuselva's death, and it was much easier then than now to ascertain whether it was genuine. If the Will was genuine, the compromise was a perfectly natural means of working out the rights of the parties, and I think the District Judge was justified in attaching great weight to its recognition by the testator's mother and the next reversioner in the course of the suit in 1888. The Will was a very natural one to make in so far as it left the testator's properties to the testator's sister's son, the 3rd defendant, then a young boy who had been brought up in his house by Adilakshmi and was, no doubt, executed on the advice of Adilakshmi who always supported it. It has, however, been attacked on the ground that it makes no provision for the testator's wife, Mangammal, who, as it states, was pregnant at the time. It provides, however, that if a male child was born to her, the Will should be void, and if a female child, the widow should remain under the protection of the 3rd defendant who should marry the daughter. It does not provide for the event which would appear to have happened, of no live child being born, probably because that was not anticipated. It may, I think, well be that Adilakshmi the testator's mother as the head of his household was not anxious that a separate provision should be made for the testator's widow beyond what the law would give her and considered it best that the widow should go on living under her own care or in the testator's life-time, and that the testator accepted this view. Even if there is some improbability about the absence of any further provision for the widow, I am not prepared to rely on this in preference to the evidence in support of the Will, afforded by the conduct of the plaintiff's father and the plaintiff himself. The suggestion that the Will was forged after the death of the testator's widow Mangammal, involves the improbability that it was forged at the instance of Adilakshmi in defeasance of her own life-interest. The Will was produced in the two suits already mentioned but is not now forthcoming. This is probably to be accounted for by the fact that the plaintiff obtained a power-of-attorney from Adilakshmi, and as husband of her granddaughter obtained control of her affairs before her death. It is then argued that the

contents of the lost Will executed by Muthuselva have not been proved. I am, however, of opinion that the conduct of the reversioners and the proceedings in the two suits are sufficient proof of the disposition of the Will in so far as regards the 3rd defendant, apart from the oral evidence which I think is sufficient. It is, therefore, not really necessary to rely upon the certified copies of the Will made and given under the authority of the Court while the Will was in the custody of the Court. The Will was, of course, a private document, and proof is necessary that these are copies made from or compared with the original. They were supplied under the ordinary copyist rules and are signed not only by the copyist but also by the examiners whose duty it is to compare the copy with the original and at least in one case also by the Judge. In these circumstances I think it may be presumed under section 114 of the Evidence Act that they are correct copies of the original Will which was in Court when they were made and would appear to have since been suppressed by the plaintiff.

With reference to the compromise by the plaintiff's father of the suit of 1888 many authorities have been cited. It is said for the defendants that under the recent decision of their Lordships in *Venkatanarayana Pillay* v. *Subbammal* (1), the suit by the plaintiff's father, to which the 1st and 2nd defendants were also parties, must be deemed to have been brought in a representative capacity on behalf of all the reversioners, and that the plaintiff as *dominus litis* was entitled to enter into a *bona fide* compromise and that such a compromise would be binding on subsequent reversioners. There would be much to be said in favour of this contention assuming the compromise to be *bona fide*, if it were not for the decision of their Lordships in *Bahadur Singh* v. *Mohar Singh* (2), where a compromise between the next reversioners at the time and the widow as to their claim to be the next reversioners was held not binding on the subsequent reversioners. They had agreed that the widow as a condition of recognising them as next reversioners should be at liberty to dispose of the estate as she liked during her lifetime, and this was the stipulation which was held not binding on later reversioners. In that case compromise was entered into before a Settlement Officer and not in a regular suit, but this is scarcely a sufficient distinction, and, therefore, I am not prepared to hold the plaintiff bound by the compromise.

It is also unnecessary to rest the decision on the ground that the compromise should be regarded as an alienation by the testator's mother Adilakshmi and was entered into with the consent of the next reversioners and is, therefore, binding on the plaintiff, a question as to which there is some difference of opinion in this Court as to the interpretation to be put on in the most recent decisions of their Lordships beginning with *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3).

Lastly as regards the alleged estoppel, I must say it appears to me that so far as the 3rd defendant is concerned, the plaintiff, having accepted in 1898 a conveyance from the 3rd defendant in his own and his wife's favour of 50 *cawnies* of the suit properties, is estopped from claiming lands now in possession of the 3rd defendant as he has, I think, by his conduct led the 3rd defendant to believe that his title was recognized by the plaintiff and to act upon such a belief in executing Exhibit XIII. For these reasons I think the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—My impression on reading the Will was that it was defective in that no provision was made for his wife in it. The testator thought that his wife was pregnant and provided that in cases he had a son, the Will should have no effect. He directed that in case a female child was born, that child should be married to his nephew who was to have all the properties of the testator. As regards his wife, beyond stating that she was to

(1) 29 Ind. Cas. 298; 38 M. 406 at p. 411; 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555.

(2) 24 A. 94; 4 Bom. L. R. 233; 6 C. W. N. 169; 9 I. A. 1 (P. C.).

(3) 30 A. 1; 17 M. L. J. 605; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 766; 35 I. A. 1 (P. C.); 3 M. L. T. 1; 5 A. L. J. 1.

be under the protection of his minor nephew, there is absolutely no provision for her. It is possible that the testator was too much under the influence of his mother. I was inclined to agree with Mr. Ramachandra Aiyar that the absence of a provision for the wife is explainable only on the hypothesis that the Will was concocted after the death of the testator's wife. Further, a great deal of suspicion attaches to the manner in which the Will was produced in the first litigation. Nor is the non-production of the original Will in the present case satisfactorily accounted for.

As against these circumstances there is the undoubted fact that the plaintiff's father who sued to set aside the Will in 1888 withdrew his suit. The disposition in the compromise in that suit to which he was a consenting party, indicates that he was satisfied that the Will was genuine. The plaintiff himself has accepted for himself and his wife certain property on the footing that the Will was genuine and that the 3rd defendant was entitled to Muthuselva's properties under it. The attesting witnesses are all dead now. Consequently although on the evidence as it stands now it is not easy to hold that the propounders have established its genuineness and validity, I am not prepared to differ from the conclusion at which the learned Chief Justice has arrived.

On the question whether a male child was born alive after Muthuselva's death, I do not think that the deposition of the 3rd defendant in the criminal case should be pressed against him too much as he is a deaf man. The fact that the father of the plaintiff did not put forward this case on the previous occasion is fatal to this contention.

As regards adoption, I feel no hesitation in holding that the statement in Exhibit II correctly represents what took place. The plaintiff has not let in satisfactory evidence to prove the factum and validity of the adoption on which he relies.

On these findings the questions of law argued in the case need not be considered. I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT NO. 29 OF 1914.

May 25, 1915.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, Mr. Justice Woodroffe and Justice Sir Asutosh Mookerjee, KT.

J. I. J. HYAM—DEFENDANT—APPELLANT

*versus*

M. E. GUBBAY—PLAINTIFF—RESPONDENT.

*Vendor and purchaser—Specific performance of contract—Terms uncertain—Contract, if concluded before stipulated writing—Earnest money, payment of, whether conclusive evidence of completion of contract—Purchaser right of, to vacant possession.*

Where it is the essential term of a bargain between the parties that there should be a written contract, there is no enforceable contract in the absence of a written agreement. [p. 59, col. 2; p. 62, col. 1; p. 72, col. 2.]

*Ridgway* v. *Wharton*, (1854) 6 H. L C. 238; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 10 E. R. 1287; 29 L. T. (O. S.) 390; 108 R. R. 88, referred to.

Per *Jenkins, C. J.*—Where parties to a contract contemplated an agreement in writing, the provision for a written agreement is not negligible in determining the question whether there was a concluded contract between the parties in the absence of writing. [p. 59, col. 2.]

In a contract for the sale of land, the substantial agreement of the parties upon the main features of the transaction, *i.e.*, the sale, the identity of the property, the price, the imposition of restrictions in some form or another, does not necessarily create a concluded contract between the parties. [p. 60, col. 2.]

In a suit for the specific performance of a contract for the sale of land, the defendant (purchaser) is not precluded from pleading that there was no concluded contract, merely because he paid earnest money. [p. 6 , col. 1.]

Per *Woodroffe, J.*—A Court will not enforce specific performance of a contract the terms of which are uncertain. [p 61, col. 1.]

The question whether a contract is uncertain in the sense that the Court cannot know what the contract is which the parties entered into, is a question of fact. [p. 61, col. 1.]

In a contract for the sale of immoveable property, an exclusively written record is not required by the law of the country. [p. 61, col. 1.]

An Appellate Court is not bound to accept the first Court's appreciation of the facts. But the appellant has to satisfy the Appellate Court that the judgment appealed against is erroneous. [p. 61, col. 2.]

The fact that the parties to a contract refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal state, does not prevent the existence of a binding contract, unless the reference to a future formal contract is made in such terms as to show that the parties did not intend to be bound until a formal contract was signed. [p. 62, col. 1.]

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Per *Mookerjee, J.*—The fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing were merely preliminary and not understood or intended to be binding. [p. 72, col 2.]

If an oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing a binding obligation is fixed upon the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing. [p. 73, col. 1.]

*Chinnock* v. *Marchioness of Ely*, (1865) 4 DeG. J. & S. 638; 11 Jur. (N. S.) 329; 12 L. T. (N. S.) 251; 13 W. R. 597; 146 R. R. 495; 46 E. R. 1066; 2 H. & M. 220; 34 L. J. Ch. 399; *Rossiter* v. *Miller*, (1877) 5 Ch. D. 648; 46 L. J. Ch. 737; *Bonnewell* v. *Jenkins*, (1878) 8 Ch. D. 70; 47 L. J. Ch. 758; 38 L. T. 8; 26 W. R. 294; *Rossiter* v. *Miller*, (1878) 3 A. C. 1124; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865, referred to.

A purchaser of land is not bound to take it subject to leases, but is entitled to vacant possession unless there is an agreement to the contrary. [p. 78, col. 2.]

*Collier* v. *Jenkins*, 34 R. R. 268; Younge, 295; *Lincham* v. *Cotter*, (1844) 7 Ir. Eq. Rep. 176.

Appeal against the judgment of Mr. Justice Chitty, dated the 11th February 1914, passed in its Ordinary Original Civil Jurisdiction.

Mr. *Hyam*, for the Appellant.

Mr. *Zorab*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit for specific performance brought by the plaintiff, who claims to have entered into a concluded contract for the sale to the defendant of immoveable property in Calcutta. Negotiation is not denied, nor is there any dispute as to the identity of the property or as to the price, but it is contended by the defendant that there is no concluded contract and certainly not one that should be specifically enforced. The defence failed before Mr. Justice Chitty, and he passed the decree for specific performance from which this appeal is preferred.

The property in dispute belongs to the plaintiff, Mr. Gubbay, who lives in London. Mr. R. C. Cohen, acting on his behalf, instructed Mr. Owen, a house-broker, to find a purchaser. The price ultimately asked was Rs. 1,33,000. Mr. Owen found a person ready to purchase at that price in the defendant, Mr. Hyam, who is in the habit of buying property with a view to subsequent building operations. Mr. Hyam was told by Mr. Owen that there were certain conditions on which Mr. Cohen insisted. As the precise limit of those conditions is a matter in dispute between the parties, I will describe them generally as designed (1) to prevent the building of a temple or mosque on the land, and (2) to secure to the Jewish School, which occupied a part of the premises, a continuance of their possession for a year. To these terms Mr. Hyam expressed his assent in the sense in which he understood them. On the 13th November Mr. Owen wrote to Mr. Gregory, the plaintiff's attorney, as follows:—

"*Calcutta*, 13*th November* 1912.
7/1 and 8, Pollock Street and
1, Mansook Lane.

Gal. Gregory, Esq.

DEAR SIR,

With reference to our conversation of date in regard to the above premises, my principal accepts your client's offer made by you to me for rupees one lac and thirty-three thousand only. My principal agrees to have no temple or mosque built on these premises or to cause any nuisance to the Jewish Synagogue. He further agrees that he will not ask the Jewish school to vacate for 12 months from the date of execution of the conveyance. The time to execute and complete the conveyance shall be for six weeks from the date of the contract, subject to approval of titles by my principal's solicitor. Please ask your client to confirm this to-day, if possible.

Yours faithfully.

OWEN OWEN."

On the 14th Mr. Cohen confirmed the arrangement orally to his attorney, Mr. Gregory, subject to the purchaser paying Rs. 5,000 as deposit money. Up to this time Mr. Hyam had not orally discussed matters with Mr. Cohen or Mr. Gregory, nor was he known by them to be the intending purchaser.

On the 15th, however, there were several interviews at which Mr. Cohen, Mr. Gregory, Mr. Hyam and Mr. Owen or some of them were present.

According to the plaintiff there were four such interviews, *first*, one at Mr. Gregory's office at which Mr. Gregory Mr. Owen and Mr. Hyam were present, *then* one at Mr. Cohen's office where Mr. Cohen, Mr. Hyam, Mr. Owen and Mr. Gareh met, a *third* at Mr. Gregory's office attended by Mr. Gregory, Mr. Hyam, Mr. Owen and Mr. Gareh, and *fourth* and last,

an interview at Mr. Gregory's office between Mr. Gregory and Mr. Gareh.

Mr. Hyam and Mr. Owen have no recollection of the first of these interviews, but there purports to be a record of it in Mr. Gregory's day-book, which was written up by a clerk at the close of the day. But whether Mr. Hyam was present or not, nothing of importance happened at this interview, and neither Mr. Hyam nor Mr. Owen can have had any reason for falsely denying Mr. Hyam's presence.

The second interview is one of importance, for, according to the plaintiff's case as developed at the hearing, it was then that the defendant accepted the plaintiff's view of the scope of the conditions.

The third admittedly took place and to a considerable extent the defendant admits that its purport is correctly recorded in the day-book.

The defendant knows nothing of the fourth, and it is not suggested he was present.

Mr. Gregory prepared a draft agreement on the 15th and sent it for approval to Mr. Cohen, who returned it approved on the 20th. On this last date it was forwarded for Mr. Hyam's approval.

On the 28th December, a power-of-attorney was received from the plaintiff, and Mr. Hyam was informed of this and asked to return the draft agreement approved. On the 15th January, Mr. Gregory wrote to Mr. Hyam offering to send the title-deeds for approval. On the same date the defendant wrote to Mr. Gregory as follows:—

"4, Middleton Row.
*Calcutta; the* 15*th January* 1913.

G. Gregory, Esq.,
*Solicitor.*

*Re* Pollock Street,
Premises No. 7/1 and 8.

DEAR SIR,

I am returning the draft agreement *re* above. Will you be so good as to re-draft the same in regard to the following particulars, *viz.*:—

1. As to the covenant not to build a mosque or temple, I agree to make this a personal covenant, but not to make it a covenant that will run with the land. But I do not bind myself as to the use of the premises for any other purpose.

2. As to the school remaining for a year, I agree to this, but the purchase is not to be completed before a year also.

3. As to the payment of interest on the purchase-money, the interest shall be at the normal rate of 6 per cent. and not 9 per cent.

I did not write to you earlier because I was willing to let the Jewish School purchase the property, but as I now understand Mr. Gubbay is not willing to sell to the school on the terms offered by them, I am returning the draft agreement as stated above.

Yours faithfully,
J. I. J. HYAM."

It seems probable that these two letters of the 15th crossed.

On the 17th Mr. Gregory replied to Mr. Hyam in the following terms:—

"J. I. J. Hyam, Esq.

17*th January* 1913,
*Re* 7/1 and 8, Pollock Street.

DEAR SIR,

I have communicated with my client's agent with reference to your letter of the 15th instant. They are not a little surprised at the objection you now raise, which they certainly decline to entertain.

The draft agreement submitted to you for approval is merely formal agreement, setting out the terms of the concluded contract entered into by you with my client through Mr. Owen Owen, the broker, and there can be no doubt that the objections you now put forward are an afterthought on your part simply with a view of delaying the completion of your purchase.

As regards your first objection, my clients cannot understand your stating that you agree to make the covenant restricting the erection of the mosque or temple a personal covenant. This point was discussed and you made no qualification restricting the covenant. The covenant must, therefore, be a covenant running with the land and be binding on you and your assigns, otherwise there would be no necessity for making it one of the conditions of the sale. There is nothing in the draft agreement restricting the use of the premises except what was agreed, namely, that you are to cause no nuisance to the Jewish Synagogue.

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Your second objection is most inconsistent with your agreement to allow the Jewish School to remain in occupation of the premises for 12 months from the date of the execution of the conveyance, which was fixed for the 6th January instant. If, as you say, the purchase is not to be completed before a year, there would have been no occasion to make such a stipulation. This objection also my client most emphatically declines to entertain.

As regards the third objection, I admit there was no rate of interest fixed at the time, and under my advice my client will have no objection to reduce the rate of interest from 9 per cent. to 6 per cent., provided you complete your purchase without any further delay.

The proposal on behalf of the Jewish School to purchase the property has nothing whatever to do with your contract to purchase, and you were fully aware at the time that the terms offered on behalf of the Jewish School had been rejected by my client long before your contract, otherwise he would not have entered into the contract with you and received the earnest money from you.

I again send you the draft agreement for your approval, and unless you return the same approved within 24 hours from this date or agree to complete your purchase on or before the first proximo (in which case the execution of the formal agreement may be dispensed with), my instructions are most peremptory to file a suit against you for the specific performance of your contract.

Yours faithfully,
G. GREGORY."

On the 22nd, Mr. Hyam wrote to Mr. Gregory as follows:—

"4 Middleton, Row,
*Calcutta, the 22nd January* 1913.

G. Gregory, Esq.,

*Re* 7/1 and 8, Pollock St. and 1, Mansook's Lane.

DEAR SIR,

Yours of the 17th instant on the subject of the above matters to hand.

I must repudiate your suggestion that my objections to certain terms in the draft agreement you sent me are an afterthought, or that they were put forward simply with the view of delaying the completion of the purchase of the premises in question.

With regard to the question of the covenant not to erect a mosque or temple being made a personal one in the conveyance, or one running with the land, with reference to which you say that the point was discussed and that I made no qualification restricting the covenant, I entirely did not discuss the point with your client or any one on his behalf, nor did I authorize any one to do so on mine. When Mr. Owen Owen reported to me that Mr. Cohen wanted to be assured that I would not pull down the existing building and erect in its place a mosque or temple, I told Mr. Owen that I certainly would not build either a mosque or a temple and told him to assure Mr. Cohen of that. Beyond this there never was any other discussion on the point, nor did any occasion arise for me to make any such qualification as you advert to in your letter regarding the covenant before you sent me the draft agreement, when for the first time I saw that the covenant was sought to be made to run with the land, and I at once objected to the same, and I deny your allegation that there was any agreement to cause no nuisance to the Synagogue which you have introduced in your draft agreement, and to which you refer at the end of the 3rd paragraph of your letter under reply.

With regard to the question of the occupation by the Jewish School of the premises for another year, the suggestion made to me was that although the school had no lease of the premises, nevertheless, in order not to work hardship on an institution which was charitable and Jewish, I was agreed to let the school remain on for a year to enable it in the meantime to find another habitation, and I agreed to this suggestion which I considered reasonable and agreed to defer the completion of the purchase for one year, until your client could give me vacant possession of the premises. The school was to remain on for a year, not from the date of the conveyance but from the date of the agreement for sale and purchase which was to be executed in writing, and this was so because I wanted and did insist on vacant possession, for I would have none of the trouble, worry and expense, not to mention the odium, of having to turn out a charitable and communal institution from the

premises which, I am informed, it has made its home for the last 40 years. Mr. Cohen, as one of the elders of the community and at one time the Honorary Secretary of the very school in question, I believe, would be in a position better than any one else to get the school vacated without unpleasantness, and I consented to the reasonable request of Mr. Cohen to let the school remain on for a year, provided the conveyance was similarly delayed and vacant possession given to me as above stated.

I deny that the 6th January instant or any particular date was fixed for the execution of the conveyance as you allege, or that I was aware at all that the school offered to purchase the premises, or that the said offer was rejected by your client.

In the circumstances it is open to your client, as he pleases, either to accede to my terms which were agreed upon but which your client now wishes to vary, or to file his action which under instructions you threaten me with, but on my part, I shall insist on your client performing his part of the contract upon the terms agreed as hereinbefore stated.

Yours faithfully,
J. I. J. HYAM."

On the 22nd, Mr. Gregory wrote to Mr. Hyam demanding a return of the draft agreement, and on the 23rd, he wrote to him as follows: —

"23*rd January* 1913.

J. I. J. Hyam, Esq.

*Re* Pollock St. and
1, Manscok's Lane.

DEAR SIR,

In continuation of my letter to you of yesterday's date, I am instructed to state that as you have declined to complete your purchase upon the terms agreed upon there is no necessity to prolong this matter by further correspondence. My client denies that there has been any variation on his part or that he is attempting to vary the terms of the contract, and as you decline to comlpete your purchase in terms thereof, my client has no other alternative left but to institute proceedings against you for the specific performance of your contract, etc., and which I am instructed to do without any further reference to you.

I have again to request you to return th fair draft agreement which was submitted to you for approval."

Mr. Hyam has explained that his delay was due to the pendency of negotiations for the purchase of the property on behalf of the Jewish School.

On the 8th February 1913 the plaint in the present suit was filed, and, among other matters, it is thereby alleged as follows:—

"3. On or about the 13th November 1912 an agreement was made in Calcutta between the plaintiff through his representative and the defendant through his broker, whereby the defendant agreed to purchase from the plaintiff the said several premises free from incumbrances subject to approval of title at the price of Rs 1,33,000 on special conditions following, namely: (1) that the said premises and the site thereof should not be used for the purposes of a mosque or a temple, or for carrying on any noisy or offensive trade or business, or for any purpose which might cause nuisance or annoyance to the Jewish Synagogue in Pollock Street, Calcutta, situate opposite the said premises; (2) that the said Calcutta Jewish School should be allowed to continue in occupation of the said premises No. 8, Pollock Street for one year, from the date of execution of the conveyance of the said property, on the same terms and conditions under which they were then occupying the same; (3) that the defendant shall accept a conveyance of the said several premises executed under a special power-of-attorney on behalf of the plaintiff.

4. On or about the 15th November 1912 the defendant personally called and saw the plaintiff's solicitors and confirmed the said agreement and paid Rs. 1,001 as earnest money therefor, and it was agreed that the plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase, including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval, it being further agreed that the said sale should be completed within six weeks from the date on which the title-deeds of the said premises should be delivered to the defendant or his

solicitors, and that in the event of the title not being approved, the plaintiff would pay no costs.

5. A draft agreement, embodying the said terms and conditions, was duly prepared by the plaintiff's solicitors and sent to the defendant for approval on the 20th November 1912, with a letter requesting the defendant to name his solicitors to whom the title-deeds of the said premises should be sent for approval on his behalf, but the defendant never replied to the said letter, The said draft agreement is now in the possession of the defendant and copy thereof is hereto annexed and marked 'A' to which the plaintiff refers as part of this his plaint."

Counsel for the plaintiff experienced great difficulty in stating when the contract on which his client sues was made. Nor is this to be wondered at for the evidence discloses no clean-cut agreement. It has to be spelt out, if at all, from the conflicting versions given in the witness-box of what passed at several interviews; and the confusion is increased by the fact that the several interviews were not all between the same persons.

At one time the case made was that the letter of the 13th November was preceded by an oral agreement of which it was but an imperfect record, and that the imperfection was cured by what passed between the parties at the interviews of the 15th.

Ultimately the case selected by the plaintiff for our acceptance was that the parties came to a concluded agreement on the 13th of November; but Mr. Zorab at the same time expressed his wish not to abandon such advantage as he might be able to derive from the interviews of the 15th November, and in particular the interview between Mr. Cohen and Mr. Hyam on that day. The case made in the plaint appears from the paragraphs I have already read. They allege an agreement between the plaintiff through his representative and the defendant through his broker on or about the 13th November and a confirmation by the defendant to the plaintiff's attorney on the 15th.

It is noticeable that the agreement of the 13th as alleged in the plaint does not correspond with the letter of that date, but this Mr. Zorab explains by the suggestion that the letter was an imperfect record of the contract, and that the fuller exposition of the plaint is merely a statement of that which was inherent in the letter and might properly be read into it, if regard were had to all the circumstances. Has then the plaintiff made out that there was a concluded agreement on the 13th November?

The ultimate conclusion of Mr. Justice Chitty is expressed in these words: "I hold that there was a definite, complete and binding agreement arrived at between the parties on 15th November 1912, by which the defendant agreed to buy the property in question for Rs. 1,33,000 subject to the three conditions set out in paragraph 3 of the plaint."

This certainly does not affirm a concluded contract on the 13th November and if it was the intention of the learned Judge to negative a concluded contract on the 13th, I agree with him.

This appears to me to be the meaning of the entry in Mr. Gregory's day-book of the 15th November, which contemplates that even on that date it still remained for terms to be settled. This too is borne out by the evidence both of Mr. Gregory and Mr. Cohen, from which it is clear that matters had not taken definite and final shape on the 13th; in fact so far were terms from being fixed that Mr. Cohen on the 15th informed the defendant that he might "leave or take" his conditions. In support of this view that there was no concluded agreement, the defendant points to such matters as the dispute regarding the scope of the special restrictive conditions, the amount of the earnest money and the date for completion, the uncertainty involved in the stipulation that the written agreement should contain the "usual terms and conditions of sale and purchase," the agreement that there should be an agreement in writing, and the conflict of view as to whether the contract was for a sale with vacant possession or not.

All this and also the subsequent negotiations and conduct of the parties, in my

opinion, afford clear indication that there was no concluded contract on the 13th.

The next question is whether there was a concluded contract on the 15th. This is regarded by Mr. Justice Chitty as "the important date in the case," and he seems to have thought that a final agreement was concluded between Mr. Cohen and the defendant on that day. This is not the case made in the plaint. It is, however, alleged in paragraph 4 that on the 15th "It was agreed that the plaintiff's said solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval."

If then, as I hold, there was no concluded contract before the 15th, it is manifest on the face of the plaint that the preparation of a formal agreement in writing embodying the usual terms and conditions of purchase was an integral part of the negotiations of that day and was actually a matter of agreement between the parties. That it was an essential term of the bargain between the parties that there should be a written contract is, I think, clear even apart from the definite allegation in the plaint. Thus Mr. Owen's letter refers to the time for completion as a matter to be determined by the "date of the contract," and on his evidence he explains that the time for completion was fixed at "six weeks after the execution of the agreement." The day-book, too, shows that a written agreement was to be prepared, and the evidence on the point is to the same effect. And in fact a draft agreement in writing was actually prepared and submitted by the plaintiff's attorney.

Can it then be said that in the absence of such formal contract in writing—for none has been executed—there is a concluded contract between the parties?.

In *Von Hatzfeldt Wildenburg* v. *Alexander* (1), it was said by Lord Parker as he now is, "it appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

Here it is expressly pleaded in the plaint that it was a matter of actual agreement, not merely the expression of a desire, that the terms should be embodied in a written agreement. And there is the further fact that this written agreement was to take the place not of a previous writing, but of previous conversations of the uncertain character disclosed by the evidence.

I am aware of no case where a provision for a written agreement in place of oral conversations has been treated as negligible: none has been cited to us. Though there may be no presumption of law negativing legal obligation in the absence of writing where there is a stipulation for a written agreement, still, from the nature of things, the inclination of decision must be stronger in that direction where the supersession is of an oral by a written agreement, and not merely of one writing by another.

In *Ridgway* v. *Wharton* (2), Lord Cranworth expressed the view that the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement, and he there was dealing with the supersession of written negotiation by formal writing. While Lord Wensleydale in the same case said: "These cases often occur in Courts of Law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agree-

(1) (1912) 1 Ch. 284 at pp. 288, 289; 81 L. J. Ch. 184; 105 L. T. 434.

(2) (1854) 6 H. L. C. 238 at p. 305; 27 L. J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 10 E. R. 1287 at p. 1313; 29 L. T. (o. s.) 390; 108 R. R. 88.

ment, nothing will bind them but that written agreement." In the absence of a written agreement, therefore, I hold there was no enforceable contract, and in the view I take, this is sufficient to dispose of the appeal.

But, in my opinion, apart from this, there are fatal objections to the success of this suit, for I think it is not established that the parties were at one. Thus the scope of what have been termed the special conditions was not definitely settled, nor were the parties agreed as to whether vacant possession was to be given on completion. I would here digress for a moment to point out that the parties might well not be in exact accord as to the precise mode in which effect should be given to the special conditions, though they were agreed as to their general character. Thus Mr. Hyam might be wanting to postpone completion for a year so as to accommodate the Jewish School and yet be unwilling to pay the purchase-price, borrowed for the purpose at interest, until he get possession, for to him the transaction was a matter of business.

Similarly the defendant may have been willing to bind himself personally as to the building on the land and have been unwilling to impose a restriction that might be a blot on the title. And as he intended himself forthwith to build, he might have supposed that would be accepted as sufficient. But to return to the difficulties in the plaintiff's way, I would next point to the allegation in the plaint, that it was agreed that the plaintiff's solicitors should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase (paragraph 4).

A draft agreement has been submitted after approval by Mr. Cohen, and its terms presumably represent what was regarded as usual.

A perusal of the document demonstrates the uncertainty of the expression "usual terms," and by way of illustration I may point to the provision in the draft that the sale is subject to tenancies, that interest at 9 per cent. is charged on the balance of the purchase-money, that a right to rescind is reserved to the vendor if he is advised not to remove or comply with any objection or requisition, that the property is sold subject to all outgoings and easements though none are particularized, and that time is to be deemed in all respects to be of the essence of the contract.

If this draft represents the plaintiff's idea of what are "usual terms" that can be introduced into an agreement for sale without discussion, it cannot be a matter of surprise if the defendant is not at one with him as to that.

Indeed the circumstances of this case illustrate forcibly the mischief against which the decision in *Rummens* v. *Robins* (3) was directed. There in reference to a similar provision Lord Justice Knight Bruce asked "what are the usual clauses in a contract for the sale of land? They differ almost incessantly; they differ according to the state of the title, the conveniences, the fancies, and the wishes of mankind, and the particular situation, convenience and inconvenience belonging to the estate." And in view of the uncertainty of the provision it was held that there was not a contract capable of being specifically enforced.

The plaintiff asserts, as is obligatory, that he was ready and willing to perform and carry out the agreement. Presumably the draft agreement embodied his conception of his obligation and indicates what he was ready and willing to perform. But if that be so, his readiness and willingness did not correspond with his obligations under the alleged agreement, either of the 13th or 15th November. Nor does it mend matters that the plaintiff may have been willing at the trial to waive any of the stipulations of the draft.

No doubt as to the main features of the transaction, *i. e.*, the sale, the identity of the property, the price, and even the imposition of restrictions in some form or another, the parties were substantially agreed, and to that extent the defendant may well have considered that as between man and man there was a contract, and have used language appropriate to that position. But that is not enough to create a concluded contract between the parties.

(3) (1865) 3 De G. J. & S. 88; 11 Jur. (N. S.) 631; 14 L. T. 717; 13 W. R. 979; 46 E. R. 571; 142 R. R. 32.

Nor is the defendant precluded from pleading that there was no concluded contract merely because he paid earnest money, more especially as the mode in which the plaintiff's agent dealt with the money shows that even he did not treat the matter as governed by a concluded agreement at the time of payment.

The conclusion then to which I come is that the learned Judge should not have decreed specific performance.

I would, therefore, allow the appeal, reverse the judgment of the first Court and dismiss the suit with costs throughout, including the costs of the appeal.

WOODROFFE, J.—This appeal, in my opinion, raises a question of fact, the principles of law applicable to such facts admitting of no doubt. The Court will doubtless not enforce specific performance of a contract, the terms of which are uncertain. If the Court does not clearly know what the contract is which the parties entered into, it cannot obviously enforce it. But the question whether a contract is in this sense uncertain, is a question of fact which arises upon the documents and oral evidence tendered in support of it. In the present case the alleged contract was for the sale of the premises mentioned in the first and second paragraphs of the plaint free from encumbrances, subject to approval of title at the price of Rs. 1,33,000 on the special conditions mentioned in the third paragraph of the plaint. Those terms appear to me to be free from uncertainty in themselves, and the defendant's agreement to them has been established by evidence which the learned Judge has accepted and which, for reasons which I later give, I also accept. This evidence is partly documentary and partly oral. There is no law in this country which in this case requires an exclusively written record, and if we were to insist upon it as a condition for the grant of specific performance, we should be requiring from the parties more than the law demands. Moreover, there is in this case a document, *viz.*, the broker's acceptance of the contract. The broker was admittedly agent for both parties. Necessarily in this case as in other cases the oral evidence for the plaintiff and the defendant is in conflict. But we have to sift that evidence and to see which is to be believed. If upon such examination the nature of the agreement is left in doubt, the plaintiff must fail, but if the evidence is believed to be true, we must, I think, give effe t to it. If the evidence given for the plaintiff is accepted, it, in my opinion, leaves no doubt as to what the facts are. Moreover this is an appeal and we are asked to reverse the judgment of the learned Judge on a question of fact. The defendant in his evidence insinuates that the letter of the broker, Mr. Owen, was due to something more than misunderstanding. He contests both the truth and accuracy of the evidence of the latter and other witnesses, charges that the evidence of Mr. Cohen is "absolutely false" and says that he returned the draft agreement which had been sent to him by Mr. Gregory, the plaintiff's solicitor, as he "suspected that the latter had drawn up an agreement, the terms of which were not the same as the broker's letter, which he knew was the basis of it." His grievance on the facts is that the learned Judge has not accepted these charges or the evidence on which they are made. I have never held that the Appeal Court is bound to accept the first Court's appreciation of the facts. In my opinion both the law and facts are open to us. Still this being an appeal on the facts, the appellant has to satisfy us that the judgment appealed against is erroneous, and this he has failed to do. On the contrary, for reasons I later state, it seems to me that the learned Judge has arrived at a correct finding on the evidence before him. He points out that the defendant's evidence stands alone, and as against it there is the evidence of the four witnesses Owen, Cohen, Gareh and Gregory, the letter of the 13th November 1912 and other documentary evidence. It would, in my opinion, require a strong case which would justify us in accepting the defendant's evidence alone as against all the other evidence which has been accepted by the Judge of first instance.

It is then alleged in the plaint as it stands that on the confirmation of the agreement and payment of the earnest money, it was agreed that the plaintiff's solicitors should prepare a formal agreement in

writing embodying the usual terms and conditions of sale and purchase including the special conditions above mentioned, and should submit the same to the defendant for approval. On the strength of this allegation and certain answers given by the plaintiff's witnesses, it is contended that there has been no completed contract between the parties and that the suit is premature. Here again the law applicable seems to me to admit of no doubt. It is well established that the mere reference to a future formal contract will not prevent a binding bargain. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal shape, does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. "If", said Lord Cairns in *Rossiter* v. *Miller* (4), "you find not an unqualified acceptance...subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then...you cannot...find a concluded contract." In other words, the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract. The question in this suit is whether the case falls within one or other of these alternatives. As James, L. J., said in *Bonnewell* v. *Jenkins* (5), each case depends on its own special circumstances.

What then are the circumstances here? I will deal with this point at once, as it is one which, if disposed of in favour of the appellant, establishes his case. This contention of the appellant appears to me to be an afterthought. It first appears in the written statement filed in March 1913, the contract for sale having been, it is said, entered into in November 1912. It has been argued that the defendant is a layman and could not appreciate the advantages which, it is contended, the law gives him. We are not asked to say that the defendant is incapable of understanding or looking after his own interests, and the point here is a simple one for the party himself, whatever may be the difficulties which the Court has in some cases in ascertaining what was passing in the minds of others. The defendant has, however, only to ask himself whether it was agreed that he was in no wise to be bound until he had approved and signed a contract. If this had been the fact, it seems to me incredible that it should not at once have occurred to the defendant, and when he was pressed by the plaintiff we should have expected the reply:—"There is no contract. I have not signed and refused to sign any agreement."

What then are the facts? On the 15th November 1912 the defendant admittedly paid earnest money of Rs. 1,001. This payment was in itself evidence of a concluded contract. It is suggested that it is not but that payment of earnest money is merely a sort of guarantee that the buyer will seriously negotiate. This, I think, is not the case. If this earnest money was not concluding a contract, why do we find no provision for its disposal and refund? Reliance is placed on the fact that it was not cashed directly by Mr. Cohen, but made over to his solicitor and cashed later. This, however, may well be due to the fact that Mr. E. M. D. Cohen intervened, when he found that the property on which the Jewish School was placed was going to be sold away. From the letter of the 5th December 1912 it appears that Messrs. Sassoon & Co. informed Mr. Gubbay that Mr. E. M. D. Cohen was writing to him about it. Mr. Gregory's day-book shows that Mr. Cohen accepted the Rs. 1,001 as earnest money, the amount of which was admittedly the previous subject of discussion, and that it was after that arranged that an agreement should be prepared and submitted to Mr. Hyam for his approval, the purchase to be completed within six weeks. That Mr. Hyam considered the acceptance of the earnest money closed the transactions, appears on his

(4) (1878) 3 A. C. 1124 at p. 1139; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865.

(5) (1878) 8 Ch. D. 70; 47 L. J. Ch. 758; 38 L. T. 81 26 W. R. 294.

evidence. That Mr. Cohen and Mr. Gregory considered the matter concluded is shown by their action in at once taking steps to get a power-of-attorney executed. On the 20th November 1912 a draft was sent to the defendant for approval. After this the parties appear to have been waiting for the receipt of instructions from Mr. Gubbay as to whether he was prepared to cancel the sale, seeing that Mr. E. M. D. Cohen of the Jewish School, which was thereby likely to be displaced, was objecting to it. Mr. Gubbay, however, refused to cancel, and on the 28th December Mr. Gregory informed Mr. Hyam of the fact "that he will not cancel the contract for sale" and asked for the return of the draft approved, without delay. The defendant was also informed of the arrival of the power-of-attorney authorising Mr. Cohen to act for Mr. Gubbay. To this the defendant gave no reply. According to his case all that he had to do was to write back and say, "there is no sale to cancel until I have approved the draft contract." He did nothing and was again written to on the 2nd January asking for return of the draft. He did nothing, and having given no reply he was again written to to the same effect on the 7th. He did nothing, and on the 13th January, Mr. Gregory wrote insisting on the sale and asking for return of the draft. This letter was not more successful than the rest and on the 15th January Mr. Gregory wrote again referring expressly to the agreement and saying that "Mr. Gubbay will not cancel the contract as you requested him to do." Legal proceedings were then threatened. With reference to this letter I may observe that Mr. Hyam spoke to him about cancelling the contract. The defendant who appreciates the inference which may be drawn from the use of the word "cancel", denies that he ever used that term to Mr. Gregory. It is noteworthy, however, that if this be so he did not deny what Mr. Gregory stated in the reply which he at length sent on the 15th January 1913. I will refer to this letter later. Its only importance here is the explanation which it gives of the delay to which I have referred. According to Mr. Hyam he did not read the draft until about this date. He then states "I did not write to you earlier because I was willing to let the Jewish School purchase the property, but, as I now understand, Mr. Gubbay is not on terms offered by them willing to sell, I am returning the draft." As the learned Judge has pointed out, Mr. Hyam has not called Mr. E. M. D. Cohen to support his story and I am unable to understand how he could have thought that there was a possibility of sale to the Jewish School, seeing that he had been definitely informed on the 28th December that Mr. Gubbay refused to cancel the sale. This is followed by an important letter of the 17th January, in which Mr. Gregory alleges that the draft sent was merely the formal expression of a "concluded contract" and asking for its approval. To this the defendant replied on the 22nd January in which letter he also assents to the position that there was a concluded contract though he disputed its terms; for he says "In the circumstances it is open to your client, as he pleases, either to accede to my terms which were agreed upon but which your client now wishes to vary or to file his action, but on my part I shall insist on your client performing his part of the contract upon the terms agreed." In the face of these express words it does not seem to me to be possible to say that there was then no contract between the parties. In fact, as the learned Judge points out, it is the case of both parties that a definite agreement to sell was arrived at, the difference between them being as to its terms. Mr. Cohen also evidently thought that the contract was concluded for, as above stated, he at once set about to get the power-of-attorney under which the conveyance was to be executed. It was, however, both his wish and that of the defendant that what is called in the evidence "the usual earnest agreement" should be drawn up, and on Mr. Cohen's answers on this point reliance is placed. Mr. Cohen says that this agreement was to embody the special conditions as contained in Mr. Cohen's letter and stated by the defendant himself on the 15th and the usual terms as written by solicitors,

He says that the sale was concluded with Mr. Hyam personally on the 15th and that all that was to be done was to insert the usual conditions. Mr. Hyam says in answer to the question "you contemplated a written contract"?—"Yes." It may be admitted that this was the intention of both parties. The question is, whether there was to be no concluded contract until the formal agreement was signed. That the parties did not then, whatever the defendant may now do, trouble about the other conditions is shown by Mr. Hyam's letter of the 15th January in which no attention is paid to these matters, and the statement in his evidence that these were no part of his business but of his attorney. Mr. Gregory says that the defendant told him on the 15th November that terms had been finally arranged with Mr. Cohen who had accepted the earnest money and that the remaining clauses were the usual clauses in an earnest agreement. He denies the suggestion that he understood "that this matter was subject to the preparation and approval of a formal contract", and says that the formal contract was only to include and did in fact include the ordinary conditions of sale and purchase. If this be not the fact, the defendant could have called evidence to show that the terms proposed to be inserted were not, as he for the first time in the written statement alleges, usual conditions of sale in Calcutta. The written statement (section 2) admits that the defendant agreed to purchase "upon the usual terms of such purchases and sales." Here I may observe, upon the defendant's allegation that the draft contains terms which are not usual, that if it were necessary to decide this question it would be sufficient to point out that the evidence is all one way, there being nothing to controvert Mr. Gregory's statement on this point. It does not, however, seem necessary to decide this point, for the plaintiff does not insist upon specific performance of the draft, conceding that if it be the fact, which is not admitted, that there are any terms therein which are not usual, the same could not be enforced against the defendant. It is obvious that specific performance could not be enforced except as to terms agreed upon, namely, those in the third paragraph of the plaint. The draft was not signed and accepted. It is noteworthy in this connection that though the defendant does now object to some of such terms, he did not do so in his letter of the 15th January. Like the objection that the execution of a formal agreement was a condition of the contract, this objection appears for the first time in the written statement. I should here mention that Counsel for the respondent stated that the terms of paragraph 4 of the plaint should run as follows:— "Should prepare a formal agreement in writing embodying the said terms and conditions and submit the same to the defendant for approval," instead of "should prepare a formal agreement in writing embodying the usual terms and conditions of sale and purchase including the special conditions agreed upon as aforesaid and submit the same to the defendant for approval", and he asked that three documents should be admitted in evidence, *viz.*, the instructions for the plaint, original draft plaint in Counsel's handwriting and a fair copy plaint. I thought that this application which was made after the close of the reply, came too late and moreover that the point was immaterial to the decision. The agreement of which specific performance is sought is that stated in paragraph 3 of the plaint and stated to have been confirmed in the first three lines of paragraph 4. The plaintiff, as stated, does not seek specific performance of the draft agreement with all its terms and the subsequent allegations as to the preparation of a formal agreement in whatever terms they are stated, have only a bearing on the question which I have already discussed, namely, whether there was a contract at all until the formal agreement was drawn up. In a still more belated fashion, though the written statement does not allege uncertainty, but on the contrary willingness to complete upon the terms the "defendant had agreed to," it was urged in argument that the contract is uncertain because the phrase "usual terms and conditions" is uncertain [*Rummens* v. *Robins* (3)]. It would be sufficient to reply to this that there is unrebutted evidence what such conditions are, and, therefore, no uncertainty if we accept Mr. Gregory's evidence. But apart

from this, what the plaintiff alleges is that the agreement sought to be enforced is that stated in paragraph 3 of the plaint, and the arrangement arrived at subsequent to and after the concluded contract there mentioned did not form part of it. This is a sufficient answer to the reply that the vendor cannot waive such stipulation, for which the case of *Lloyd* v. *Nowell* (6) is cited. That case, moreover, is distinguishable, for there the contract was to sell "subject to the preparation by the vendor's solicitors and completion of a formal contract." This was, therefore, a term of the contract itself in that case where it was held not to be for the benefit of the vendor only and, therefore, could not be waived by him alone.

A new point has been raised on appeal, that the sale was free from encumbrances whereas there were some leases on the property. It appears from Mr. Cohen's evidence that the property sold was subject to lease. The Jewish School were monthly tenants and the other leases expired in October 1913, that is, before the expiration of the year when the defendant was to get possession from the Jewish School and before the hearing of the suit. The first answer to this which is given by the respondent appears to me conclusive, *viz.*, the point was not raised in the pleadings, nor was an issue directed to the point, nor does Mr. Hyam anywhere say that he did not know of the existence of the leases and if he had known he would not have purchased. The Court is not called upon to raise an objection of this kind which the party himself has not raised. But it was submitted that Mr. Hyam could not raise the point as he was, it is suggested, unaware of the leases. I do not believe that he was unaware, nor has he sworn that he was ignorant of them. Counsel for the appellant stated that Mr. Owen was the common agent for both parties. Mr. Cohen swears that the possession was subject to the lease and that he told the broker, the common agent, of the tenancies affecting the properties. His evidence on this point is supported by Mr. Owen, who swears that he told Mr. Hyam "exactly the terms which Mr. Cohen had proposed and he accepted them." Mr. Cohen says that the term that property should be taken subject to lease was one of his expressed conditions. Mr. Hyam says that nothing was said about encumbrances without, however, mentioning the leases. That Mr. Cohen's terms were as he states, is borne out by the draft agreement which he handed to Mr. Gregory on the 20th November. The draft was sent on to Mr. Hyam on the same date. Paragraph 1 of the draft expressly mentions that the property was sold free from the encumbrances but "subject also to the existing tenancies affecting the same." Incidentally I may remark that Mr. Gregory was here distinguishing between encumbrances and leases, the two terms not being always synonymous. This agreement must have put Mr. Hyam on notice even if he had not had actual information before. That Mr. Hyam read this agreement before suit I believe, for when he returned it on the 15th January 1913 he took specific exception to two terms of the draft, namely, the second touching interest and the last making the covenant not to build a mosque or temple to run with the land. It is noted further that the property which is the subject-matter of the suit adjoins a property of Mr. Hyam who was, therefore, likely to know what was the state of it. Nor is it in the least degree likely that Mr. Hyam, who is represented to be a person who speculates in land, did not make full enquiries as to the state of the property which he proposed to purchase. Again Mr. Hyam must have known from the draft agreement that the sale was subject to existing tenancies. If this had been for him the vital "defect in title" now alleged, one would have expected him to have said at once: "There are leases on the property. I was not told of them. The negotiations are off," and this he would, one should have thought, have done the more readily seeing that on other grounds he had sought to get the sale cancelled. That he did not, points to the inference that he was aware of the leases from the beginning. Notwithstanding all this no objection on this point was taken in the written statement nor issue raised thereon. Even if we were to make the improbable assumption that Mr. Hyam was unaware of the leases until the point was mentioned in the evidence, Mr. Hyam gave his deposition after the witnesses of the plaintiff and he does not

(6) (1895) 2 Ch. 744; 64 L. J. Ch. 744; 13 R. 712; 3 L. T. 154; 44 W. R. 43.

even then say that he was unaware of the leases and that if he had known of them, he would not have purchased. It is true that a somewhat similar statement was made by his Counsel here but what Counsel says is not evidence, and is not accepted as such. Nor was the point sought to be made by amended defence, nor was it according to the respondent's Counsel argued in the lower Court. That this statement is likely to be correct is shown by the fact that there is no mention of a point which has been made so much of in appeal in the judgment of the learned Judge, nor is the point specifically taken in the grounds of appeal. The point first arose in the last hearing before two Judges as a result of certain observations made by the Court, which were subsequently adopted as his argument by Counsel for the appellant. The point, therefore, in my opinion, cannot be taken now. Had it been taken in the first Court it might have been possible to lead evidence to show that it had no substance, as the facts to which I have referred themselves suggest. But even if the point were open there does not appear to me to be any substance in it. If there had been it would have been taken. In answer to the Chief Justice, Counsel for the respondent whilst submitting that the question did not arise said that if required to answer the question, he would say that the property was sold free from encumbrances but subject to the existing tenancies as the draft says, but submitted that there was no contradiction having regard to the nature of the tenancies, the return on the money which they give, *viz.*, $5\frac{1}{2}$ per cent. and the fact that the tenancies had expired before the hearing of the suit. Further, that even if the leases were encumbrances, that was no defence if the plaintiff discharged them and offered them free of encumbrances. As stated, these tenancies have long ceased to exist and cannot be any real defence. The real objection, as I point out later, is that Mr. Hyam is unwilling to incur the odium of turning out the Jewish Poor School now in possession of portion of the premises. Doubtless the point might have had a legal bearing on the question, what was the contract between the parties, if it had been raised. But it was not and as I have said there is no evidence by Mr. Hyam that when he entered into negotiations he believed he was negotiating for purchase of a property free of existing leases. Had this been the case and there was any substance in the objection, it would have undoubtedly been properly raised. The defendant can have possession now, but he will not take it because he does not wish to incur the displeasure of his community by turning the Poor School out as he would be entitled to do if he accepted the property.

As regards the evidence that the parties were not *ad idem*, it is sufficient generally to say that this must depend on the view the Court takes of the facts. If the evidence given for the plaintiff is accepted the parties were *ad idem*, for that evidence shows that the defendant understood what the terms were and gave his assent to them.

In my opinion these various objections fail and were an afterthought put forward to relieve the defendant of the obligation into which he had entered, should he fail on the substantial part of his case, to which I now turn. That question, is, assuming as I hold that there was a concluded contract, what were its terms?

But before doing so, I will deal with a point advanced in the argument, namely, when and where the offer was accepted and whether Mr. Owen had authority to accept on the defendant's behalf.

Mr. Owen's acceptance is contained in the letter of the 13th November 1912. Mr. Hyam swears that he "never gave him authority to write any such letter and that the first time he saw it was on the 24th January 1913; but that he never wrote repudiating his authority as he did not think it necessary." He denied Mr. Gregory's explicit statement that he showed him Mr. Owen's letter at the interview of the 15th. No doubt Mr. Gregory's veracity was impugned in cross-examination, it being suggested and denied that his day-books (in which this particular incident was not described had been characterised as false entries in another case. It is also a circumstance in Mr. Hyam's favour that Mr. Owen does not recollect this incident. But it is easier in the case of an incident of this kind to forget it than to honestly suppose that it took place when it did not. It is hard to imagine any alternative to the acceptance of Mr. Gregory's positive statement than that he was telling an untruth. I am unable to hold this, nor has the learned Judge done so. The incident seems to be quite a probable

one. Is it likely that a conversation should be had between Mr. Cohen, Mr. Gregory and the defendant without any reference to the broker's letter which was the basis of the contract? I think not. It appears also to be the fact that Mr. Hyam's ignorance of the contents of the letter till the 25th January was not put in cross-examination to any of the plaintiff's witnesses. Mr. Owen admits that after writing the letter he did not show it to the defendant before sending it to Mr. Gregory, but he swears that he wrote it on Mr. Hyam's authority, who suggested to him its terms in the form and to the effect in which it now stands. It is said that Mr. Hyam did not previously take exception to Mr. Owen's authority. But I think there is nothing in this. For I think a fair reading of Mr. Hyam's evidence is that Mr. Owen had authority to negotiate and settle but only on the terms which Mr. Hyam alleges. With this I deal later. For reasons which I give later also I hold that Mr. Owen had authority to bind the defendant as he purported to do by his letter: and that (on Mr. Gregory's evidence) Mr. Hyam must be taken to have been aware of its terms. The question whether Mr. Owen was authorised to write the letter of acceptance is of secondary importance in this case, for if the evidence of the plaintiff be accepted the defendant personally later on gave his assent to the conditions sought to be enforced against him.

This being so, the facts stand as follows:—

Mr. Owen was informed by Mr. Gregory of the plaintiff's terms on the 13th November. Mr. Cohen was then informed by Mr. Gregory of the result of this interview. Mr. Owen accepted by his letter of the 13th November of which Mr. Cohen was informed. The latter confirmed the arrangement to Mr. Gregory on the 14th November. Mr. Owen called at Mr. Gregory's office on the 15th with Mr. Hyam, when they said that they would call on Mr. Cohen to settle the terms with him and would see him again later. They are then alleged to have seen Mr. Cohen in the presence of Mr. Gareh and the contract was confirmed. After this both Mr. Cohen and Mr Hyam called at Mr. Gregory's Office when Mr. Hyam told Mr. Gregory that he was agreeable to Mr. Cohen's terms. On the same day it is said that the 6th January was fixed for completion. On the 2nd Mr. Cohen handed the draft agreement approved to Mr. Gregory who, as stated, forwarded it to the defendant on the 20th November. Now, if this evidence be true the result is that Mr. Owen on the 13th January accepted the plaintiff's offer explicitly as regards all terms but two, and as to these implicitly. As regards these latter there was, it is said, an acceptance though an imperfectly expressed acceptance. These two terms were, *firstly*, (the defendant having agreed that he would not ask the Jewish School to vacate for 12 months from the date of execution of the conveyance) that the school was to remain on the same terms as heretofore. This was not expressly stated but implicitly accepted, because without it the condition would be nugatory since it would be open to the defendant to nullify the condition by changing and enhancing the rent to a point at which the school could not pay and remain This term was in any case, according to the evidence, later expressly accepted. Nor does the defendant deny that the school were to have possession on the same terms; what he says is that he had no objection to that provided that the contract was not to be completed until after the expiration of 12 months. The *second* term imperfectly recorded was that there was to be a special power-of-attorney under which the conveyance was to be executed. This is indicated though not expressed by the reference to "six weeks." This arose out of the conversation with Mr. Gregory, in which it was explained that as Mr. Gubbay was in England the contract could not, as he proposed, be executed in a month.

The matter is one of no importance and it is not contended that it is of any concern to Mr Hyam whether there was such a special power or not. The same remarks apply to the fixing of a definite date, the 6th of January, which was done on the 15th. These terms were further, it is alleged, confirmed by the defendant personally on the 15th - with the evidence I deal later. It comes then to this, either there was an acceptance of the contract by Mr. Owen's letter expressly and implicitly as to the terms mentioned (other than the actual date for execution) and an acceptance of this last term by the defendant personally on the 15th January

and an express confirmation by him of the other terms on the same date; or if, as the defendant alleges, Mr. Owen had no authority or his letter does not mean what the plaintiff says he does, or if he says there was no implicit acceptance of the terms imperfectly recorded, then there was an acceptance by the defendant personally on the 15th in terms which have no ambiguity about them. I think the plaintiff is entitled to rely, as he does, not only on Mr. Owen's letter which is regarded as the acceptance but on the subsequent oral conversations which, if true, more fully and clearly state and confirm that to which the letter refers. As first put before us there was some inaccuracy in the statement of the case by Counsel for the respondent which he subsequently corrected. As it now stands it is, in my opinion, in conformity with that pleaded. The appellant has submitted that there is a variance between pleading and proof in two particulars. The plaint alleges an agreement on the 13th November 1912 between Mr. Cohen and Mr. Owen and a confirmation to the plaintiff's solicitors on the 15th. It is suggested that the case now made is an agreement with Mr. Cohen on the 15th. This argument is, in my opinion, without foundation. The plaintiff relies on the agreement of the 13th, namely, the broker's letter. What he says is that two minor terms which were implied but not expressly stated in this letter, were clearly stated and confirmed on the 15th. Confirmation was given to the plaintiff's solicitors on the return of the defendant and the broker from Mr. Cohen. The plaint omits, it is true, to state any reference to the interview with Mr. Cohen but this is an omission to plead evidence only. The confirmation to the solicitor alleged in the plaint is proved. Some reliance was placed on the fact that the learned Judge finds that an agreement was arrived at between the parties on the 15th. But this does not seem open to objection, for the learned Judge had previously also held that the conditions had been previously agreed to when Mr. Owen wrote and gave Mr. Gregory the letter of acceptance on the 13th and when, as the learned Judge holds, both the solicitor and Mr. Cohen regarded the matter as concluded. The agreement evidenced by this letter was as to the terms expressed in the letter and with the two particulars so implicitly therein contained became, as the learned Judge holds, a definite, complete and binding agreement on the 15th November.

We are here led to a consideration of the question, what, if any, were the terms agreed upon by the parties? I will take them in the order in which they are stated in the broker's letter. The acceptance of the general offer for the sale of the premises in suit for Rs. 1,33,000 is not disputed. The first of the disputed special conditions is stated in the letter as follows:—"My principal agrees to have no temple or mosque built on these premises." As these words are not in any way qualified they mean, in my opinion, what they in effect say and that is that a temple or mosque is not to be built by any one, whether the purchaser or others taking, through him. This construction is strengthened by the wording of the next sentence "he will not ask the Jewish School to vacate, etc.," where the purely personal obligation is expressed as such. It is also supported by a consideration of the following facts. It cannot be matter of doubt upon the oral evidence and the day-book of Mr. Gregory that the vendor who is a Jew was insisting that the premises should not be used as a mosque or temple and that no noisy or offensive business should be carried on there, because the premises were near to the Jewish Synagogue. This is a permanent institution and it is, therefore, reasonable to suppose that the vendor at least intended that it should be permanently protected. If he had it in his mind to bind the immediate purchaser only, the latter could have made the protection nugatory by selling the property the following day to some one else who might have built a mosque or temple or created a nuisance on the property. I think also that Mr. Hyam must have understood this. Whether he accepted the condition in this sense is another question to which I next refer. He must be taken to have done so for the following reasons. In the first place that is the construction which I put on the letter of Mr. Owen who, in my opinion, had authority from his principal. That the words of the letter as they stand mean this, is to some extent indicated by Mr. Hyam's evidence. For he takes exception to the statement in the letter, which would be unnecessary if it merely meant what he says he agreed to. But the matter does not rest there for the oral evidence for the plaintiff, if true, shows both the meaning of the words in Mr.

Owen's letter and that Mr. Hyam expressly agreed to the plaintiff's conditions. Mr. Cohen expressly swears that the defendant in his presence agreed to a clause being inserted in the conveyance binding the land, that is, the purchaser's assigns. This and other evidence of Mr. Cohen is charged by the defendant as being false and unless it is displaced is conclusive of the matter. Before us it has been argued that as the plaint pleads a confirmation between Mr. Gregory and the defendant, the confirmation spoken of in the evidence between Mr. Cohen and the defendant must be an invention. According to the plaintiff's evidence it is a fact that the defendant did confirm to Mr. Gregory the plaintiff's special conditions. I may here refer to Mr. Gregory's evidence and his day-book. So far then the plaint is not at variance with the evidence. We are, however, asked to say that because the plaint did not plead confirmation to Mr. Cohen, therefore, such a confirmation did not take place. In the first place, it is in a high degree unlikely that no confirmation was given to Mr. Cohen. This latter was not some stranger but the person acting for the vendor in England who knew the vendor's mind and intentions and had full authority to give effect to them. Mr. Gregory on the other hand was merely the solicitor of the vendor who in all matters would have to refer to the latter's agent, Mr. Cohen. It is, therefore, in a high degree probable that the defendant saw and spoke to Mr. Cohen and if he did it does not seem to me to be likely that at such interview, the latter would omit to discuss the special terms on which alone the sale was to take place. Mr. Cohen's evidence is further supported by that of Mr. Gregory and his day-book. The latter states that on the 15th November Mr. Owen and Mr. Hyam called on him and they said they would call on Mr. Cohen, settle the terms with him and see Mr. Gregory again. It is true that Mr. Owen does not seem to recollect having seen Mr. Gregory twice with the defendant. But as against what is possibly a lapse of memory on his part we have a reliable contemporaneous record in the day-book. That they did see Mr. Cohen is sought to be proved by the latter evidence and that of Mr. Gareh. As regards the latter's evidence it might have been a question had we been sitting as a Court of first instance, whether it is sufficiently proved that Mr. Gareh was there. Mr. Gareh is a young assistant who would not ordinarily be present unless sent for. He himself says that he cannot remember whether he was present when the defendant arrived or went in afterwards or whether he was sent for. Mr. Owen says Mr. Gareh was not there (that is, during the interview) and that he was sent for at the conclusion to accompany them to Mr. Gregory. That he did this there is no doubt. Mr. Cohen on the other hand supports Mr. Gregory when he says Mr. Gareh was present. The learned Judge has accepted both Mr. Cohen and Mr. Gareh's evidence and I see no sufficient reason for differing from him, the more particularly that I disbelieve the defendant's case as put in the cross-examination of Mr. Gareh "that no terms whatsoever (other than the amount of earnest money) were discussed between Mr. Hyam and Mr. Cohen." Mr. Gregory also says, though this evidence is not of much account, that Mr. Gareh told him that the matter had been discussed before Mr. Cohen. Mr. Owen also says the terms were verbally agreed to between the defendant and Mr. Cohen. Mr. Gregory next deposes that the defendant came to him saying that they had arranged the terms finally with Mr. Cohen and that they were agreeable to his special conditions, which to the best of his belief were mentioned in detail. Mr. Gregory says that on that day he had shown the defendant Mr. Owen's letter and that the defendant did not repudiate Mr. Owen's authority, but said he would have no objection to give a personal covenant. He then naturally said that the defendant must speak to Mr. Cohen direct on the subject as his own instructions on the point were peremptory. He says, however, that when they came back (and in this he agrees with Mr. Cohen) the defendant agreed that the covenant should run with the land. As against this evidence there are two circumstances which are relied upon for the defendant. Mr. Gregory's day-book runs: "and that he would not convert the premises into a mosque or temple" and next in his letter of the 17th January 1913 he writes: "This point (personal covenant) was discussed and you made no qualification restricting the covenant", no mention being made of the express agreement referred to

in the evidence. Mr. Gregory's explanation is that in the day-book matters are not completely stated and that there was an omission in the letter. So far as they go it must be conceded that these two points favour the defendant. The question is, however, whether in this appeal they are sufficient to displace the other facts to which I have in part referred, including the positive direct testimony for the plaintiff which is such that it must be either true or false. I cannot believe that all of it which the defendant traverses was due to mis-recollection or mistake. Further, Mr. Hyam says that he agreed to and understood there was to be a personal covenant and according to his evidence he expressed himself in these terms. It was then that Mr. Gregory said "no, no I must put it in the agreement." This appears to me to indicate what Mr. Gregory says about the question of the personal covenant. It was to go in the agreement because as Mr. Cohen says "it was to go with the title-deeds binding him for ever." That it was at least so understood, is shown by the fact that the draft was drawn up in this way on the 15th and was not repudiated by the defendant to whom it was sent on the 20th November until the 15th January following. According to Mr. Hyam's evidence on the other hand when asked, "do you say Mr. Cohen, when asked, did not say a single word as regards the conditions?" he answers "absolutely nothing—not one word." As I have said, that and the story that Mr. Gregory only said "what about the mosque and temple" does not seem to me a likely tale. I may here point out that whilst the defendant asserts that what Mr. Cohen has said on this point is "absolutely false", such a case was not put in cross-examination to the latter. On the contrary Mr. Sircar's question at page 37, line 4, assumes that there was in fact a conversation between Mr. Hyam and Mr. Cohen on the subject of the mosque and temple though the parties were at variance as to the terms of it. If, as Mr. Hyam says, the question of building a mosque or temple was dropped directly it was ascertained that he, a Jew, was the purchaser, how is it that according to his evidence Mr. Gregory insisted upon the condition appearing in the draft and its appearance there? Mr. Hyam's suggestion that there were to be two agreements, seems a new case.

Some of the considerations above mentioned apply also to the second and other terms of Mr. Owen's letter. The second runs "or to cause any nuisance to the Jewish Synagogue." If these words stood alone they would, in my opinion, cover the condition as stated in the plaint. But they do not stand alone. Mr. Hyam's case is that the "question of nuisance was never discussed, never put to me." As against this we have the following facts. Mr. Gregory's day-book of the 13th November shows that Mr. Cohen was insisting that the purchaser would not "carry on any noisy or offensive business." This is, however, not repeated in the note made as regards the broker's visit which followed. Mr. Cohen spoke on the subject to Mr. Owen. The latter embodied it in his letter of the 13th November. He swears also that he told Mr. Hyam that the premises should not be made a source of nuisance to the Synagogue; that he told the latter all the terms Mr. Cohen proposed and that the defendant accepted them. Mr. Cohen says the defendant agreed to these conditions. Mr. Gregory enters in his day-book of the 15th November "that the defendant agreed not to do any act which would be a nuisance to the Jewish Synagogue," and deposes to the same effect saying that the defendant told him that "he would not cause any tin shop or anything of that kind or other things to make a noise there which would be a nuisance." He embodies a provision in the draft regarding a subject which Mr. Hyam says was never discussed and subsequently asserts the agreement in his letter of the 17th January. It seems to be impossible on these facts to hold that all this evidence is either untrue or mistaken and that, as Mr. Hyam says, the subject was never discussed at all. The letter of Mr. Owen affords strong corroborative evidence that it was discussed and that the letter in this and other respects states the plaintiff's case, is shown by the defendant's exception to it as disagreeing not only in form but in substance from what he gave Mr. Owen authority to accept.

The next term was "that he will not ask

the Jewish School to vacate for 12 months from the date of execution of the conveyance." Learned Counsel for the respondent does not, having regard to the circumstances and time which has elapsed, insist upon this term but says it was agreed upon. The letter is imperfect in that it does not expressly state "on the same terms and conditions under which they (the school) were then occupying the same." I should myself, as I have said, have thought this was implied. For the obvious desire was to benefit and give time to the school and unless it was allowed to remain on the same terms, the provision might have been rendered nugatory by asking a rent or imposing other conditions which would oblige the school to vacate. That, however, the defendant agreed to this is shown by the evidence of Mr. Gregory and his day-book and of Mr. Cohen. Mr. Owen says he has no recollection whether the terms were discussed. He, however, speaks to the term "from the date of execution of the conveyance" and Mr. Gregory's evidence is that Mr. Owen's letter was shown to the defendant and that the only term which the latter attempted to get conceded was the question of personal covenant not to build, with which I have already dealt. The plaintiff's case is also stated in Mr. Gregory's letter of the 17th January. The defendent's contention is set out in his reply of the 22nd January where he says he agreed to defer completion of purchase for a year. But if so, what had the defendant to do with the school? He could not interfere with the tenants until his purchase was completed and he became owner of the property. And if so, any stipulation on the point was unnecessary. Mr. Hyam's statement that "not a word" was said at the interview with Mr. Gregory about the school is contradicted by Mr. Gregory's evidence, his day-book and the letter he wrote on the 17th January. The last term was as to the date for completion of conveyance which was fixed in the broker's letter as six weeks from the date of execution and was subsequently fixed on the 15th November for the 6th January following. This the defendant denies but the plaintiff's case is made out as to the letter by Mr. Owen, and as to the 6th January by Mr. Gregory, his day-book, Mr. Gareh and Mr. Owen. According to the latter his letter was written under the defendant's instructions. Six weeks from the date of the contract would expire by the beginning of January and so, Mr. Gregory says, the 6th January was fixed as the exact date. The last point which was somewhat faintly referred to is the term under which a conveyance was to be accepted under a special power-of-attorney, the vendor being in England. This is referred to in Mr. Gregory's day-book and his evidence.

In short the question presents itself to me as a question of fact and the credibility of the plaintiff's witnesses. Mr. Owen, the broker, swears that he wrote the letter of acceptance under instructions from Mr. Hyam who "suggested to me the terms to write to Mr. Gregory." The first question is, therefore, whether Mr. Owen is to be believed on this and other points of the case. Nextly Mr. Cohen, who so far as I can see has no personal interest in the matter, swears that the defendant personally agreed to the terms and Mr. Gregory, the solicitor, swears that Mr. Hyam confirmed the acceptance of these terms to him and that he (Mr. Gregory) further showed the defendant the broker's letter. Again, the question is whether these witnesses are speaking the truth or not. It is quite impossible that all these witnesses should be mistaken as to all the matters on which reliance is laid on behalf of the plaintiff. Nor does Mr. Hyam suggest that, for he expressly in his evidence charges Mr. Cohen's evidence to be "absolutely false" and seems to make the same suggestion against the latter's solicitor and his day-books, which in cross-examination were alleged to have been characterised as false in another case. We are asked to disbelieve all this evidence on the strength of Mr. Hyam's denial. The learned Judge who heard the evidence has not done so, nor am I able to hold that he is in so holding wrong. The reasons which have led to that denial have, in my opinion, been correctly surmised by Mr. Justice Chitty.

Mr. Hyam, though himself a Hebrew, does not at first appear to have thought of or troubled himself about the consequences of his purchase of the Jewish Poor School

and as regards the covenant against building a mosque and temple he speaks of it as "personal to him," and Mr. Cohen who was "prejudiced." Later on,as is stated in Exhibit E., Mr. E. M. D. Cohen, the manager of the Poor School, learning of the proposed sale, went to Mr. Hyam "and had a big row with him" and so much so that the latter wished to cancel the contract. As appears from Mr. Gregory's day-book of the 29th November, Mr. Hyam called on the former and said that Mr. E. M. D. Cohen had raised obstacles in the way of his purchasing the property, "that he was quite disgusted with the whole affair", and that he would be prepared to cancel the contract. This is admitted. Correspondence then took place with Mr. Gubbay, the plaintiff, who, however, refused to cancel. On the 8th January 1913 the Solicitor's day-book shows that Mr. Hyam again called and stated that he would rather not complete his purchase "as the whole of the Jewish community were against his doing so." Mr. Hyam in his evidence refers to Mr. E. M. D. Cohen speaking of the "curses of the Jews being heaped on his head." Then on the 22nd January Mr. Hyam wrote to Mr. Gregory that he insisted on vacant possession for "I would have none of the trouble, worry and expense, not to mention the odium, for having to turn out a charitable and communal institution from premises in which it had made its home for 40 years." It appears to be this, and not the numerous objections taken later, why the defendant attempted to back out of his contract. It is true that he had previously taken an objection to the covenant running with the land but according to the evidence this objection was not persisted in. If it was, why did the negotiations hang on from November 13th, 1912, till towards the close of January 1913? It is quite clear that the plaintiff's agent was insisting on the covenant and if, as is suggested now, the point was vital to the defendant and not given up by him, the negotiations would have come to a close. That they did not, supports the plaintiff's case that the objection though taken was given up. Nor is there any evidence in support of the suggestion now made, that Mr. Hyam would not have agreed to conclude the contract before he got possession of the school premises as his money would be lying idle. Mr. Hyam in his evidence does not take this objection. The real objection which he had was that stated to Mr. Gregory and the rest is an afterthought, with a view to avoid an agreement which I hold is binding on him.

In my opinion, the appellant has established no sufficient ground for reversing the decision of Mr. Justice Chitty that the plaintiff had proved and was entitled to have specific performance of the contract pleaded.

The appellant has not, in my opinion, established grounds for the reversal of the judgment and decree against him and I would, therefore, dismiss this appeal with costs.

MOOKERJEE, J.—This appeal is directed against a decree made by Mr. Justice Chitty for specific performance of a contract for sale of land in Calcutta. The substantial question in controversy between the litigants is, whether there was a concluded contract in respect whereof specific performance may be directed by the Court. The trial Court has pronounced in favour of the plaintiff. That decision has been assailed by the defendant, and we have been invited to hold that there was no completed contract between the parties, as they contemplated a formal agreement which was never executed, and as they were not even of one mind with regard to material terms of the proposed agreement while the negotiations were in progress.

It is well settled that the fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing are merely preliminary and not understood or intended to be binding. If it is definitely expressed and understood that there is to be no contract until the formal writing is executed, there is plainly no binding agreement formed until this provision is complied with. It is also true that if all the terms of the agreement have not been settled and it is understood that these unsettled terms are to be determined by the formal contract, there is no binding obligation until the writing is executed. But if the oral agree-

ment or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing, a binding obligation is fixed on the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing. These principles, which in their application give rise to questions of considerable nicety, are illustrated by decisions of the highest authority, to some of which reference may usefully be made here. In *Chinnock* v. *Marchioness of Ely* (7), the defendant's solicitors wrote to the plaintiff, naming the price for an estate about which they had been negotiating, the plaintiff wrote a letter in which he agreed to give the price named, and then added, "I shall be obliged if you will forward me the usual contract." In reply, the defendant's solicitors wrote, "we have been instructed by the Marchioness of Ely to proceed with the sale to you of these premises. The draft contract is being prepared and will be forwarded to you for approval in a few days." Lord Westbury, L. C., held that so far the parties were in treaty merely, and that without the execution of the draft mentioned, there was no contract concluded. In *Bonnewell* v. *Jenkins* (5), the defendant's agents offered certain premises for sale. The plaintiff wrote to the agents, making an offer of £800 for the estate. The agents wrote in reply as follows:—"We are instructed to accept your offer of £800 for these premises and have asked Mr. Jenkins' solicitor to prepare contract." The Lord Justices of Appeal held that there was a concluded contract. Thesiger, L. J., said:—"The mere reference to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape, does not prevent the existence of a binding contract." In *Rossiter* v. *Miller* (8), there was much correspondence about a sale of certain lots of land, and the question arose whether the correspondence showed a completed contract without the formal draft which had been referred to in some of the letters. James, L. J., said:—"The reasonable view of the case is that the parties intended the signing of the formal contract to be a condition precedent." Coleridge, C. J., said:—"If a set of terms are agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here, a set of terms never was finally agreed to." Baggallay, L. J., said:—"The letters left the defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement." When the case of *Rossiter* v. *Miller* (4) was taken on appeal to the House of Lords, Lord Hatherley said:—"Although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement...between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, we will have this agreement put into due form by a solicitor." Lord O'Hagan said:—"The correspondence gives no colour to the suggestion that the contract was not final, and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been furnished." Lord Blackburn said:—"The mere fact that the parties have expressly stipulated that there shall be afterwards a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." In the course of the same speech, Lord Blackburn further said:—"Parties often do enter into negotiation, meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if, on seeing the result in that shape, they find they are agreed) signed and made

(7) (1865) 4 De. G. J. & S. 638; 11 Jur. (N. S.) 329; 12 L. T. (N. S.) 251; 13 W. R. 597; 146 R. R. 495; 46 E. R. 1066; 2 H. & M. 220; 34 L. J. Ch. 399.

(8) (1877) 5 Ch. D. 648; 46 L. J. Ch. 737.

binding; but that each party is to reserve to himself the right to retire, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think the parties ought not to be held bound, till they have executed the formal agreement." In *Ridgway* v. *Wharton* (2), Lord Cranworth, L. C., said:—"If parties have entered into an agreement, they are not the less bound by that agreement because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords to my mind generally cogent evidence that they do not intend to bind themselves till it is reduced into form. The circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." Lord Wensleydale said in the same case:—"These cases often occur in Courts of Law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the Statute of Frauds applying to all agreements....If the parties agree finally to be bound by any terms and then, for the sake of preserving a memorial, having agreed to be bound by the original terms, they get a document drawn up, there is no doubt that they are bound by the original terms. An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled, until those terms are settled, he is perfectly at liberty to retire from the bargain." In *Rummens* v. *Robins* (3), where an offer to sell a piece of land at a certain price was accepted, it was ruled that there was no completed contract as the letter by which the offer was made stated that there would be the usual clauses in a contract and some limitations as to the length of the title and other minor details. Knight Bruce, L. J., said:—"What are the usual clauses in a contract for the sale of land? They differ almost incessantly; they differ according to the state of the title, the conveniences, the fancies and the wishes of mankind, and the particular situation, convenience and inconvenience belonging to the estate." To the same effect are the decisions in *Von Hatzfeldt Weldenburg* v. *Alexander* (1), *Lloyd* v. *Nowell* (6), *Jones* v. *Daniel* (9), *Winn* v. *Bull* (10), *Oxford* v. *Provand* (11), *Brien* v. *Swainson* (12), *Page* v. *Norfolk* (13), *Watson* v. *McAllum* (14) and *Clark* v. *Robinson* (15). It is needless to multiply authorities, but reference may be made to the following observation of Lord Selborne in *Hussey* v. *Horne-Payne* (16):—"A contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement." Lord Cairns, L. C., in the same case affirmed the important principle that where a Court has to find a contract in a correspondence, the whole of that which has passed between the parties must be taken into consideration; a line cannot be drawn at one point of the negotiations, conducted

(9) (1894) 2 Ch. 332; 63 L. J. Ch. 562; 8 R. 579; 70 L. T. 588; 42 W. R. 687.

(10) (1877) 7 Ch. D. 29; 47 L. J. Ch. 139; 26 W. R. 230.

(11) (1868) 2 P. C. 135; 5 Moore P. C. (N. S.) 150; 16 E. R. 472.

(12) 1 L. R. Ir. 135.

(13) (1894) 70 L. T. 23.

(14) (1902) 87 L. T. 547.

(15) (1903) 51 W. R. 443.

(16) (1879) 4 A. C. 311; 48 L. J. Ch. 846; 41 L. T. 1; 27 W. R. 585.

partly by correspondence and partly at meetings between the parties, without regard to the sequel of the negotiations which may plainly show that terms of the intended agreement, of great practical importance and regarded on both sides as such, then remained unsettled and were still the subject of negotiation between them.

From these expressions of judicial opinion, it is clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. As was said in *Lyman* v. *Robinson* (17), the question in such cases always is, did the parties mean to contract by their correspondence or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound? The expression of this idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if however it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed. To determine which view is entertained in any particular case, several circumstances may be helpful, as for example, whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested or referred to during the negotiations, it is some evidence that the parties intended it to be final closing of the contract. Still, with the aid of all rules and expositions of principles, the solution of the question in concrete cases is often difficult, doubtful and sometimes unsatisfactory. A good illustration of the uncertainty inherent in the subject is afforded by the case of *Rossiter* v. *Miller* (4), where Coleridge, C. J., James, L. J., and Baggallay, L. J., were clear that there was no contract for want of a formal draft, while Cairns, L. C., Lord Hatherly, Lord Blackburn and Lord Gordon, no less able and eminent jurists, were confident in the contrary opinion. We come now to the consideration of the circumstances and correspondence in this case in the light of the principles explained.

The plaintiff Gubbay is the owner of premises, 8 and 7/1 Pollock Street and 1 Mansook Lane in Calcutta. The first of these is in the occupation of the Calcutta Jewish School as tenants at a monthly rent of Rs. 300; the others consist of a godown and a lower-roomed house. The plaintiff resides in London, and employed R. M. Cohen to sell these premises for Rs. 53,000. Cohen instructed a house-broker Owen to find a purchaser. Owen negotiated with the defendant Hyam, who was speculating in the purchase of landed property in Calcutta for the purpose of building operations. Owen appears to have intimated to Hyam that the sale would be subject to two conditions, *first*, that no temple or mosque would be built on the site, and *secondly*, that the possession of the Jewish School would not be disturbed for a year. Hyam agreed to these conditions as he interpreted them. On the 13th November 1912, Owen wrote to Gregory, the solicitor of the plaintiff, and intimated to him that he had found a purchaser of the property who was willing to pay the price demanded and had agreed not to have a temple or mosque on the site, nor to cause any nuisance to the Jewish Synagogue Bethel and also not to ask the Jewish School to vacate for 12 months from the date of execution of the conveyance. The broker added that the time to execute and complete the conveyance would be six weeks

(17) 14 Allen 242.

from the date of the contract, subject to approval of titles, and requested that confirmation by the vendor might be obtained in the course of the day, if possible. It is not quite clear on the evidence whether, before the institution of this suit, defendant was aware that a letter in the terms mentioned had been written by the broker to the solicitor. Gregory asserts that he read it out to Hyam in the presence of Owen, but the latter has no recollection of the incident; Owen, at any rate, did not show the letter to Hyam, who denies all knowledge of it before suit. Gregory wrote for instructions to Cohen, who, on the day following, verbally confirmed the arrangement, subject to the payment of Rs. 5,000 by the purchaser as deposit money. This appears from the entries in the day-book of the solicitor under dates 13th and 14th November; entries in this day-book, it may be added, were made by a clerk in the office of the solicitor at the end of each day. Up to this stage, Owen does not appear to have disclosed the name of the intending purchaser, and Hyam had not met either Cohen or Gregory. On the 15th November, there were, according to the plaintiff, four interviews between various persons in connection with the proposed transaction: three of these are said to have taken place in the office of the solicitor and one in the office of Cohen. The first interview in point of time took place in the office of Gregory, where Owen, Hyam and Gregory are alleged to have been present, but Hyam cannot recollect that this interview did in fact take place. At the second interview, which took place in the office of Cohen, there are said to have been present Owen, Hyam, Cohen and Gareh, an assistant of Cohen employed to look after the properties of Gubbay. Owen and Hyam both deny that Gareh was present when the conversation took place; according to them, Gareh was sent for by Cohen, and merely asked to accompany Owen and Hyam to the office of Gregory; this version seems probable. The third interview was in the office of Gregory, when Owen, Hyam, Gregory and Gareh were present. The fourth interview was in the office of Gregory, between the defendant, Gregory and Gareh, and the defendant, as may be expected, denies all knowledge thereof. What is alleged by the different witnesses to have taken place at these interviews appears from their depositions and the version of Gregory may also be gathered from the entry in his day-book. There is a wide divergence between the witnesses in the accounts they profess to give of what was said by the different persons at these interviews; this is not surprising, as the witnesses were endeavouring to narrate conversations which had taken place nearly fifteen months before they deposed in Court. But this much is clear that Hyam paid a cheque for Rs. 1,501 as earnest money, which Cohen and Gareh had agreed to accept, and it was arranged that Gregory should prepare an agreement to be submitted to Hyam for approval. Gregory appears to have prepared the draft agreement on that very day and sent it to Cohen for approval. Cohen returned the draft approved on the 20th November and Gregory sent it on to Hyam at once for his approval. The evidence does not show that there was any communication between the parties between that date and the 28th December when the power-of-attorney of Gubbay was received from England. Gregory informed Hyam of the receipt of the power-of-attorney and requested the return of the draft agreement with his approval. Hyam does not appear to have replied to this letter till the 15th January 1913, and in explanation of his silence, he now states that he was waiting to see whether the Jewish School would acquire the property, as the elders of the Jewish community had heard with evident concern that the property was about to change hands. On the 15th January 1913, Hyam wrote to Gregory and stated his willingness to complete the purchase subject to three conditions, *first*, that the covenant not to build a temple or mosque would be personal to him and not a covenant running with the land; *secondly*, that the purchase would not be completed for the year during which the Jewish School were to be left in possession; and *thirdly*, that interest on the balance of purchase-money would be charged at six instead of nine per cent. as stated in the draft agreement. On the same day, before this letter was received by Gregory, he wrote to Hyam offering to send title-deeds for inspection and approval. On the 17th January, Gregory replied to the letter

of Hyam dated the 15th January, accepted the proposal about the interest on the balance of purchase-money, but repudiated the suggestions about the personal covenant and the time for completion of purchase. On the 22nd January, Hyam wrote to Gregory, explained that he had understood the proposed covenant not to build and not to disturb the Jewish School in the sense indicated in his letter dated the 15th January, and stated that he must insist on vacant possession. On the same day, Gregory demanded return of the draft agreement. On the next day, Gregory wrote to Hyam again, and stated that as Hyam had declined to complete the purchase on the terms which, he alleged, had been agreed upon between the parties, there was no necessity to prolong the matter by further correspondence. The present suit for specific performance was thereafter instituted on the 8th February 1913. In these circumstances, the question arises whether there was a completed agreement between the parties as alleged by the plaintiff.

In the third paragraph of the plaint, it is stated that the agreement was made on or about the 13th November 1912 between the plaintiff through his representative and the defendant through his broker for the sale of the premises, subject to approval of title and on three special conditions. In the fourth paragraph, it is stated that on or about the 15th November, the defendant personally called, saw the solicitor for the plaintiff, confirmed the sale agreement, paid Rs. 1,001 as earnest money, and agreed that the solicitor should prepare a formal agreement in writing embodying the usual terms and conditions for sale and purchase, including the special conditions aforesaid. The case for the plaintiff, therefore, plainly is that there was a concluded agreement on the 13th November, which was confirmed two days later. A bold endeavour was made in this Court, after the conclusion of the arguments on both sides in this appeal, to obtain practically an amendment of the plaint, when the Counsel for plaintiff sought to introduce additional evidence to explain how the plaint had been originally drafted and how it had been transformed before it was filed in Court. The course attempted by the Counsel for plaintiff was so contrary to well-recognised rules of procedure that his endeavour was wholly unsuccessful and the merits of the controversy must be adjudged on the plaint as it stands, which has been accepted throughout as the basis of the investigation by the trial Court and the discussions before the Court of Appeal. When, then, was the agreement between the parties made? The Counsel for the plaintiff found this a very embarrassing question to answer. Four alternative hypotheses are possible; *first*, that the complete contract is embodied in the letter of the 13th November from Owen to Gregory; *secondly*, that the contract was verbally made on that date and that the letter embodies an imperfect narration thereof; *thirdly*, that the contract was made verbally in the course of the interviews on the 15th November; and *fourthly*, that there was never, in any stage, a completed agreement, as the parties intended that the agreement should be embodied in a written instrument which was drafted by the solicitor for the plaintiff but disapproved by the purchaser. The Counsel for the plaintiff found it difficult to make his choice among the first three alternatives, although the plaint is founded upon the first hypothesis or possibly a combination of the first and second. The Counsel for the defendant has pressed the Court to accept the fourth alternative. Mr. Justice Chitty, if I appreciate his judgment correctly, has held that there was no concluded agreement on the 13th November. In that view I concur without hesitation. The day-book of the solicitor, his evidence in Court, as also the deposition of Cohen, make it perfectly plain that there was no concluded agreement on the 13th November. Nothing had been settled at the time as to the amount of the earnest money and the date for completion; even the scope of the restrictive covenants had not been settled, nor had the question of interest on the balance of purchase-money been even mooted. In these circumstances, one can well understand why, even on the 15th November, Gregory should state in his day-book that Owen and Hyam had called to confer with him and had stated that they would call on Cohen "to settle the terms with him." This is consistent with the statement of Cohen that when on the 15th November Hyam offered to give a personal covenant not to build a mosque or temple on the site, he told him, "these are my conditions, leave or take." There is, in my opinion, no escape from the position that no agreement was concluded between the parties on the 13th November and that they

were on that date still in the stage of negotiation. The specific case made in the plaint, consequently, fails; indeed, the case as sought to be developed by the plaintiff in the course of the evidence is that the concluded agreement was made on the 15th November. It may be observed, in passing, that there is thus some force in the contention of the Counsel for defendant that the plaintiff should not be allowed to succeed on a case different from that set out in the plaint, and that the Court should refuse specific performance when there is substantial variance between pleading and proof: *Hawkins* v. *Maltby* (18), *Lindsay* v. *Lynch* (19) and *Mortimer* v. *Orchard* (20). But, assuming that the plaintiff is entitled to a decree for specific performance in the suit as framed, if he proves that the agreement was concluded on the 15th November, the question arises whether the plaintiff has established the third hypothesis previously mentioned? The answer depends principally upon an examination of the oral testimony as to what passed at the four interviews said to have taken place on that date. Nothing material happened at the first interview, of which the plaintiff has no recollection. As regards the other interviews, the witnesses are hopelessly in conflict with each other, specially as to what was said about the covenant not to build a temple or mosque on the site, and there is that absence of certainty which is fatal to a claim for specific performance: *Reynolds* v. *Waring* (21). Upon this point, the evidence of Gareh is not reliable, and it seems improbable that he should have been present throughout the interview between Cohen and Hyam: if he had been he could not have failed to notice that Hyam at the time wrote out and tendered a cheque for the earnest money. There is then a conflict between Cohen and Hyam. Cohen seeks to make out that Hyam at first pressed to make the covenant personal, but yielded ultimately, and agreed to make the covenant run with the land. Hyam denies this, and his version appears to me more probable in all the circumstances of the case. In any event, the parties agreed that Gregory would draw up a draft agreement for their approval. Hyam and Cohen both allege that each of them wanted this draft agreement to be drawn up. What then was their intention? Did they intend that the written instrument should be merely a memorial of an agreement already completed, or was it their intention that the draft should bring out clearly the points which still required consideration and must be settled before the agreement could be deemed completed? To determine the true view of the situation, we must bear in mind that important points had not been settled up to that stage. For instance it had not been determined whether the purchaser should have vacant possession. There were leases yet to run in respect of the premises not occupied by the Jewish School. There is nothing to show that Hyam was aware of the fact of these leases, their terms and conditions, though it has been asserted that he must have made enquiries into the matter and made up his mind to accept the property subject to the leases. It is well settled that the purchaser is not bound to take subject to leases and is entitled to actual possession, unless there is an agreement to the contrary: *Collier* v. *Jenkins* (22) and *Lineham* v. *Cotter* (23). Hyam would, therefore, be *prima facie* entitled to vacant possession, and this would also be essential for the building operations he had in view. The question of vacant possession, then, was obviously one of the points which would require to be settled by the written agreement. There was also the question of completion of the transaction. According to the letter of Owen to Gregory, dated the 13th November, the time to execute and complete the conveyance was six weeks from the date of the contract; this would make the written agreement essential for the conclusion of the bargain. But it is now sought to be proved by oral evidence that in the course of the interviews on the 15th November, the date for completion was fixed at the 6th January 1913. The reason for this

(18) (1867) 3 Ch. App. 188 at p. 194; 37 L. J. Ch. 58; 17 L. T. 397; 16 W. R. 209.
(19) (1804) 2 Sch. & Lef. 1; 9 R. R. 54.
(20) (1793) 2 Ves. 243; 30 E. R. 615.
(21) (1831) Younge 346; 34 R. R. 284.
(22) (1831) Younge 295; 34 R. R. 268.
(23) (1844) 7 Ir. Eq. Rep. 176.

alleged variance is not satisfactorily made out, and the story is not convincing. There were evidently also other terms which might lead to differences between the parties, though they were compendiously described under the somewhat misleading category of "usual terms and conditions of sale and purchase." What the conception of Cohen and his solicitor was about usual terms and conditions is amply made out by the draft agreement prepared later. These terms included provisions to the effect that the purchaser would take the property subject to existing tenancies, that the balance of purchase-money would be paid and the sale completed on a date different from that contained in the letter of Owen, that interest on the balance of the purchase-money would run at 9 per cent. per annum, that the sale would be effected on the authority of a special power-of-attorney from the vendor, that the costs incidental to the completion would be paid by the purchaser, that the properties would be sold subject to unspecified outgoings and easements, that there would be a right of rescission in the vendor, that there would be a covenant running with the land not to use the site for the purposes of a mosque or a temple and not to carry on any noisome or obnoxious trade or business calculated to cause nuisance or annoyance to the Jewish Synagogue, and finally, that time would be deemed of the essence of the contract. It is obvious that many, if not all, of these conditions could in no sense be regarded as usual terms and conditions for the sale of lands. In the words of Knight Bruce, L. J., they were dependent on the state of the title, the conveniences, the fancies and the wishes of the agent of the vendor. The inference seems to me to be legitimate that the parties intended the written draft to be the consummation of their negotiations which were to be treated as concluded only upon the final execution of the written instrument. It is immaterial that the purchaser was prepared to modify the condition as to payment of interest before the negotiations were broken off or that he was prepared to waive one or other of the conditions named in the draft, during the trial of the suit. The vital point is that the fact that so many terms still remained undetermined, is a sure index that the contract had not yet been concluded. This view fits in with the mode in which Cohen dealt with the earnest deposit; Cohen admits that he did not cash the cheque, but returned it to Gregory to keep it with him until he heard further from Gubbay; this is consistent only with the hypothesis that Cohen at that stage believed that there was no completed agreement and that it was still open to Gubbay to transfer the property to the Jewish School if he so desired. The inference that there was no concluded agreement is strengthened when we remember that the parties were really not of one mind with reference to material elements of the transaction. Cohen thought that the property would be transferred subject to existing leases; Hyam was under the impression that he would have vacant possession. Cohen thought that there should be a covenant binding the land for all time to come to the effect that no temple or mosque would be built on the site nor any business carried on there which might prove a nuisance to the Jewish Synagogue. Hyam was under the impression that as he would build on the site at once, a personal covenant from him was all that was required. There was ample room for misunderstanding, as is clear from the looseness of the language used by the parties, and if there was ambiguity in any of the conditions of sale in restriction of the rights of the purchaser, the condition would be construed most strongly against the vendor: *Seaton* v. *Mapp* (24). Thus, even in the day-book of the solicitor, in the entry of the 13th November, we find the proposed covenant described in one place as "that the purchaser would not use the premises as a temple or mosque" (language appropriate to a personal covenant by the purchaser) and in another place as "that the premises must not be used as a mosque or temple" (words appropriate to indicate a covenant running with the land). After anxious consideration of all the circumstances of the case, I do not see any escape from the conclusion that there was no concluded contract either on the 13th or the 15th November, and that as the parties intended the exe-

(24) (1846) 2 Collyer 556; 70 R. R. 324; 63 E. R. 859.

cution of the draft to be the final step in their negotiations, there was no concluded agreement capable of specific performance. In my opinion, this appeal should be allowed, the decree for specific performance discharged and the suit dismissed with costs throughout.

*Appeal allowed.*

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MADRAS HIGH COURT.

CIVIL APPEALS NOS. 303 AND 304 OF 1913.

SECOND CIVIL APPEAL NO. 1873 OF 1913.

September 24, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

R. M. M. S. T. VYRAVAN CHETTY *alias* SOMASUNDARAM CHETTY—DEFENDANT—APPELLANT IN APPEALS NOS. 303 AND 304 OF 1913 AND RESPONDENT IN S. A. No. 1873 OF 1913

*versus*

SRIMATH DEIVASIKAMANI NATARAJA DESIKAR—PLAINTIFF—RESPONDENT IN APPEALS NOS. 303 AND 304 OF 1913 AND APPELLANT IN S. A. No. 1873 OF 1913.

*Civil Procedure Code (Act V of 1908), O VIII, r. 6—Equitable set-off, whether can be pleaded—Suit for rent time-barred—Claim for unliquidated damages, whether can be set up.*

The Code of Civil Procedure does not prevent a defendant from claiming an equitable set-off in respect of unliquidated damages claimable in connection with the transaction on which the suit is brought; but the plea is available only in respect of sums legally recoverable. [p. 80, col. 2; p. 81, col. 1.]

Therefore, in a suit by the landlord for rent in respect of certain *faslis* it is not open to the defendant to set up by way of equitable set-off an unliquidated claim for damages, which has become barred by limitation, arising from obstruction to quiet enjoyment in previous years. [p. 80, col. 2; p. 81, col. 1.]

*Chidambara Mudaliar* v. *Krishnaswami Pillai*, 28 Ind. Cas. 221; 28 M. L. J. 285; 2 L. W. 241; *Fitton* v *Macclesfield*, 1 Vernon 293; 23 E. R. 474; *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 607; 9 R. R. 119, followed.

*Parasurama Pattar* v. *Venkatachalam Pattar*, 21 Ind. Cas. 701; 25 M. L. J. 561; (1914) M. W. N. 198; *Ramdhari Singh* v. *Permanund Singh*, 21 Ind. Cas. 716; 19 C. W. N. 1183, referred to.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suits Nos. 42 of 1913 and 90 of 1911.

Second appeal against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 585 of 1911, preferred against that of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suit No. 154 of 1910.

Mr. *A Krishnasuami Aiyar*, for the Appellants in A. S. Nos. 303 and 304 of 1913 and for Respondent in S. A. No. 1873 of 1913.

Mr. *S. Srinivasa Aiyangar*, for the Respondents in A. S. Nos. 303 and 304 of 1913 and for Respondent in S. A. No. 1873 of 1913.

JUDGMENT.

WALLIS, C. J.—The appellant in these cases, when sued for rent in respect of *faslis* 1318 and 1319, set up by way of equitable set-off a claim against his lessor the plaintiff in respect of disturbance of possession in *faslis* 1313 and 1314. It is well settled in this Court that claims for unliquidated damages may be raised by way of equitable set-off if they arise out of the same transaction as the plaintiff's cause of action, but I cannot agree that in a case like this, such claim can be so set up even if it was barred at the date of the suit. It would certainly not be equitable or in accordance with the equitable principles administered by the Court of Chancery to allow the provisions of the Statute of Limitations to be evaded in this way. The authorities are referred to in the judgment of my learned brother which I have had the advantage of reading. If *Chidambara Mudaliar* v. *Krishnaswami Pillai* (1) is inconsistent with the view, I am unable with great respect to follow it. As regards the present case, the defendant was in full possession and enjoyment for the *faslis* in respect of which rent is sued for. Cross-claims on account as between mortgagor and mortgagee, trustee and *cestui que trust* and the like stand on a different footing and I do not wish my observation to be taken as applicable to such cases. Otherwise I agree in the order proposed by my learned brother.

SESHAGIRI AIYAR, J.—The point for decision in these appeals is whether in a suit by the lessor for rent, it is open to the lessee to plead by way of set-off an unliquidated claim for damages which has become barred by limitation, arising from obstruction to quiet

(8) 28 Ind. Cas. 221; 28 M. L. J. 285; 2 L. W. 241.

enjoyment in previous years. My answer is in the negative. Under Order VIII, rule 6, of the Code of Civil Procedure, a set-off is not permissible if the money is not *legally recoverable.* This would include all unsustainable claims whether barred by limitation or otherwise. It is no doubt true that this rule applies in terms only to what is known as legal set-off. Although in this country it has been held in numerous cases that the Code of Civil Procedure does not prevent the defendant from claiming an equitable set-off in respect of unliquidated damages claimable in connection with the transaction on which the suit is brought, I think that, on the principle that equity follows the law, the plea will be available only in respect of sums *legally recoverable.* Lord North states the principle very clearly in *Fitton* v. *Macclesfield* (2): "For when the Legislature had fixed the time at law, it would have been preposterous for equity (which by its own proper authority always maintained a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And, therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar." Lord Redesdale in *Hovenden* v. *Lord Annesley* (3) expresses himself with equal clearness: "It is said that Courts of Equity are not within the Statutes of Limitations * * * I think it is a mistake in point of language, to say that Courts of Equity act merely on analogy to the Statutes; they act in obedience to them. * * *

* * * * * * * *

I think, therefore, Courts of Equity are bound to yield obedience to the Statute of Limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions." The Indian Legislature, it seems to me, has recognised this in Order XX, rule 19, of the Code of Civil Procedure. Clause (1) of that rule regards the claim to set-off as a plaint in a cross suit, and provides for a decree in favour of the defendant. Clause (3) says that this rule is applicable to the plea of set-off under rule 6 of Order VIII or *otherwise*, thereby indicating that equitable set-off is also within the rule. I am, therefore, of opinion that as the defendant's claim was barred by limitation, the plea of equitable set-off was not open to him. An exception to this rule has been recognised in some cases; where there is a fiduciary relationship between the parties, as in the case of trustee and *cestui que trust*, and there is accountability, even barred claims may be taken into account in passing the final accounts. This exception has been extended in some of the decided cases in India to mortgages, presumably on the ground that there is accountability between the parties. See *Parasurama Pattar* v. *Venkatachalam Pattar* (4); *Chidambara Mudaliar* v. *Krishnaswami Pillai* (1) and *Ramdhari Singh* v. *Permanund Singh* (5). It is not necessary to say now whether these cases have been rightly decided. I see no reason for extending the exception to suits between a lessor and a lessee.

Regarding the memorandum of objections, we think that the defendant is only entitled to simple interest at 9 per cent. but not to compound interest. The plaintiff is entitled to interest at 6 per cent. on the arrears of rent due to him from the dates on which they fell due. We are also of opinion that the defendant is not entitled to interest on the sum of Rs. 5,130 found in the previous litigation to be binding on the *mutt*, prior to the death of Thandavaraya Desikar. The decree must be modified by awarding interest only from *fasli* 1312. These conclusions are applicable to Second Appeal No. 1873 of 1913. Subject to this modification, the second appeal is dismissed. Parties will pay and receive proportionate costs in the memorandum of objections to the two appeals and in the second appeal.

*Appeals partly dismissed; Decree modified.*

(2) 1 Vernon 293; 23 E. R. 474.

(3) 2 Sch. & Lef. 607 at p. 630; 9 R. R. 119.

(4) 21 Ind Cas. 70 ; 25 M. L. J. 561; (1914) M. W. N. 198.

(5) 21 Ind. Cas. 716; 19 C. W. N. 1183.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 4153 OF 1913

July 12, 1915.

*Present:*—Mr. Justice Chitty and Mr. Justice Richardson.

NIRAS PURBE AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Musammat* TETRI PASIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 41—Wife selling husband's property during his absence—Wife entered as owner—Proper inquiry, effect of.*

Where during the absence of a person on pilgrimage, his wife sold his land which before his departure had been mortgaged by her with his consent and the purchaser before the purchase had on enquiries learnt that the wife's name was registered in the landlord's *sherista*:

*Held*, that the requirements of section 41 of the Transfer of Property Act were carried out and that the husband was entitled neither to recover possession nor to redeem the mortgage which had passed to the hands of the purchaser by reason of his having paid it off after the purchase.

Appeal from a decision of the District Judge, Darbhanga, dated the 8th November 1913, reversing that of the Officiating Munsif, Darbhanga, dated the 26th June 1913.

Babu *Umakali Mukerjee* (with him Babu *Chandra Sekhar Banerjee*), for the Appellants.

Babu *Jitendra Nath Roy*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff whose suit has been dismissed by the District Judge, reversing the decree of the Munsif. The plaintiff was possessed of a piece of land in Darbhanga town. His case was that he left home on pilgrimage in 1901 and that his wife remained in possession of the land, but that on his return from pilgrimage in 1911 he found that his wife had conveyed the property to the defendants Nos. 1 to 4 on 25th July 1901 and had died in June 1902. He claimed to recover the land from these defendants on the ground that his wife had no power to sell to them. On the finding of fact, however, arrived at by the learned District Judge, it appears that the plaintiff has really no case. He admits that he allowed his wife to mortgage the property for Rs. 115 in 1894 in favour of Doman Panjiar. The plaintiff's case is that that mortgage was executed before his departure on pilgrimage, and that that was done by his consent. He, therefore, at that time expressly consented to his wife acting as the ostensible owner of the property. On whatever date he went on pilgrimage, it was certainly on 4th July 1901 when his wife *Musammat* Chulhya sold the property to defendants Nos. 1 to 4. The plaintiff says that that did not operate as a sale to those defendants, inasmuch as his wife had no right to convey; and his case as made before us is that he should at least be allowed to redeem the mortgage which was passed to the hands of the defendants by reason of their having paid it off some five years after their purchase. This contention, however, is of no avail, having regard to the finding of the Judge on the evidence which was given in the case. It was in evidence that the defendant Chhathoo Pasi enquired at the Raj *sherista* and found that *Musammat* Chulhya's name was registered in the *sherista* and that the Raj *patwari* also told him that her name was so entered. It cannot, therefore, be said that the requirements of the proviso to section 41 of the Transfer of Property Act have not been carried out in this case. The transferee made enquiries at the proper quarter to ascertain whether *Musammat* Chulhya had power to make that transfer. The Judge no doubt had this evidence in his mind when he said that the defendant was, in his opinion, a *bona fide* purchaser for value, without notice, actual or constructive, of any defect in his vendor's title. The Judge may not be quite correct in having said that the defendant was not bound to look beyond the mortgage-bond in order to ascertain whether *Musammat* Chulhya was the real owner of the property or not. As a matter of fact we find that the defendant did not stop there, but did make further enquiries. No doubt the Judge had this in his mind when he arrived at the finding. We must accept that finding as correct. The appeal must, therefore, be dismissed with costs.

*Appeal dismissed.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2275 TO 2278 OF 1914.

October 27, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SARAKHI ABDUL RAHIMAN TARAGAN AND ANOTHER—DEFENDANTS—APPELLANTS IN ALL

*versus*

MUHAIDIN PATHUMMAL BIVI AND ANOTHER—PLAINTIFFS—RESPONDENT IN S. A. NO. 2275 AND 2276 OF 1914

PATHUMMAL BIVI—PLAINTIFF—RESPONDENT IN S. A. NOS. 2277 AND 2278 OF 1914.

*Limitation Act (IX of 1908), Sch. I, Art. 120—Suit by a tenant-in-common for share of the family property—Debts due to family collected by one co-sharer—Plaint, amendment of—Civil Procedure Code (Act V of 1908), O. VI, r. 17.*

In suits for partition, administration and the like suits which do not necessarily arise out of any wrongful act on the part of the defendant, the right to sue accrues day by day so long as the right to the suit property exists. [p. 85, col. 1.]

*Mohabharat Shaha* v. *Abdul Hamid Khan*, 1 C. L. J. 73 at p. 76, referred to.

A Muhammadan having died intestate his two daughters brought a suit in July 1911 against their step-brothers for partition of the family properties. The lower Appellate Court allowed the plaint to be amended by claiming also a share in certain sums received by the defendants from the mortgage-debtor of their father in 1904 and awarded such share:

*Held*, (1) that the amendment was rightly allowed, and that the defendants having already set up the plea that they spent much more than the plaintiffs' share in these amounts for the plaintiffs themselves, no further opportunity could be given them for adducing fresh evidence; [p. 84, cols. 1 & 2.]

(2) that the plaintiffs being entitled to the property as tenants-in-common with the defendants, their claim to a share in the amount received by the defendants on account of debts due to the family was not barred by limitation; [p. 85, col. 2.]

*Marian Beeviammal* v. *Kadir Meera Saib Taragan*, 29 Ind. Cas. 275; *Khadersa Hajee Bappu* v. *Puthen Veetil Aiyissa Umma*, 6 Ind. Cas. 50; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447; 34 M. 511, followed.

*Abdul Gaffar* v *Nur Jahan Begam*, 29 Ind. Cas 347; 37 A. 434; 13 A.L. J. 486; *Amina Bibi* v. *Najm-un-nissa Bibi*, 27 Ind Cas. 712; 13 A. L. J. 255; 37 A. 233, referred to.

Second appeals against the decrees of the District Court of Tinnevelly, in Appeal Suits Nos. 39, 56, 38 and 47 of 1914, preferred against the decree of the District Munsif of Tinnevelly, in Original Suits Nos. 259 and 260 of 1911.

Mr. *M. D. Devadoss*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *N. A. Krishnier*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—These four connected second appeals have arisen out of two connected suits brought by three Mussalman ladies—one of the suits was brought by two sisters against their two step-brothers and their mother for partition of the properties of their father (including the accretions to the said properties) and the other suit was by the mother of the plaintiffs in the first suit against her said step-sons (the same defendants Nos. 1 and 2) for her share. The father died in February 1898 and these suits were brought in July 1911.

The lower Appellate Court modified the order of the Court of first instance in the plaintiffs' favour on the plaintiffs' two appeals and dismissed the two appeals of the defendants Nos. 1 and 2 preferred to the lower Appellate Court against those portions of the decrees of the District Munsif which were in the plaintiffs' favour. Hence the defendants have now filed these four second appeals. The step-sisters and the step-mother of the appellants have also filed two memoranda of objections in two of the four second appeals, because the lower Courts did not give them their shares in the house standing on the site in Schedule I and also gave certain vague directions regarding the mode of partition of that site.

The Second Appeals Nos. 2276 and 2278 may be disposed of at once. In these two second appeals, the defendants Nos. 1 and 2 contend that the plaintiffs ought to have been made liable for their shares of the debts alleged by the defendants to be family debts and also of the expenses alleged to have been incurred by the defendants out of their own pocket for the marriage expenses of their step-sisters. Both the lower Courts have found that the marriage expenses were incurred out of the profits of the plaintiffs' shares in their father's properties

and that the alleged family debts either do not exist or were not incurred for purposes binding on the plaintiffs. These are findings of fact which are binding upon us in second appeal. Further, the learned District Judge says that "the findings of the District Munsif as to the debts were not seriously attacked" before him. These second appeals, therefore, are dismissed with costs.

The two remaining Second Appeals Nos. 2275 and 2277 are directed against the award to the plaintiffs of their shares in two sums of Rs. 1,000 and Rs. 900, which were received by the defendants Nos. 1 and 2 from the mortgage-debtors of their father in 1904 and 1909 respectively. The attack is based on three grounds:—

(1) That as the plaintiffs did not claim any shares in the amount of Rs. 1,900 in their plaints as originally framed but claimed only shares in certain immoveable properties alleged to have been purchased with the aid of the Rs. 1,900, the lower Appellate Court was wrong in allowing the plaints to be amended by claiming a share in the sums themselves and in awarding such shares (the plaintiffs having failed to prove that the immoveable properties were purchased with the aid of the Rs. 1,900).

(2) That even if the amendment were properly allowed, the lower Appellate Court ought to have granted to the defendants Nos. 1 and 2 a further opportunity to meet the plaintiffs' case after such amendment.

(3). That the plaintiffs' claims for shares in the sum of the Rs. 1,900 are barred by limitation.

I think there is nothing in the first two contentions. The amendments were, in my opinion, rightly allowed (Order VI, rule 17). The defendants Nos. 1 and 2 in the 12th paragraph of their written statement contended that much more than the value of the plaintiffs' shares in these amounts and in the other properties of their father had been spent for the plaintiffs. The 11th issue also was framed on this plea of the defendants and they let in all their evidence on that issue. I agree with the remark of the lower Appellate Court that "it was quite open to them" (that is, the defendants Nos. 1 and 2) "to have shown already what they did with these moneys and I am afraid it would be nothing but a direct incitement to perjury if I allowed them to adduce fresh evidence at this stage."

Coming to the *third* ground of attack, so far as the Rs. 900 received by the defendants Nos. 1 and 2 in 1909 is concerned, the suits cannot be barred by limitation as they were brought in 1911. Mr. Devadoss, therefore, fairly admitted during the concluding portion of his argument that his plea of limitation should be confined to the sum of Rs. 1,000 received by the defendants Nos. 1 and 2 in 1904.

As regards this sum of Rs. 1,000 the Full Bench decision in *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (1) is binding upon me. The following observations occur in that judgment: "In the case of a Muhammadan dying intestate, the estate is at once vested in the heirs as *tenants-in-common*"..... ..... "The answer to the question referred" (namely, what is the Article applicable to a suit by one of several Muhammadan heirs for a share of the intestate's shares) "must be that Article 120" is the Article applicable "when the property is moveable property."

Article 120 provides a period of six years' limitation for a suit for which no period of limitation is provided elsewhere in the First Schedule (which First Schedule relates to suits) and the time from which the period begins to run is mentioned as "when the right to sue accrues."

The next question, therefore, which has to be considered is whether the right of the plaintiffs to sue their Mussalman co-heirs for their (the plaintiffs') share of the intestate's properties accrued within six years of this suit. If the phrase "the right to sue accrues" be interpreted as meaning "the right to sue *first* accrues", there can be no doubt that the plaintiffs' right to recover their shares in the Rs. 1,000 accrued in 1904 as soon as the defendants Nos. 1 and 2 received the money from the debtors and the present suits brought in 1911 would, therefore, be barred.

(1) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288 8 M. L. T. 4; (1910) M. W. N. 447.

In *Mohabharat Shaha* v. *Abdul Hamid Khan* (2), Mookerjee, J., says at page 76, "if we are called upon in any concrete case to decide the question" (namely, whether the provisions of the Limitation Act do or do not apply to suits for partition, administration, construction of Wills, public charities, and apportionments of rent), "we might possibly hold that such suits are not beyond the scope of the Limitation Act, but that in each case, the right to sue accrues every moment during the whole of the time, that the right to the property continues to exist; for instance, the liability to be partitioned is one of the incidents of joint property and a co-owner has the right to sue for partition at every moment of the whole period during which he continues to be co-owner. Indeed, it has been held in more than one case to be found in the books that Article 120 and section 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation." These observations are, no doubt, *obiter* for the question, which had to be decided in that case, was whether a declaratory suit brought more than six years after the denial of the legal character sought to be declared by the suit was barred or not; and it was held that where the suit is based on a wrong or injury which is in the nature of a completed act, that is, where the wrong is not a continuing one in the eye of the law, limitation begins to run from the date of the wrong and the question whether the right to sue is a continuing one is irrelevant. However, it is clear from that case that the learned Judges did make a distinction between suits for partition, administration and the like suits which do not necessarily arise out of any wrongful act on the part of the defendant and other suits which are necessarily based upon such a wrong. In the former class of suits, the right to sue accrues day by day so long as the right to the suit property exists. In the recent case of *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (3), decided by Sankaran Nair and Oldfield, JJ., the following remarks occur: "The defendants having taken up possession of the property *as tenants-in-common*, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit." That was a similar case to the case before us and the learned Judges held that the plaintiffs' claim was not barred, though the moveables (namely, cash and sovereigns of the value of more than Rs. 25,000) in which she (the plaintiff) claimed a share had come into the defendants' (co-heirs') hands more than 20 years before suit.

This question of limitation is not, however, at all free from difficulty. The Allahabad High Court in the case reported as *Abdul Gaffar* v. *Nur Jahan Begum* (4) has taken the view that Article 62 applied to a similar case. [See also *Amina Bibi* v. *Najm-un-nissa Bibi* (5)] But I think I am bound by the decision of *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (1) and *Marian Beeviammal* v. *Kadir Meera Sahib Taragan* (3). I would, therefore, hold that the claims of the plaintiffs for their shares in the Rs. 1,000 are not barred by limitation. The result is that these two Second Appeals Nos. 2275 and 2277 should also be dismissed with costs.

Coming to the memoranda of objections, we must accept the finding by the lower Courts that the houses on the sites in Schedule I were built with the self-acquired funds of defendants Nos. 1 and 2 and that the plaintiffs acquiesced in the erection of the buildings found on that site.

The objections are, however, maintainable in so far as they attack the vague reference in the District Munsif's decree to the Partition Act. The decree in each suit says that "as regards house-sites in Schedule I, steps be taken under the Partition Act, IV of 1893, in execution." What precise steps were intended to be taken, or directed to be taken, is not clear. In the Munsif's judgment, the following vague words occur: "Under these circumstances and especially as the defendants Nos. 1 and 2 own more than a half share in the items" (that is, the house-sites in Schedule I),

(2) 1 C. L. J. 73 at p. 76.
(3) 29 Ind. Cas. 275.
(4) 29 Ind. Cas. 347; 13 A. L. J. 686; 37 A. 434.
(5) 27 Ind. Cas 712; 37 A. 233; 13 A. L. J. 255.

"and it is inconvenient to divide the sites after removing the buildings, I decide to take action under the Partition Act, as requested by the learned Vakil for the defendants Nos. 1 and 2." The Partition Act contains only 10 sections. The provisions of the Act empower a Court to direct a sale of properties sought to be divided if a division of the property itself by metes and bounds cannot reasonably or conveniently be made. It seems to me that in this case, a sale of the sites alone without the houses would lead only to further litigation between the purchaser at such a sale and the defendants Nos. 1 and 2 and that it is not the most convenient way of effecting partition. But the Civil Procedure Code in Order XXVI, rule 14, clause 1, empowers the Court to authorise the Commissioner, who is appointed before a final decree for partition is passed, to award sums to be paid to one or more of the sharers for the purpose of equalising the value of the shares. Order XX, rule 18, clause 2, further empowers the Court in its preliminary decree to give such further directions as may be required to effect the most equitable partition. I would, therefore, modify the decrees of the lower Courts in Suit No. 259 of 1911, by omitting the clause "that as regards the house sites in Schedule I, steps be taken under the Partition Act, IV of 1893, in execution, and by substituting for the clause 'and the plaintiffs do recover 14/48th share of the value of the house sites above said" the following, namely, "that the Commissioner to be appointed before the final decree is passed be authorised to award 14/48th share of the value of the house sites in Schedule I to the plaintiffs for the purpose of equalising the value of the shares, allowing the defendants Nos. 1 and 2 to take the sites themselves exclusively." A similar modification with the necessary variation as to the fractional share will be made in the decree in the other suit. There will be no order as to costs in the memoranda of objections.

NAPIER, J.—I agree. I think that we must give a broad construction to the words "right to sue accrues" in an "omnibus" Article like 120. The specific Articles contain various different starting points of limitation and doubtless if the Legislature had succeeded in providing for every class of suit, words more suited to each suit would have been used and not this general language. In this case we are entitled to treat this right as a continuing right to sue from day to day. Any other construction would work the greatest injustice.

*Appeal dismissed; Decree modified.*

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CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL No. 273 OF 1915.
November 24, 1915.
*Present*:—Mr. Justice Richardson and Mr. Justice Imam.
MEJAJENNESSA BIBI—DEFENDANT—APPELLANT
*versus*
SHEIK DIDARY—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 10, cl. (2)—Appeal rejected—Appeal to High Court, whether lies from an order refusing to set aside an order rejecting appeal—Revision, whether lies from refusal to review.*

No appeal lies from an order refusing to set aside an order rejecting an appeal under Order XLI, rule 10, clause (2), Civil Procedure Code, 1908. [p. 88, col. 1.]

*Firoz Begam* v. *Abdul Latif Khan*, 30 A. 143; A. W. N. (1908) 53; 5 A. L. J. 103; 3 M. L. T. 221 approved.

A High Court ought not to interfere in revision with the order of a lower Appellate Court determining that in its view there was no good ground for a review of its order rejecting an appeal under Order XLI, rule 10, clause (2), Civil Procedure Code, 1908. [p. 88, col. 1.]

*Semble.*—An application for restoration of an appeal rejected under Order XLI, rule 10, clause (2), Civil Procedure Code, 1908, may be treated as an application for review of the order rejecting the appeal. [p. 87, col. 1.]

Appeal against the order of the District Judge of Dacca, dated the 16th of March 1915.

Babu *Rajendra Chandra Guha*, for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This matter arises out of an appeal which was filed in the lower Appellate Court on the 9th September 1914. On a subsequent date the respondent applied that the appellant should be directed to give security for costs and, on the 20th November 1914, an order was made requiring the appellant to furnish security

for the costs which had been incurred in the first Court and the costs which might be incurred in the Appellate Court. This security was directed to be furnished by the 30th November 1914. As the learned Judge of the Court below observes in his order of the 16th March 1915, practically six extensions of the time were given to the appellant to furnish the security required from him. However, the security was not furnished and on the 4th January 1915, the Judge passed an order which is in effect an order rejecting the appeal under Order XLI, rule 10, clause (2), Code of Civil Procedure. Then on the 18th February 1915, the appellant presented an application for the restoration of the appeal to the file. That application, the learned Pleader who now appears for the appellant argues, is to be treated as an application for review of the preceding order of the 4th January 1915. So far we may agree with him. Unfortunately the learned District Judge on the 5th February 1915 without notice to the respondent passed an order restoring the appeal on condition that the appellant deposited the security demanded in cash. The requisite amount was afterwards deposited and on the 13th March, the appeal came on for hearing. On that day the respondent challenged the order of the 5th February on the ground that it had been made without notice to him. The learned Judge held, by the judgment complained of dated the 16th March, that this contention was correct and regard being had to the terms of the first proviso of rule 4 of Order XLVII, Code of Civil Procedure, we are unable to say that the view taken by the learned Judge was wrong. The position there is that the order of 5th February 1915 is not binding on the respondent. The argument on behalf of the appellant on that state of things comes to this that if the order is to be vacated as an order not binding on the respondent or is to be treated as null and void, he is entitled to a proper order on his application dated the 1st February 1915. He contends that the learned District Judge in the order of the 6th March did not deal with the merits but merely decided that he had no power to review the order of the 4th January 1915 after that order had once been made and that that view was inconsistent with the decision of the Privy Council in the case of *Balwant Singh* v. *Daulat Singh* (1). Reading the order as a whole, however, it does not appear to us that the learned Judge intended to say that he had no power to review an order made under Order XLI, rule 10, clause (2), Code of Civil Procedure. In every case of course the power of a Court to review an order depends upon the circumstances of the case; that is to say, the circumstances may be such in a particular case that no application for review can be successfully made. In such a case it is possible for the Judge to say that he has no power to review the order, not because the jurisdiction is lacking but because there is no ground on which an order for review can be properly made. It seems to us that it was in that sense that the learned District Judge referred to his power of review in the present case. The conclusion at which he seems to have arrived is that he could find no good ground for reviewing his order of the 4th January 1915. If that is the conclusion to which the learned District Judge came, it is a sufficient answer to the contention that no order has been passed on the merits of the application of the 1st February 1915. The learned District Judge clearly had that application in his mind when he said that no reasons had been suggested before him for holding his order rejecting the appeal wrong in any way or liable to review. If the application of the 1st February 1915 was not explicitly mentioned, the order made on the 16th March 1915 was in substance an order determining that there was not good ground for acceding to that application. In that view of the matter, it is impossible to us now to make an order in the appellant's favour. The case comes to us in two ways. An appeal was filed on the 16th March 1915 and at the same time a Rule was obtained from this Court upon the respondent to show cause why the order referred to should not be set aside. The appeal is clearly from an order refusing to set aside an order rejecting an appeal under Order XLI, rule 10, clause (2), Code of Civil Procedure.

( ) 13 I. A. 57; 8 A. 315.

That no appeal lies from such an order was decided by a Bench of the Allahabad High Court in the case of *Firozi Begam* v. *Abdul Latif Khan* (2). We see no reason to differ from the view there taken and the appeal is accordingly dismissed. As to the Rule, if the order of the 16th March 1915 is, as in our opinion it is, an order determining that in the view of the District Judge there was no ground for a review of the order of the 4th January 1915, it is clearly an order with which this Court ought not to interfere in the exercise of its revisional jurisdiction. The Rule must consequently be discharged. We make no order as to costs either in the appeal or in the Rule.

*Appeal dismissed; Rule discharged.*

(2) 30 A. 143; A. W. N. (1908) 53; 5 A. L. J. 109; 3 M. L. T. 221.

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1726 OF 1913.

May 15, 1915.

*Present*:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

HARBHAJ MAL—DEFENDANT—APPELLANT

*versus*

DIWAN CHAND—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 120—Award, suit on, limitation for—Award not signed by parties, if binding.*

A suit based on an award is governed by Article 120, and not Article 113 or 115, of Schedule I of the Limitation Act. [p. 89, col. 1.]

An award even in the absence of the signatures of the parties, is binding on all who had agreed to make reference to arbitration. [p. 89, col. 1.]

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 31st July 1913, decreeing the claim in part.

Bakhshi *Tek Chand* and Lala *Manak Chand*, for the Appellant.

Mr. *Monohar Lal*, for the Respondent.

JUDGMENT.

CHEVIS, J.—The parties in this case are rothers owning property in Calcutta and mritsar. They fell out on the death of their father, and appointed an arbitrator who gave an award. The present claim is based largely on that award. Plaintiff sues now for Rs. 5,355-9-6 and the lower Court has given a decree for Rs. 1,044-14 0 and proportionate costs. The defendant appeals, and the plaintiff has filed cross-objections. (Stamp on the amount claimed in cross-objections, *viz.*, Rs. 2,345-8 0 has been made up.)

Full details of the claim and of the facts of the case have been given in the judgment of the learned Subordinate Judge, and it is unnecessary to repeat them. It may be noted that the plaintiff's claim is made up of the following eight items:—

| | Rs. | A. | P. | |
|---|---|---|---|---|
| (*a*) | 615 | 12 | 0 | disallowed by the lower Court. |
| (*b*) | 606 | 0 | 0 | Rs. 298 allowed. |
| (*c*) | 1,607 | 10 | 6 | disallowed. |
| (*d*) | 701 | 0 | 0 | allowed. |
| (*e*) | 45 | 14 | 0 | allowed. |
| (*f*) | 170 | 0 | 0 | disallowed. |
| (*g*) | 1,284 | 4 | 0 | disallowed. |
| (*h*) | 325 | 0 | 0 | disallowed. |

Neither side attacks the finding as regards items (*e*) and (*f*). The finding on each of the other items is attacked by one or other or by both parties, and we shall have to deal with each of these items separately.

The first point to consider, however, is the general one, whether the claim so far as it is based on an award is within time. The award is dated 8th December 1906, the suit was filed on 4th August 1912. The lower Court relying on *Sornavalli Ammal* v. *Muthayya Sastrigal* (1) holds that Article 120 of the Schedule to the Limitation Act applies. For the defendants it is urged that as the parties both signed the award, it is not only an award, but also an agreement, and that Article 113 or 115 applies. Appellant's Counsel owns that *Radha Kishen* v. *Delhi Cloth and General Mills Company* (2) is authority for holding that where the award is not signed by the parties Article 120 applies. But he points to a remark on page 125 of this ruling, where we read: "It is possible that if the parties sign the arbitrator's award in

(1) 23 M. 593; 10 M. L. J. 208.

(2) 16 Ind. Cas. 804; 32 P. R. 1913; 265 P. W. R. 1912; 259 P. L. R. 1912.

token of their acceptance and thus merge the award into a new contract between themselves, the claim might be regarded as one for compensation for breach of contract within the meaning of" Articles 113 and 115. Counsel also quotes *Kuldip Dube* v. *Mahant Dube* (3). That ruling, however, does not seem to us to help him. What was there held was that the particular suit before the Court was not a suit for specific performance, and that Article 113 was not applicable, but that *either Article* 116 *or* 120 *was*. Which of the two applied was left unsettled. In fact, as Counsel admits, there is no ruling which lays down that an award blossoms into a contract when signed by the parties. Counsel can only point to certain remarks which he owns are *obiter dicta*. We see no sufficient reason for regarding the award as anything higher than an award. For the parties to sign an award is satisfactory to all concerned, as giving all a confidence that all will act up to the provisions of the award honestly, but even in the absence of such signature, the award is binding on all who agreed to refer to arbitration. We consider, therefore, that Article 120 applies to the case so far as it is a claim based on the award.

Turning now to the first item of Rs. 615-12-0, which has been disallowed by the lower Court, the plaintiff disputes the lower Court's findings in cross-objections. The details of this sum of Rs. 615-12-0 are to be found on page 7 of the paper-book. Plaintiff's Counsel gives up the claim except as regards the third item to be found on page 7, *viz.*, an item of Rs. 508-6-0 and out of this item he only claims Rs 365-14 as a short realization from the Raja of Garipur. But on its being pointed out to him that the award says that if plaintiff realizes from the Raja any amount less than what is stated in the award the defendant shall pay *half* the deficiency (see page 30, line 9), Counsel limits his claim to only $\frac{1}{2}$ of Rs. 365- 4 0. On page 74 is to be found the Raja's evidence. The answer to clause 4 clearly shows that there was a short realization of Rs. 365-14-0. For defendant it is urged that the Raja knows nothing personally and his Diwan should have been examined. But the Raja gives evidence based on a record of the accounts kept by his Diwan, and the Diwan would not show in this account *less* than he actually paid to creditors, for to do so would mean a personal loss to himself. The defendant could have examined the Diwan had he thought fit to do so. Then it is urged that plaintiff should have recovered the full amount of his bill from the Raja. But it is not always easy to recover in full from Rajas. We have no doubt plaintiff got as much as he could, and as there is a proved deficiency of Rs. 365-14-0 we consider defendant must pay half of this sum, *i.e.*, Rs. 182-15-0 as provided in the award.

The next item is one of Rs. 606 out of which the lower Court has allowed Rs. 298. Here both sides attack the finding of the lower Court.

The items making up a total of Rs. 606 are to be found on page 8 of the paper-book. (It should be noted that the fifth item is here shown as Rs. 40 realized from Bhawan Mohan Rai, but the correct amount should be Rs. 43-8.) The lower Court has allowed the first item of Rs. 298 only, an item said to have been realized from Lachmi Narain. The evidence of Lachmi Narain (page 67) shows that the firm of which plaintiff and defendant were members got a decree against him, and that he paid the amount to one Babu Sri Krishna Chatterjee, Pleader. The certificate printed on page 34 of the paper-book certainly shows that it was Kesho Das, defendant's son, who got the decree against Lachmi Narain transferred to Kendrapara for realization and no doubt Babu Sri Krishna Chatterjee realized the money there. But what Mr. Chatterjee did with the money is not shown. We do not suppose he stole it, but the proof that it reached the defendant's hands is entirely wanting. Mr. Chatterjee has not been examined. It is further not proved that the decree was satisfied after the award, for the decree was transferred to Kendrapara in July 1903, some five months before the award. On what date Lachmi Narain paid the money to Mr. Chatterjee we do not know. Kesho Das, when examined with regard to this decree, shows (or pretends to show) a remarkable ignorance or forgetfulness, and we do not feel inclined to trust too much to

(3) 11 Ind. Cas. 705; 34 A. 43; 8 A. L. J. 1138.

him, but at all events there is nothing in his evidence to prove that he or his father even got this money.

Plaintiff lodges cross-objections, urging that the full decree against Lachmi Narain was Rs. 760-10-6 (see details of the decree given in the certificate on pages 34 and 35) out of which, according to the award plaintiff was to get Rs. 488-8 and half the remainder. So plaintiff claims Rs. 326-2-3 more on account of this decree in addition to the Rs. 298 allowed by the first Court. But as we find that, though it is proved that Lachmi Narain paid the money to Mr. Chatterjee, there is no proof that it ever reached defendant's hands, we must disallow this part of the claim altogether.

Plaintiff in cross-objections claims a further sum of Rs. 43-8, urging that according to the award he had to get a sum of Rs. 158-4 from one Bhawan Mohan Rai, out of which he only got Rs. 114-12. (For evidence of Bhawan Mohan Rai, see page 68.) But why plaintiff realized less than the full sum is not explained. If he remitted part of the claim, as is often done by creditors, how can defendant be held liable?

With regard to this part of the case, therefore, *i. e.*, with regard to item (*b*) defendant succeeds and plaintiff fails, and we shall disallow the claim to item (*b*) *in toto*.

Next comes item (*d*), a sum of Rs. 701 which the lower Court has allowed. This part of the case seems to us clearly within time. This item is claimed not on the award, but on account of a payment made by plaintiff of a debt owed jointly by plaintiff and defendant. Here Article 61 applies, and the claim is within time (see Punjab Loans Limitation Act). The debt in question is Rs. 1,007-10-6 of which plaintiff claims half, and adding interest the claim comes to Rs. 701. The plaintiff says the debt was one which was left by the father of the parties at his decease. The defendant, who appeals as regards this item, denies that the debt was due as stated. With regard to this debt there is the evidence of *Musammat* Dhalli (page 62). With regard to this, defendant's Counsel contends that the debt was not due by the father of the parties but was borrowed by plaintiff's wife *Musammat* Nihali. But one woman often goes to another to borrow on behalf of her male relations. It is urged on defendant's behalf that as there is evidence that the arbitrator (see page 65) went to enquire about this debt it should have figured in the award. But the award gives particulars only of debts due to the parties, not of debts due by the parties. The evidence of *Musammat* Dhalli is that plaintiff's wife took the money for her father-in-law, and the debt, or at least the payment of it, figures in the books of the firm. And the evidence of defendant on this part of the case (see page 71) seems very shaky; he does not deny that his father had an account with *Musammat* Dhalli, but pleads ignorance, and when confronted with an entry in the *bahi* says he cannot say if it is in his father's handwriting. We think the lower Court's decision on this part of the claim is correct and we can see no reason why plaintiff should not get interest. The award (paragraph 12) clearly provides for interest.

Next comes the item of Rs. 45-14 allowed by the lower Court. This item defendant had to pay, as provided by paragraph 19 of the award (page 33). Defendant pleads that he has paid it. Defendant has no receipt but relies on the evidence of Manak Chand (page 81). But Manak Chand speaks of Rs. 26 odd being paid in cash and the rest being made up in furniture, whereas defendant (page 61) says he paid all in cash. Defendant says the receipts were sent to Madho Parshad, the arbitrator, but Madho Parshad says he has no receipts.

Here too we think the lower Court's decision is correct.

The next item is the claim for Rs. 1,284-4, disallowed by the lower Court. Plaintiff claims this as half share of property missing from the Calcutta shop. What apparently happened was that plaintiff left the goods in that shop in charge of defendant's son Kesho Das, after valuing the stock. Some days later plaintiff had a lock put on the shop. Kesho Das, of course, had a lock on all the time. Later on when the shop was opened the stock was found deficient. This is plaintiff's case, and he claims the value of half the deficiency. Plaintiff says he left Rs. 12,100 stock in the shop, and only got goods to the

extent of Rs. 4,288 on partition. But if there was a deficiency as alleged, how is defendant liable any more than plaintiff? The goods were left in charge of Kesho Das, and he would appear to be liable if any one. If he made away with them why should the defendant be held liable? Kesho Das is defendant's son, but the family was a joint Hindu family, and it is not at all clear that Kesho Das was agent for defendant more than for plaintiff at the time when plaintiff left the goods in his charge. No doubt Kesho Das acted as his father's agent later on at the partition, but that is another matter. It must be noted that defendant was not in Calcutta between the time when plaintiff left the goods there and the time when plaintiff had his lock put on. We find no sufficient proof that defendant was liable for the alleged deficiency.

The last item is Rs. 325, which plaintiff claims as half the cash balance left in the Calcutta shop. The *rokar bahi* certainly shows this sum, but there is no proof as to what became of it. If this money was left in Kesho Das's charge there is no proof that it found its way into defendant's hands. This part of the claim must fail along with the claim to the preceding item of Rs. 1,284-4.

The result is that we allow the plaintiff's cross-objections to the extent of Rs. 182-15 and we allow the defendant's appeal to the extent of Rs. 298 and we reduce the decree to one for Rs. 929-13. The plaintiff's claim has failed to the greater part, and we fail to see why his decree should carry costs. The whole affair is a sad family squabble which would have been more creditably settled out of Court. We leave the parties to bear their own costs in both Courts.

*Appeal partly allowed.*

## MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 25 AND 32 OF 1914.

October 18, 1914.

*Present*:—Sir John Wallis, Kt, Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN A. A. O. No. 25 OF 1914

K BALASUBRAHMANIA IYER—

DEBENTURE CLAIMANT No. 28—

APPELLANT.

IN A. A. O. No. 32 OF 1914

S. GOPALAKRISHANA IYER—

DEBENTURE CLAIMANT No. 20—

APPELLANT

*versus*

S. KANDASAMI PILLAI AND ANOTHER—

PETITIONER AND OFFICIAL LIQUIDATOR—

RESPONDENT IN BOTH.

*Companies Act (VI of 1882), s. 68—'Officers of the Company,' meaning of—Charge in favour of officers, legality of—Floating security, nature of—Debenture-deed—Provision allowing Company to carry on business till happening of certain event—Business, if automatically determines on happening of the event.*

A charge created by the Directors of a Company on its assets when the Company is still a going concern is not illegal; but a charge created in favour of its own officers is void when not registered under section 68 of the Indian Companies Act. [p. 92, col. 2; p. 94, col. 2.]

*Wright* v. *Horton*, 12 A. C. 371; 56 L. J. Ch. 873; 56 L. T. 752; 35 W. R. 17; 52 J. P. 179; *Patent Bread Machinery Company, Ex parte Valpy and Chaplin*, 7 Ch. Ap. 289; 26 L. T. 228; 20 W. R. 347; *In re South Durham Iron Company, Smith's case*, 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845, followed.

A person who ceases to hold any office at the time of creation of a charge is not "an officer of the Company" within the meaning of section 68 of the Indian Companies Act and a charge created in his favour is not illegal. [p. 94, col. 2.]

When a deed of debenture, after charging all the assets of the Company by way of a floating charge, provides that notwithstanding such charge the Company should have power to carry on business and deal with the assets until the happening of a certain event, the right to carry on the business is not determined automatically by the happening of the event indicated but continues until the debenture-holder intervenes to show his desire that it should cease. [p. 93, col. 2.]

*Edward Nelson & Co., Ltd.*, v. *Faber & Co.*, (1903) 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21; 10 Manson, 427; *Evans* v. *Rival Granite Quarries Co. Ltd.*, (1910) 2 K. B. 979; 79 L. J. K. B. 970; 54 S. J. 580; 26 T. L. R. 5 9, followed.

It is of the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. [p. 93, col. 1.]

*Government Stock and other Securities Investment Company* v. *Manila Railway Company*, (1897) A.C. 81; 66 L. J. Ch. 102; 75 L. T. 553; 45 W. R. 353 followed,

Appeal against the order of the District Court of Tinnevelly, dated the 22nd December 1913, in Execution Petition No. 42 of 1913 in Original Petition No. 307 of 1911.

Messrs. *S. Srinivasa Aiyangar* and *R. Narayanaswami Aiyar*, for Appellant in C. M. A. No. 25 of 1914.

Messrs *A. Sundaram* and *S. Parthasarathy Aiyar*, for Appellant in C. M. A. No. 32 of 1914.

Mr. *C. Padmanabha Aiyangar*, for the Respondents in both.

These appeals and appeals against orders Nos. 24 and 29 to 31 of 1914 coming on for hearing on the 22nd and 23rd April 1915, and having stood over for consideration till the 30th April 1915, the Court (the Chief Justice and Tyabji, J.) delivered the following

JUDGMENT.

WALLIS, C. J.– These are appeals from an order of the District Judge of Tinnevelly in Original Petition No. 307 of 1911 in the matter of the winding-up of the Swadeshi Steam Navigation Company, Limited. By an order of the 27th April 1912 made in the winding-up, the District Judge had held that the charges created by a resolution of the Directors in favour of claimants Nos. 23 and 16, the Secretary and Manager of the office of the Company, were not rendered invalid by the provisions of the explanation to section 68 of the Indian Companies Act, 1882, and that they did not amount to a fraudulent preference. The claimants then put in the petitions now under appeal for payment out of the assets of the amounts of their charges, when the debenture-holders of the Company, whose rights as secured creditors had not been considered in the previous application, appeared and opposed the applications on the ground that their floating security had become fixed or crystallised and had attached on the assets of the Company before the creation of these charges. The District Judge having overruled these objections, the debenture-holders have appealed and have raised three contentions in support of their case.

In the *first* place, they rely on the express provision of the debenture deed which, after charging all the assets of the Company by way of floating charge and providing that notwithstanding such charge the Company should have power to carry on business and deal with the assets of the Company until default should have been made for six calendar months in the payment of the principal, an event which admittedly happened, provided that from and after the happening of such default the liberty and authority hereinbefore given (to carry on business) shall forthwith cease and determine and the charge created by this debenture shall and may be immediately enforceable.

In this connection it must be borne in mind that the right of the Company to create a charge of this kind is incident to its right to carry on business, and it is quite clear that no such charge can be created after the Company has actually stopped business or after the debenture-holder has intervened under the powers reserved to him to stop the business by obtaining the appointment of a Receiver or petitioning for the winding-up of the Company. The difficulty arises when, as in the present case, the Company has been allowed to go on carrying on business and creating charges after the happening of any of the events which determined its right to carry on business. In cases of this kind the Courts have been disposed to hold, at any rate when the language of the deed admits of it, that the right to carry on business is not determined automatically by the happening of one of the events indicated, but continues until the debenture-holder intervenes to show his desire that it should cease, as by applying for a Receiver. In *Government Stock Investment and other Securities Company* v. *Manila Railway Co.* (1), Lindley, L. J., pointed out the hardship and injustice that must arise to third parties by the debenture-holders allowing the business to go on after the happening of the specified event and then turning round and treating all the transactions as void under the debenture deed, and held that such a result was so unreasonable and undesirable that in the absence of an express provision to that effect in that case, it ought not to be held to have been in the contemplation of the parties. On appeal the House of Lords in *Government Stock and other Securities*

(1) (1895) 2 Ch. 551; 64 L. J. Ch. 740.

*Investment Company* v. *Manila Railway Co.*, (2) took the same view and Lord Macnaughten laid down generally that it was of the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.

There was no difficulty in applying that doctrine to the facts of that case, but there is more difficulty when, as in the debenture in *Edward Nelson & Co., Ltd.* v. *Faber & Co.* (3), which is in terms identical with the debenture here except in a particular which does not seem very material, it is expressly provided that on the happening of a specified event the liberty and authority of the Company to carry on business shall forthwith cease and the charge created by the debenture shall and may be immediately enforceable. In this case it would almost seem as if these words had been expressly inserted to take the case out of the decision in *Government Stock and other Securities Investment Company* v. *Manila Railway Co.* (2) and to determine the Company's authority to carry on business automatically without any intervention of the debenture-holders. The Courts, however, lean strongly against such a contention and Joyce, J., has rejected it in *Edward Nelson & Co.* v. *Faber & Co.* (3), a decision which was not appealed against and has been since cited without comment in some cases and most textbooks, though it is omitted from the last edition of Buckley on Companies. In a still later case, *Evans* v. *Rival Granite Quarries Co., Ltd.* (4), Fletcher Moulton, L. J., after referring to the leading cases as to the incidents of a floating security of this kind, observed that in all of the cases the Courts realised that it was impossible to come to any other conclusion than that it was intended to leave the Company free to carry on its business until the time arrived when the debenture-holders enforced their security upon the Company's assets and undertaking. And the learned Lord Justice went on to say, not without reference I cannot help thinking, to Nelson's case which had been cited in the argument, that though in the earlier cases the actual words of the particular document may have influenced the Courts, it early became clear to the Judges that this did not depend on the special language used but upon the essence and nature of a security of this kind. On the other hand, Lord Justice Buckley in the same case seems still to have relied on the language of the document and speaking of the various ways in which crystallisation may happen and the security become fixed, he said: "A Receiver may be appointed, or the Company may go into liquidation and a liquidator be appointed, or any event may happen which is defined as bringing to an end the license to the Company to carry on business."

In this state of the authorities I hesitate to differ from the decision of Joyce, J., reinforced as it is by the observations of Fletcher Moulton, L. J., although it is not strictly binding on me

As regards the *second* point, the appellants do not seem to have relied in the lower Court on the fact that the Company had stopped business before the granting of the charges and the evidence taken by the District Judge in the earlier case sufficiently shows that it had not.

The *third* point is that the charges having been created in favour of officers of the Company—one of them is Secretary and the other had been appointed, by resolution, Manager of the Company's office—and not having been registered as required by section 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the explanation to that section. This objection was taken by the liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice Oldfield. It was again expressly taken in the lower Court in this case, but was apparently not argued in view of Mr. Oldfield's decision at an earlier stage. It is not expressly mentioned in the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision we think we ought to enforce the provisions of

(2) (1897) A. C. 81; 66 L. J. Ch. 102; 75 L. T. 553; 45 W. R. 353.

(3) (1903) 2 K. B. 367; 72 L. J. K. B. 771; 89 L. T. 21; 10 Manson, 427.

(4) (1910) 2 K. B. 979; 79 L. J. K. B. 970; 54 S. J. 580; 26 T. L. R. 509.

the section if they are applicable. The Companies Act of 1862, whilst providing penalties for failure to register mortgages and charges, did not provide that unregistered mortgages and charges should be void, but there were decisions that it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases pointing out that they imposed an additional penalty not warranted by the Statute and his view was finally upheld in 1887 by the House of Lords in *Wright* v. *Horton* (5). At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the Legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Patent Bread Machinery Company, Ex parte Valpy and Chaplin* (6), Lord Justice James after observing that the mortgage was not void for want of registration went on: "But as it is the duty of the officers of the Company to see that every charge specifically affecting property of the Company, is registered, I am of opinion that no Director, Manager, or other officer of the Company, can avail himself of a charge which is not registered," and he applied the doctrine to a person who had acted as Solicitor to the Company. The same language was used by the Court of Appeal in *In re South Durham Iron Company, Smith's* case (7), where Sir George Jessel interpreted the decisions as meaning that a Director, Manager or officer cannot avail himself of the security. These were all cases in which the officer had taken a charge in respect of advances made by him to the Company and not for arrears of salary due to him.

The explanation to section 68, which appears to be intended to reproduce the ruling of Lord Justice James in *Patent Bread Machinery Company, Ex parte Valpy and Chaplin* (6), as far as possible in his own language, is as follows:—

"Omission to register under this section a mortgage or charge does not render it invalid, But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered." The words "as such" present some difficulty. If they mean "as officers of the Company," it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company, unless it be that they cannot take such mortgages or charges when they are officers of the Company which is what was laid down in the cases referred to. It is, I think, clear that the Legislature was anxious to reproduce not only the substance, but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation.

The only other point is whether both claimants were officers of the Company. The Secretary admittedly was. The other claimant denies that he was an officer of the Company within the meaning of the section, and although he would *prima facie* appear to be such, yet as he appears to rely on special facts which he has not had an opportunity of proving, we have decided to call for a finding as to whether he was an officer of the Company within the meaning of the section when he obtained the charge. Fresh evidence may be taken. The finding should be submitted in one month after the re-opening of the lower Court after the mid-summer vacation. Seven days will be allowed for filing objections.

The appeals against orders Nos. 24 and 29 to 31 of 1914 are allowed as against the 23rd claimant with costs.

TYABJI, J.—I agree.

In compliance with the order contained in the above judgment, the District Judge of Tinnevelly submitted the following

FINDING.— * * * * *

My finding is that claimant (if he ever was an officer of the Company) had ceased to be so at the time when the charge was created. No doubt a formal order of dismissal is not forthcoming, but Exhibit I shows that the Directors considered him to have left the Company's service before January 1910. Admittedly he had nothing to do with the office after

(5) 12 A.C. 371; 56 L. J. Ch. 873; 56 L. T. 782; 36 W. R. 17; 52 J P. 179.

(6) 7 Ch. Ap 289; 26 L. T. 228; 20 W. R. 347

(7) 11 Ch D. 579; 48 L. J Ch. 480; 40 L. T. 572; 27 W R. 845.

January 1st and Exhibit B indicates that he was leaving it from that date.

Appeals against orders Nos. 25 and 32 of 1914 coming on for final hearing after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the appeals. Costs are not claimed.

*Appeal against order in favour of Secretary allowed; Appeal against order in favour of Manager dismissed.*

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 449 OF 1913.

November 30, 1913.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

BANS GOPAL AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

SHEO RAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Cause of action—Limitation Act (IX of 1908), s. 31—Regulation XVII of 1806, cl. 8.*

A mortgage executed in 1866 for six years contained a provision that the property mortgaged should not be transferred so long as any principal or interest remained unpaid and that if it was transferred or if the money due to the mortgagees was not paid, the latter without waiting for the expiry of the six years might bring a suit to recover principal and interest and might also get possession by completion of sale. A part of the property was transferred in 1867:

*Held*, that the cause of action arose in 1867 and a suit brought in 1910 to enforce the right was barred by limitation. [p. 96, col. 2; p. 97, col. 1.]

First appeal from the decision of the Subordinate Judge of Cawnpore, dated the 2nd October 1913.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

Mr. *B. E. O'Conor* (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for foreclosure of a mortgage said to have been made on the 25th of February 1866. The principal sum alleged to have been secured was Rs. 3,000. The interest claimed is Rs. 16,000: in all Rs. 19,000. The suit was instituted in August 1910, a few days before the expiration of the special period of grace allowed by section 31 of the Limitation Act, IX of 1908. This provision was passed in consequence of the injustice supposed to be likely to occur by reason of the decision of their Lordships of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). There can be very little doubt that this enactment led to the institution of many doubtful mortgage suits. It is not alleged that from the date of the mortgage to the institution of the suit any payment had ever been made upon foot of principal or interest secured by the mortgage. The plaintiffs were unable even to produce the original mortgage-deed, but no question on this point is before us in the present appeal. The claim is at least an exceedingly stale one. The Court below has held the suit barred by limitation. The copy of the mortgage, which has been allowed to be given in evidence, will be found at page 7 of the appellant's book in First Appeal No. 382 of 1911. The translation is not particularly accurate. It begins by a statement that the mortgagor has borrowed Rs. 3,000 and has mortgaged the property for six years under conditions specified therein. The first clause provides that interest on the Rs 3,000 at the rate of 1 per cent. per mensem should be paid every year in the month of *Baisakh* for six years. It goes on to provide that the mortgagor is to remain in possession and to pay the Government revenue. Clause 3 deals with redemption. Clause 4 provides that the mortgagor may make payments on account of principal in the manner specified therein. Clause 5 provides that if after the expiry of the six years anything remains due to the mortgagees, the mortgagees may forthwith enter into possession of the mortgaged property and realise the principal and interest. Clause 6 provides that the property shall not be transferred so long as any principal or interest remains unpaid and that if it is transferred, or if the money due to the mortgagees is not paid, the latter without waiting for the expiry of the six years may bring a suit to recover principal and interest and may also get possession by "completion of

(1) 30 M. 426; 17 M L. J. 444; 4 A. L. J. 625; 9 Bom. L. R. 1104; 6 C. L. J. 379; 11 C. W. N. 1005; 34 I. A. 187 (P. C.); 2 M. L. T. 333; 17 M. L. J. 444.

sale." The translation "possession by foreclosure" is not strictly accurate. The real meaning is that the mortgagees will get the possession as that of a purchaser. It will be seen from the terms of this mortgage that the purchasers were to remain in possession until some (one or more) of the events mentioned in the deed occurred. This mortgage seems more like a "simple mortgage" within the definition of such a mortgage in section 58 of the Transfer of Property Act than a mortgage by conditional sale. Save for the words in clause 6, the mortgagor does not appear "ostensibly to sell" the mortgaged property, words which occur in the definition of a "mortgage by conditional sale" as defined in the same section. The appellants contend that they were never entitled to get possession as "*owners*" of the property until they had taken proceedings under clause 8 of Regulation XVII of 1806, that they could not take any such proceedings until the expiration of six years from the date of the mortgage, that consequently time could not possibly begin to run against the mortgagees until the year 1872, that as the law stood at that time (in the year 1872) they had 12 years within which they might institute a suit for possession or take proceedings for foreclosure, that Act XV of 1877, Article 147, gave them a right to sue for foreclosure within 60 years of the time of the money becoming due, that on the passing of Act IV of 1882 (the Transfer of Property Act) proceedings under that Act for the realization of the mortgage debts were substituted for the provisions of clause 8 of Regulation XVII of 1806, and that consequently their suit having been brought within the period prescribed in section 31 of Act IX of 1908, the suit was within time.

We must mention here that both the events mentioned in the mortgage, which would give the mortgagee a right to "possession as a purchaser," happened in the year 1867. Part of the mortgaged property was transferred in July 1867, and as already mentioned, there has never been any payment on foot of principal or interest. The appellants contend that this can make no difference and rely upon the decision of their Lordships of the Privy Council in *Kishori Mohun Roy* v. *Ganga Bahu Debi* (2). It is true in that case their Lordships of the Privy Council held that "the stipulated period" mentioned in section 8 of Regulation XVII of 1806 was the particular period mentioned in the deed and that proceedings under that section could not be brought before the expiration of that period, even where there was a contract in the deed of mortgage making, *without reference to redemption*, the whole principal lent become due upon failure to pay interest at a certain time. We need hardly mention that the terms of the mortgage in the present suit are wholly different. Under clause 6 the mortgagees were, in the events which have happened, entitled at once to bring a suit or get possession without waiting for the expiry of the stipulated period. Furthermore, the condition that the property shall not be transferred was very different from a mere stipulation that the money should become due if default was made in the payment of interest. The transfer of the property prejudiced the security for the loan. We think that under the circumstances of this case we must hold that time began to run in July 1867. Proceedings might then have been taken for possession in the Civil Court or for foreclosure under the Regulation within 12 years.

In principle the circumstances of the present case seem to be undistinguishable from the case of *Srinath Das* v. *Khetter Mohun Singh* (3). In that case there was a mortgage, dated the 17th of November 1865. Proceedings had been taken under the Regulation in the year 1873 but only the mortgagor was served with the prescribed notices. The contending defendants who were purchasers from the mortgagor had not been served. Their Lordships state at pages 700 and 701 of the report: "The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to their Lordships to be as follows: the foreclosure was, as against Hari Narayan perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they, therefore, remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed

(2) 23 C. 228; 22 I. A. 183 (P. C.).

(3) 16 C. 693; 16 I. A. 85 (P. C.); 13 Ind. Jur. 182; 5 Sar. P. C. J. 315.

possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if Article 135 is the one applicable to the case, the 12 years there allowed ran out in the month of August 1878 at the latest."

Their Lordships were referring to Article 135 of Act XV of 1877. That Article provides that a suit by a mortgagee for possession of immoveable property must be brought within 12 years from the time when the mortgagor's right to possession determines. The plaintiffs in the suit had been contending that Article 147 of the same Act was applicable to the case. That Article provides that a suit for foreclosure by a mortgagee might be brought within 60 years from the time when the money became due. It is quite clear that their Lordships held that Article 135 was the Article applicable. We think that the present appeal is concluded by this authority.

We may also refer to the cases of *Shyam Chandra Singh* v. *Baldeo* (4) and *Ram Dawar Rai* v. *Bhirgu Rai* (5), where numerous rulings are referred to. We think that the cause of action accrued to the plaintiff in July 1867, and consequently the present claim was barred within 12 years from the expiration of that date. We dismiss the appeal with costs including in this Court fees on the higher scale.

*Appeal dismissed.*

(4) 17 Ind. Cas. 467; 10 A. L. J. 522.
(5) 15 Ind. Cas. 240; 10 A. L. J. 538.

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## MADRAS HIGH COURT.

[SECOND CIVIL APPEAL NO. 2305 OF 1913.

October 15, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

KRISHNA BHATTA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

UDAYAVAR SRINIVASA SHAMBAGU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Trusts Act (II of 1882), ss. 44, 45, 71, 76—Deed of trust vesting management of temple in five trustees—Resignation of one, effect of—Suit by four, whether maintainable—Death of one pending suit—Suit, whether can be continued by remaining three—Tender of mortgage-money not made—Interest, whether can be charged.*

A deed of trust vesting the management of a temple in five trustees provided that suits on behalf of the temple must be filed by them jointly, and laid down the procedure for filling vacancies caused by the death or resignation of any trustee. One of the trustees having resigned, the other four brought a suit on behalf of the temple and one other trustee died pending the appeal to the High Court:

*Held*, (1) that the resignation operated as a valid discharge of the trustee from his duties, and there being no contrary declaration in the instrument of trust, the trust property passed to the others; [p. 98, col. 2; p. 99, col. 2.]

(2) that the suit instituted by the remaining four trustees was maintainable, no one having been appointed in place of the trustee who resigned; [p. 99, col. 1.]

(3) that on the death of one of the trustees in the course of the suit, it could be validly continued by the other three. [p. 99, col. 2.]

*Santhalva* v. *Manjanna Shetty*, 7 Ind. Cas. 754; 8 M. L. T. 213; (1910) M. W. N. 608; 20 M. L. J. 814; 34 M. 1, distinguished.

Where there is no tender of the mortgage amount, interest is rightly chargeable. [p. 99, col. 2.]

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 49 of 1912, preferred against that of the Court of the Subordinate Judge of South Canara, in Original Suit No. 27 of 1911.

Mr. *K. Ramanath Shenai*, for the Appellants.

Messrs. *J. L. Rosario*, *K. P. Madhava Rao*, and *K. P. Lakshmana Rao*, for the Respondents.

This second appeal coming on for hearing on the 2nd and 3rd February 1915, and the case having been ordered to be proceeded with without the legal representatives of the 4th respondent reported to be dead (*vide* Admission Court's order dated 13th November 1914), the Court (Ayling and Tyabji, JJ.) made the following

ORDER.—The objection taken before us is that the plaintiffs were not competent to sue on behalf of the temple under clauses 16, 21 and 22 of Exhibit I, the award under which they hold the office of trustees of the temple. It is argued that these clauses entitle only a majority of the five trustees to sue. The clause relating to powers to sue is clause 21, which empowers a suit to be brought even though some of the trustees

are opposed to it, on the condition that the trustees unwilling to sue are made a party defendants. But clause 21 refers to clause 16 and it is argued that by implication, unless the requirements of clause 16 are satisfied, a suit cannot be properly instituted. Assuming that this contention is correct, that clause 16 applies to the institution of suits, we do not consider that its provisions are fatal to the present suit. Clause 16, in our opinion, provides

(1) that if the trustees are unanimous their acts will bind the temple;

(2) if the trustees are divided, then if the majority includes one of the senior *muktessors* the act of the majority will bind the temple;

(3) if, however, one or more of the trustees who do not form such a majority as is above referred to choose to do any act against the consent of the other trustees, they shall do so at their own risk as to costs.

The present suit, therefore, cannot fail merely because it is not instituted by such a majority.

The next objection by the appellants is that in no case can a suit be validly instituted on behalf of the temple to which all the trustees are not parties (if not as plaintiffs then as defendants) and that unless there are five trustees, the temple cannot be properly represented. It is admitted that at the time of the institution of the suit there were only four trustees as parties to the suit. Since the appeal to this Court was filed, another trustee (the 4th respondent) has died and we have now only three trustees before us. We think that it would be most convenient and just in the circumstances of this case to allow the respondents three months' time during which they may take steps to have two more trustees appointed and made parties to this appeal. Should the respondents get such trustees appointed and made parties and should the trustees so appointed and made parties consent to be bound by the proceedings leading up to this second appeal, some of the formal objections taken before us may not be material. We do not express any opinion upon the effect that the addition of the fresh parties may have on the result of the appeal, but take the course to which we have referred in order to meet the appellants' objection that unless there are five trustees to represent the temple they cannot get a valid discharge.

This second appeal again coming on for hearing on 11th and 12th of October 1915 after expiry of the time allowed for appointment of new trustees, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The respondents have not had additional trustees appointed for the suit temple, as provided in this Court's order of 3rd February 1915; and consequently the question of whether the temple is properly represented in this suit has now to be determined on the merits.

Appellants raise two contentions (1) that the alleged resignation of the 5th *moktessor* does not operate so as to discharge him from his duties as trustee, and

(2) that even if the 5th defendant has ceased to be trustee, the temple cannot be represented by the remaining trustees alone.

On the *first* point it is contended that in accordance with the principles of the Trusts Act II of 1882, which admittedly is not applicable in this case, the resignation of the 5th *muktessor* is invalid, and reference is made to sections 44, 45 and 71 of that Act. Under section 71 (*c*) a trustee may be discharged by such means as may be prescribed by the instrument of trust; paragraph 14 (*b*) of the award (Exhibit I) clearly provides for vacancies being caused by resignation. We can, therefore, see no reason why the resignation, which has been accepted in Exhibit F, should be invalid and should not operate as a discharge.

As regards the *second* point, it is argued that unless there are five *moktessors* in existence and impleaded in the suit, the temple cannot be properly represented, because the award or trust-deed prescribes that the number of trustees shall not be less than five. In support of this proposition, we are referred to *Santhalva* v. *Manjanna Shetty* (1). That case was decided entirely on the construction of the language of Act XX of 1863, and it was held that the provisions of sections 7 and 10 of that Act were obligatory and imperative, and that consequently when a Temple Committee consisted

(1) 7 Ind. Cas 754; 34 M. 1; 8 M. L. T. 213; (1910) M. W. N. 608; 20 M. L. J. 814.

of three members, and one died, the remaining two members do not form a Committee, and cannot perform the functions of the Committee. This interpretation of the Act was dissented from in *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee* (2), but we are not concerned with the interpretation of Act XX of 1863 in this case, and the appellants' Counsel relies upon the principles upon which *Santhalva* v. *Manjanna Shetty* (1) was decided and especially upon the dictum of White, C. J.: "The question whether provisions of this sort are obligatory and imperative or are merely directory must be determined with reference to the words of the particular enactment or the particular settlement in which they occur." We are thus thrown back upon the language of Exhibit I and we can find no obligatory and imperative provision as to the minimum number of *moktessors* required to represent the temple. No doubt five *moktessors* are appointed under Exhibit I, two first *moktessors* and three managing *moktessors*, and the procedure for filling vacancies caused by death or resignation is provided for [paragraph 14 (*a*) and (*b*)]. No provision is made for the possibility of the family of either of the first *moktessors* becoming extinct and it is easily conceivable that the election to a vacancy among the managing *moktessors* might be infructuous. In either case the vacancy could not be filled up under the provisions of Exhibit I and, therefore, it is difficult to suppose that the framers of Exhibit I intended that the minimum number of *moktessors* should always be five and yet omitted to make proper provision for securing that number. No doubt in paragraph 21, there is a provision that a suit must be filed by the five *moktessors* jointly, and another provision that the five *moktessors* must join together and defend a suit against the temple. There is no other passage in the award supporting the appellant's proposition that the temple cannot be represented unless there are five *moktessors*. To read such a provision into the award would be productive of great inconvenience and difficulty and consequently we do not think that the language of paragraph 21 can be considered to be obligatory and imperative, but is merely directory. This being so, the principle of section 76 of the Trusts Act is applicable, and that lays down that on the discharge of one of several co-trustees the trust survives and the trust property passes to the others, unless the instrument of trust expressly declares otherwise. We, therefore, hold that the temple was properly represented in this suit.

A further objection is taken to the award of interest but it is perfectly clear, as found by both the lower Courts, that there was no tender of the mortgage amount and consequently interest is rightly chargeable. The second appeal is dismissed with costs.

*Appeal dismissed.*

(2) 12 Ind. Cas. 147; 39 C. 304.

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 217 OF 1914.

November 1, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

VUDATHU KAMALANABHAN AND ANOTHER—PLAINTIFFS NOS. 1 AND 2—APPELLANTS

*versus*

VUDATHU SATTIRAZU AND OTHERS—DEFENDANTS AND PLAINTIFF NO. 3—RESPONDENTS.

*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 93—*'Attempt to enforce a forged instrument', meaning of—Application by a widow for succession certificate as heir to her deceased husband—Claim as legatee not set up—Application, whether an attempt.*

A person can be said to "attempt to enforce a forged instrument against the plaintiff" within the meaning of Article 93 of Schedule I of the Limitation Act, only when he institutes proceedings in which the genuineness of the document is directly put in issue and to which the person against whom it is sought to be enforced is a direct and necessary party. [p. 101, col. 1.]

An attempt to register a document cannot be treated as an attempt to enforce it against other person's rights. [p. 101, col. 1.]

*Achyut Rayapa Shanbhag* v. *Gopal Subbayya Shanbhag*, 30 Ind. Cas. 399; 17 Bom. L. R. 635, followed.

A widow applied for a succession certificate, basing her right to collect the debts due to her deceased husband expressly on the ground that she was his widow and as such entitled to the certificate under the Hindu Law and only incidentally mentioned a Will of her deceased husband, but did not base her right upon her position as a legatee. In a suit by the reversioners of the husband to declare the Will forged:

*Held*, that the mention of the Will in the petition was not an attempt within the meaning of Article 93, Schedule I to the Limitation Act, 1908. [p. 101, col. 1.]

Appeal against the decree of the District Court of Godaveri, in Original Suit No. 12 of 1912.

FACTS.—Plaintiffs, reversioners to the estate of the husband of the 1st defendant, a widow, sued in 1912 in the District Court of Godaveri to declare that a Will set up by the widow as having been executed in her favour by her husband in 1907 is a forgery. The 1st defendant, *i. e.*, the widow, pleaded that the suit is barred by limitation under Article 93 of the Limitation Act, having been instituted more than three years from the date of her application for a certificate of succession in which she made mention of the Will. The District Judge held that the mention of this Will in the certificate proceedings was "an attempt to enforce the Will against the plaintiff" within the meaning of Article 93 of Schedule I of the Limitation Act and dismissed the suit. The present appeal is against that decree.

Messrs. *P. Narayanamurthi* and *P. Somasundaram*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

JUDGMENT.—This case has unfortunately been decided on a preliminary point and not tried on its merits. The result is that it has to go back to be tried over again. We know that the particular Judge in this case has a heavy district and is a conscientious officer and we do not suggest it has been done for the purpose of saving trouble.

The point taken here was that this suit was barred by limitation. The suit was brought by the plaintiffs, who were the next presumptive reversioners to the estate of one Virraju, deceased. He left a widow and the widow produced in due course of time a Will, dated 20th June 1907, purporting to convey absolutely the whole of Virraju's properties to his widow. He died in August 1907, and in October 1907 the widow applied under the Succession Certificate Act for a certificate to enable her to collect the debts owing to her deceased husband and in accordance with the machinery set up by the Act, she put in a petition stating her rights to collect those debts and obtained a certificate. In her petition she sets out that she is the widow of the late Virraju and states that he has no heirs nearer than herself. She concludes her petition for the certificate by basing her right to collect the debts expressly on the ground that she is her husband's widow and entitled as such to the certificate under the Hindu Law. That takes up six paragraphs in the petition and is very emphatic. In paragraph 7 she sets out the Will or rather the effect of it and explains that under it she is the legatee of her deceased husband. Nowhere does she base her right to collect the debts due to her husband's estate upon her position as legatee. Although the question we have to decide does not turn upon what actually happened, nevertheless it may be observed in passing that in fact the District Judge declined to go into the question of the genuineness of the Will in the proceedings and gave the certificate on the ground that under the Hindu Law she would be entitled to collect the debts.

Some time in 1908, she made a further application to have the Will registered and after contest and difficulty, the Will was registered in February 1909. Nothing further happened until 26th February 1912 when this suit was filed. The contention put forward by defendants is this. They say that the suit is barred by limitation under Article 93 of the Limitation Act, which enacts a period of three years' limitation for suits to declare the forgery of an instrument attempted to be enforced against the plaintiff. The point from which time begins to run is stated to be the date of the attempt. The defendants' case is that the institution by the widow of the proceedings in the District Court to obtain a succession certificate must be treated as an attempt to enforce the Will against the plaintiffs. It has been observed in the course of the argument that it was by mere accident that the plaintiffs appeared in these proceedings, because although mention is made in the petition of the existence of near relatives of the deceased, no machinery exists for compelling their presence unless the Judge in his discretion thinks that they ought to be there. He might in this case have thought that it was totally unnecessary to secure their presence, having regard to the capacity in which she

applied for the certificate. He did not take that view in fact, but we think it was open to him to take that view. Then the startling result would have been that an attempt against the plaintiffs' right would be one which the plaintiffs had no opportunity of dealing with or meeting. The attempt contemplated by Article 93 of the Limitation Act must be something more than a superfluous paragraph in a petition to administer the estate as a widow. There is very little authority guiding us on the point. There is a decision of the High Court of Bombay reported as *Achyut Rayapa Shanbhag* v. *Gopal Subbayya Shanbhag* (1), and what was clearly decided in that case was that an attempt to register a document cannot be treated as an attempt to enforce it against other person's rights. That decision is no doubt correct. Actual registration of the document is not enforcing it. On the other hand, there is a decision of the Privy Council reported as *Hurri Bhusan Mukerji* v. *Upendra Lal Mukerji* (2) where analogous questions are dealt with, but the judgment is so concise that it is very difficult to draw satisfactory analogies for our guidance in the present case. What was decided in that case is this: that an adoption by a widow which would not have the effect of ousting the rights of the reversioner was not an attempt within the meaning of the section. Such an adoption being made in accordance with the mandate contained in a forged instrument was not an attempt to enforce such an instrument against the plaintiff. Their Lordships' decision, it seems to me, was that the mere ceremony of adoption cannot be treated as an attempt. The mere insertion of a paragraph in a document like this petition could not have any further effect.

We think that the appeal must be allowed and the case remitted to the District Judge for trial on the merits. Costs will abide the result.

*Appeal allowed; Suit remanded.*

(1) 30 Ind Cas. 399; 17 Bom. L. R. 635.
(2) 24 C. 1 at p. 7; 23 I. A. 97 (P. C.).

## CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 345, 346, 348 AND 399 OF 1915.

December 14, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

IN No. 345

TAMIJUDDI SHEIKH—OPPOSITE PARTY—APPELLANT

IN No. 346

ABDUL KARIM AND OTHERS—OPPOSITE PARTY—APPELLANTS

IN No. 348

AINUDDI AND OTHERS—OPPOSITE PARTY—APPELLANTS

IN No. 399

NAWAB ALI BEPARI AND OTHERS—OPPOSITE PARTY—APPELLANTS

*versus*

*Kumar* SATYA SHANKER GHOSAL AND OTHERS—PETITIONERS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *O. XLVII, r.* 2—"*Judge who passed the decree*", *meaning of*—*Review*—*Jurisdiction.*

The expression "the Judge who passed the decree" in rule 2 of Order XLVII of the Civil Procedure Code, 1908, means the Judge who has decided the case and not the Judge who has merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor. [p. 102, col. 1.]

Therefore, a Judge who merely signed a decree, which was in accordance with a judgment passed by his predecessor, has no jurisdiction to review the decree and the fact that a review was granted by his predecessor which was set aside by the High Court on the ground that no notice was sent to the other party, does not validate his order. [p. 102, col. 2.]

Appeal against the orders of the Special District Judge of Tipperah, dated the 12th June 1915.

Babus *Bepin Behari Ghose* and *Mohini Mohan Chatterjee*, for the Appellants.

Mr. *B. C. Mitter* and Babu *Ram Chandra Mitra*, for the Respondents.

JUDGMENT.—In these four appeals the question we have to decide is whether an application under Order XLVII, rule 2, for a review of a decree upon some ground other than the discovery of new and important matter or evidence, or the existence of a clerical or arithmetical mistake, can be made to a Judge who signed the decree but did not write or deliver the judgment in accordance with which the decree was drawn up. In other words, the point for determina-

tion is the meaning of the expression "the Judge who passed the decree" in that rule. In our opinion these words undoubtedly mean the Judge who has decided a case, and not the Judge who has merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor.

It has been contended by the learned Counsel who appears on behalf of the respondents that the decree is non-existent until it is signed and that, therefore, the Judge who signed the decree must be held to have passed it. But once the decree is signed, it takes effect from the date of the judgment. The Judge who delivers the judgment expresses what the decree is and is responsible for its substance, while the signing Judge is responsible only for its verbal accuracy. There is no straining of language in saying that the former passed the decree which subsequently came into operation with retrospective effect on the performance of an official act by the latter. The word "pass" has many meanings, but when used as a part of a legal expression it signifies "utter or pronounce judicially, *e. g.*, pass sentence" [see the Oxford Dictionary, paragraph 52 (*b*), under this word].

The view we take is supported by a comparison of the former and the present Code of Civil Procedure. In section 624 of the Code of 1882, it was provided that no application for a review of judgment on, what may be called for the sake of brevity, special grounds should be made to any Judge other than the Judge who delivered it. A careful comparison of sections 623 and 624 of that Code with the corresponding rules 1 and 2 of Order XLVII and section 114 of the Code of 1908 now in force shows that though there has been an alteration of the language, there has been no change of the law. Section 623 of the former Code and section 114 and Order XLVII, rule 1, of the present Code provide generally that an application for review may be made to the Court which passed the decree. Rule 2 of Order XLVII, however, requires that an application for review on special grounds must be made to the Judge who passed the decree. If such an application could be made to a Judge who had only signed the decree, there would be no necessity to substitute the word "Judge" for the word "Court." Any successor of the Judge who delivered judgment could deal with such an application for review as well as one who had signed the decree. The act of his signing the decree is simply an accident due to his having happened to be appointed during the interval between the delivery of judgment and the preparation of the decree. It seems clear, therefore, that the word "Judge" has been deliberately used in place of the word "Court" in order to retain the provision of the former Code that applications of this kind must be made to the Judge who delivered judgment.

We, therefore, hold that the learned Special Judge was wrong in holding that he was the Judge who passed the decrees of which he granted a review. As he acted without jurisdiction the fact that his predecessor had previously granted a review, which was set aside by the High Court on the ground that the order was passed without notice to the other side, cannot give validity to his order.

We accordingly decree these appeals and set aside the order of the Special Judge granting review of the four appellate decrees in respect of which these appeals have been preferred. The appellants (?) will pay the respondents' costs in this Court. We assess Pleader's fees at two gold *mohurs* for the four appeals.

*Appeals decreed.*

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## COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION PETITION NO. 233 OF 1914-15.

October 28, 1915.

*Present*:—Sir M. W. Fenton, F. C.

KHADIM HUSSAIN KHAN—DEFENDANT—APPLICANT

*versus*

*Musammat* MURAD BIBI—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts.* 120, 109—*Suit by co-sharer for share of produce in joint holding—Punjab Tenancy Act (XVI of* 1887), *s.* 77 (3) (k) *—Trusts Act (II of* 1882), 90—*Co-sharer, 'exclusive possession by, effect of.*

A suit by a co-sharer in a holding under section 77 (3) (*k*) of the Punjab Tenancy Act for a share of the produce of the joint holding, is governed by Article 120 of the First Schedule to the Limitation Act. [p. 104, col. 1.]

KHADIM HUSSAIN KHAN *v.* MURAD BIBI.

*Robert Watson & Co.* v. *Ram Chand Dutt*, 23 C. 799; *Phani Singh* v. *Nawab Singh*, A. W. N. (1905) 233; 28 A. 161; *Parsotam Rao Tantia* v. *Radha Bai*, 28 Ind. Cas. 953; 13 A. L. J. 407; 37 A. 318, referred to.

The relation of a co-sharer who obtains exclusive possession to a fellow-sharer who is not in possession, is, by section 90 of the Indian Trusts Act, declared to be a fiduciary one and the receipt by the trustee in such circumstances of profits for which he is liable as trustee to render an account, cannot be said to be a wrongful receiving within the meaning of Article 109 of the Limitation Act. [p. 103, col. 2.]

Petition for revision of the order of the Commissioner, Jullundur, dated the 19th June 1915.

Mr. *Fazl-i-Hussain*, for the Applicant.

Mr. *Badri Das*, for the Respondent.

ORDER.—Both revision applications Nos. 233 and 254 will be disposed of in this order.

This is a suit by one co-sharer, *Musammat* Murad Bibi, against another co-sharer, Khadim Hussain, her deceased husband's brother, for her share of the produce of a joint holding for twelve harvests. The plaintiff has obtained a decree, the amount of which as fixed by the appellate order of the Commissioner is Rs. 6,000. This sum is decreed in respect of plaintiff's share of the produce of six years—twelve harvests. Both parties apply for revision on the ground that the amount so decreed is too much or too little, and that wrong methods of appraisement and calculation have been followed in fixing it. None of the arguments advanced in this connection, however, seem to me to establish any valid ground for exercising revisional powers. I shall confine myself, therefore, to the plea that the plaintiff's claim is barred by limitation in respect of the first three years of the period to which her suit relates. In other words, it is contended that the period of limitation for a suit under section 77 (3) (*k*) of the Punjab Tenancy Act by one co-sharer for a share in the profits of a holding is three years. The Commissioner has held that the Article of the First Schedule of the Limitation Act which is applicable is Article 120 (suits for which no period of limitation is provided elsewhere in the Schedule), and that the period of limitation is six years. It is curious that there should be no Punjab ruling on this point. Suits by co-sharers for a share of the profits of an estate or holding are among the commonest of revenue suits. I believe that there has heretofore been a general impression that a three years' period of limitation is applicable to such suits as well as to suits for rent against tenants.

Mr. Fagan's decision that the period of limitation is six years is based on the Calcutta High Court ruling in *Robert Watson & Co.* v. *Ram Chand Dutt* (1). In that case in which some of the co-sharers in property owned in common sued the remaining co-sharers, who had taken possession of and exclusively cultivated the joint property for mesne profits, it was urged on behalf of the defendant that either Article 36 or Article 115 of the First Schedule of the Limitation Act was applicable. The Court, however, held that in the circumstances, *i. e.*, when some co-sharers take exclusive possession of the joint property and manage it without associating the other co-sharers in the possession and management, there is neither misfeasance nor malfeasance nor breach of contract which would make Article 36 or 115 applicable. In the present case the defendant argued before the Commissioner that Article 109 is applicable. Article 109 relates to suits "for the profits of immoveable property belonging to the plaintiffs which have been wrongfully received by the defendant." The learned Commissioner rightly holds that the profits received by a co-sharer in possession are not *wrongfully* received merely because they belong in part to co-sharers who are not in possession. The ruling of the Allahabad High Court which he cites in support of this view, *Phani Singh* v. *Nawab Singh* (2), is entirely to the point. It may be added that the relation of a co-owner, who obtains exclusive possession, to a fellow-sharer who is not in possession is, by section 90 of the Indian Trusts Act, declared to be a fiduciary one. It cannot, therefore, be said that the receipt by the trustee in such circumstances of profits, for which he is liable as trustee to render an account, is a wrongful receiving within the meaning of Article 109 of the Limitation Act. In this Court the defendant seeks to establish the applicability of Article 62 of the Limitation Act. Article 62 relates to

(1) 23 C 799.
(2) 28 A. 161; A. W. N. (1905) 233.

suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." If the present suit were really one of that description, it would not lie in the Revenue Courts. But it would be a straining of the law and of the ordinary meaning of language to hold that a suit for a share in the profits of an estate or holding under section 77 (3) (*k*) of the Tenancy Act is a suit for money received by the defendant on behalf of the plaintiff. What is due to the plaintiff is only ascertainable after an account has been taken, an account in which the managing co-sharer is entitled to set off expenses of management before the proportion of the rent paid by tenants under section 15 of the Tenancy Act, which is due to the co-sharer who is not in possession, can be ascertained. This view is supported by the Allahabad High Court ruling in *Parsotam Rao Tantia* v. *Radha Bai* (3), in which it was held that a suit by a co-sharer to recover, from a manager of property in common ownership money received by the defendant as manager was not a suit for "money had and received", but was one to which Article 120 of the first Schedule of the Limitation Act applied.

In the Rent Acts of Agra and Oudh there are general provisions declaring the applicability of the Indian Limitation Act to revenue suits arising thereunder, except in the case of suits for which a special period of limitation is provided in those Acts. Such a special period of limitation, *viz.*, three years, is provided in both Rent Acts for suits by co-sharers for a share of the profits of a holding—a circumstance which involves the implication that the Limitation Act period for such suits is not one of three years.

For the foregoing reasons I am unable to dissent from the Commissioner's decision on this question of limitation, *viz.*, that Article 120 applies to suits of the description for which section 77 (3) (*k*) makes provision. On no other ground is there any reason to revise the order of the Commissioner. I accordingly reject the applications in both these cases (Nos. 233 and 256). Parties will pay their own costs in this Court.

*Petition rejected.*

(3) 28 Ind. Cas. 953; 37 A. 318; 13 A. L. J. 407.

## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 100 OF 1914.

December 2, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

JADUBANSI KUER *alias* GULAB KOER AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MAHPAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 2 (11)—Legal representative—Hindu Law—Hindu woman, suit by—Death of plaintiff pending suit—Right to continue litigation.*

A Hindu woman in possession of an estate as such represents the estate and a suit brought by her to recover possession of the estate can be continued on her death pending the suit by a person entitled to succeed to the estate after her. [p. 107, col. 1.]

Where, therefore, an unmarried daughter sued to recover her father's property making her married sisters *pro forma* defendants and died pending the suit:

*Held*, that the married sisters could continue the litigation as plaintiffs in the cause. [p. 107, col. 1.]

First appeal from the decision of the Subordinate Judge of Ghazipur, dated 20th December 1913.

FACTS.—One Brij Raj Kuer brought a suit for possession of the property belonging to her father. She alleged that as an unmarried Hindu daughter she was entitled to the whole property in the possession of the defendants other than defendants Nos. 9, 10 and 11, who were her sisters and who were made *pro forma* defendants. During the pendency of the suit, the plaintiff died and her three sisters applied to be brought on the record as plaintiffs in place of their deceased sister. Their application was granted, the contesting defendants raising no objection. Both the parties then adduced evidence. At the hearing, the defendants raised an objection to the effect that the right of an unmarried daughter to succeed to her father's property being a purely personal one, the right to sue did not survive to the deceased plaintiff's sisters. The Court below relying on *Balak Puri* v. *Durga* (1), passed an order to the effect that the suit had abated. The plaintiffs appealed to the High Court.

Mr. *Baldeo Ram Dave* (for the Hon'ble Dr. *Sunder Lal*), with Nawab *Abdul*

(1) 30 A. 49; 4 A. L. J. 783; A. W. N. (1908) 6; 3 M. L. T. 181.

*Majid* and Mr. *M. L. Agarwala*, for the Respondents, raised a preliminary objection to the effect that the order of the Court below being one declaring that the suit had abated, no appeal lay under the provisions of the Code of Civil Procedure.

Mr. *Lakshmi Narayan*, for the Appellants.—The Court below has passed the order of abatement on a complete misapprehension of the facts. The present plaintiffs were brought on the record in place of their deceased sister within six months of the death of the latter. The contesting defendants raised no objection and the present plaintiffs were allowed to continue the suit. If the Court below was of opinion that the right to sue did not survive to the sisters, it ought to have dismissed the suit. Under these circumstances Order XXII, rule 3, does not apply and the decree of the Court below is virtually a decree within the meaning of section 2 (2) of the Code of Civil Procedure: *Bhikaji Ram Chandra* v. *Purshotam* (2), *Subbayya* v. *Saminadayyar* (3), *Meenatchi Achi* v. *Ananthanarayana Ayyar* (4).

The real question to be decided, however, is whether the present plaintiffs can continue the suit as brought by their deceased sister. The suit was no doubt instituted by an unmarried daughter. She was exclusively entitled to the whole estate; but the suit was one for possession of certain property and the unmarried daughter, while she brought the suit, represented the whole estate and the sisters were made *pro forma* defendants so as to protect their interests. So far as the contesting defendants were concerned it was perfectly immaterial to them who brought the suit, the unmarried daughter or the married ones. Moreover, the sisters represented the father's estate and they were entitled to carry on the suit instituted by their sister: *Rikhai Rai* v. *Sheo Pujan Singh* (5); *Mahadeo Singh* v. *Sheo Karan Singh* (6).

The former case was decided by one of the Judges who decided the case reported as *Balak Puri* v. *Durga* (1). In the latter case it was held that there is no difference in principle between the case of a widow and a daughter.

Both have only a life-estate and the person who comes after them is the legal representative.

[RICHARDS, C. J., referred to *Venkatanarayana Pillay* v. *Subbammal* (7).]

This case helps me in principle. I also rely on *Tribhuwan Sundar Kuar* v. *Sri Narain Singh* (8); *Hari Nath Chatterjee* v. *Mothur Mohun Goswami* (9); *Premmoyi Choudhrani* v. *Preonath Dhur* (10): *Katama Natchiar* v. *Raja of Shivagunga* (11); *Musammat Parbutty* v. *Musammat Higgin* (12).

If Brij Raj Kuer had died after obtaining the decree, there would have been no difficulty: *Muhammad Husain* v. *Khushalo* (13). But this fact makes no difference. Her claim was not a personal claim because she represented the estate. If the reasoning adopted in *Balak Puri* v. *Durga* (1) were correct, a suit by a widow would be a personal claim. Merely because a daughter or a widow sues for exclusive possession of an estate, her claim cannot be called a personal one. Section 2, clause (11), Civil Procedure Code, contains the definition of a "legal representative" and this definition is broad enough to include a sister, because in law she represents the estate.

Mr. *B. R. Dave*.—Rightly or wrongly the Court has ordered the suit to abate and there is no appeal from such an order. If the appellant had any remedy that was by way of revision.

*Balak Puri* v. *Durga* (1) is on all fours with the present case. The two cases are similar in all respects.

The right of the original plaintiff was a purely personal one, because the other daughters could not join in the suit as plaintiffs on the same allegations. That right of hers

(2) 10 B. 220.
(3) 18 M. 496; 5 M. L. J. 63.
(4) 26 M. 224; 12 M. L. J. 380.
(5) 7 Ind. Cas. 97; 33 A. 15; 7 A. L. J. 960.
(6) 21 Ind. Cas. 464; 35 A. 481; 11 A. L. J. 796.
(7) 29 Ind. Cas. 298; 38 M. 406; 28 M. L. J. 535; 17 M. L. T. 435, 21 C. L. J. 515, 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; (1915) M. W. N. 555.
(8) 20 A. 341; A. W. N. (1898) 65.
(9) 21 C. 8 (P. C.); 20 I. A. 183.
(10) 23 C. 636.
(11) 9 M. I. A. 539 at p. 543; 2 W. R. 31 (P. C.); 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 842.
(12) 17 W. R. 475.
(13) 9 A. 131 (F. B.); A. W. N. (1886) 322.

could not survive to the sisters who claimed through their father. The sisters cannot be said to be the legal representatives of the deceased plaintiff. If they so desire, the present plaintiffs can bring another suit.

Mr. *Lakshmi Narayan* was not heard in reply.

JUDGMENT.—This appeal arises out of a suit for possession of immoveable property. The property originally belonged to one Rampal Singh. He was succeeded by his widow *Musammat* Zamira. Rampal left four daughters (*Musammat* Raghubansi Kunwar, *Musammat* Jadubansi Kunwar, Shyam Rani Kunwar and Bahuria Brij Raj Kunwar). The present suit was instituted by Bahuria Brij Raj Kunwar. She alleged herself to be entitled to the property upon the death of her mother to the exclusion of her sisters, because she was unmarried whilst the others were married. She made her sisters *pro forma* defendants. Whilst the suit was pending she died, and thereupon an application was made by the surviving sisters that their names should be changed from the array of defendants to that of plaintiffs. The application was granted apparently without any opposition on the part of the defendants. The evidence was taken but on the case coming up for decision and during the course of the arguments, it was contended by the defendants that on the death of the original plaintiff the suit abated inasmuch as the right to sue did not survive to the substituted plaintiffs. The Court below without going into the merits of the case made a decree in which it is stated: "It is ordered and decreed that it is declared that *Musammat* Birj Raj Kunwar being dead, the suit has abated". The plaintiffs have appealed.

A preliminary objection is taken by the respondents that no appeal lies. It is contended that the decree or order (whichever it is called) is not a "decree" within the meaning of section 2, clause 2, of the Code of Civil Procedure and that, therefore, (no appeal being directly given by the Code) no appeal lies It seems to us very doubtful whether under the circumstances of the present case the order of the Court below is not a decree "within the meaning of section 2 (clause 2). After the death of original plaintiff so far from the suit having been declared to have "abated," new plaintiffs were brought on the record and a formal decree has in fact been drawn up. In its very words it states that "it is ordered and decreed." If on the death of the original plaintiff the defendants had asked the Court to declare the suit abated and it had done so and if on the application of appellants the Court had refused to set aside the abatement on the ground that the right to sue did not survive, an appeal would have lain against such order. It is unnecessary, however, to decide whether the present appeal lies as such, because in our opinion the circumstances of the present case demand that if necessary, we should treat the present appeal as an application in revision.

We now come to the merits of the case. If the original plaintiff's allegations be true, she was entitled to possession of the property claimed for a Hindu woman's estate. On her death her married sisters (surviving her) would take jointly. It is contended on behalf of the respondents that the claim of the original plaintiff was one personal to her, that her sisters would not take as her heirs but as the persons entitled next after her, and, therefore, they can in no way be said to be her "legal representatives" under section 2 (clause 11). The respondents rely on the case of *Balak Puri* v. *Durga* (1). In that case an unmarried daughter claimed to redeem a mortgage on her father's property, making her surviving married sister and the minor children of another deceased sister defendants to the suit. During the pendency of the suit, the plaintiff died. On the application of the married sister and the children of the deceased sister to be brought on the record as plaintiffs, it was held that the claim of the original plaintiff being personal to her, the suit abated and the surviving sister could not carry on the litigation. The other side relies on the recent case of *Mahadeo Singh* v. *Sheo Karan Singh* (6). In this case a daughter obtained a decree for possession of her father's estate against trespassers. Before she got possession she died and her sons applied for execution. The argument was that the sons did not take as heirs of the mother but as reversioners to their grandfather and that accordingly they were not entitled to execute the decree obtained by their mother. It was held that the suit by their mother must be deemed to be a suit by

a Hindu woman representing the estate, and that accordingly her sons who were reversioners were entitled to execute the decree. In the very recent case of *Venkatanarayana Pillay* v. *Subbammal* (7), the question arose whether on the death of a reversioner who had brought a suit for a declaration that an alleged adoption was illegal and invalid, the next reversioner could be substituted for him and carry on the litigation as plaintiff. Their Lordships held that he could be so substituted. At page 413 their Lordships say:—"Sub-section 11 was embodied in Act V of 1908 with the object of putting in statutory language the results of the decisions of the Indian Tribunals on the meaning of the words 'legal representative;' but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner."

It is true that their Lordships go on to say that the case could be decided on broader ground. It is, however, an expression of opinion by their Lordships that even a reversioner can represent the estate. If a reversioner can represent the estate, there seems to be much stronger reason for holding that a Hindu woman in possession of the estate as such represents the estate. It has been held over and over again that in honest litigation the widow does so represent the estate, and that reversioners are bound by the results of the litigation. If reversioners are bound by the result of the litigation on the principle of *res judicata*, there seems very little reason why the persons who succeed one after another to the estate should not be entitled on successions to continue the litigation commenced by their predecessors. We think that the decision of the Court below was not correct and we accordingly allow the appeal, set aside the decree (or order) of the Court below and remand the case with directions to re-admit the suit upon its original number and to proceed to hear and determine the same according to law. Costs will abide the result, including fees in this Court on the higher scale.

*Appeal allowed* ; *Case remanded.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1579 OF 1911.

November 23, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Kumaraswami Sastri.

KUYYATTIL KUNDAN KUTTY—DEFENDANT No. 22—APPELLANT

*versus*

VAYALPATH PARKUM NATUKANDIYILAKATH THARUVAI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 TO 21—RESPONDENTS.

*Malabar Law—Gift Donor following Marumakkattayam Law—Intention of donor—No indication of character of estate conferred—Donees, whether take absolutely.*

Per *Kumaraswami Sastri, J.*—In construing a deed of gift the Courts have to see the intention of the donor as evidenced either by the deed or by the surrounding circumstances at the time. [p. 111, col. 1.]

Where a Marumakkattayam donor gives properties to children of the same mother or to a member of a *tavazhi* without any express indication that an absolute alienable estate is granted, the presumption is that the donor intends to confer only an estate with all the incidents of *tarwad* property. [p. 110, col. 2.]

The mere fact that a donor states that he has a right to sell the property and that the donees should have all his rights, does not confer upon the donees any higher estate. Express words that the donees were to take the property as tenants-in-common and not under ordinary Marumakkattayam Law are necessary. [p. 109, col 2.]

*Chakkara Kannan* v. *Kunhi Pokker*, 30 Ind. Cas. 755; 18 M. L. T. 255; (1915) M. W. N. 740; 29 M. L. J. 481; *Kunhacha Umma* v. *Kutti Mammi Hajee*, 16 M. 201; 2 M. L. J. 226, followed.

Where there are expressions indicating that the donees take an absolute heritable and alienable estate, there is no reason to treat the clauses as repugnant and unenforceable simply because the gift is to the donee and his or her children or heirs. [p. 110, col. 2.]

Where, therefore, an uncle following the Marumakkattayam Law made a gift of certain property to his nieces, children of the same mother, and there was nothing in the deed to indicate that an absolute alienable estate was intended to be conferred:

*Held*, that the property was intended to be given as *putravakasam* property. [p. 111, col 1.]

Per *Coutts-Trotter, J.* (dissenting)- That inasmuch as the deed contained an assignment by the donor

of all his rights in full, it conferred an absolute estate on the donees without the incidents of *tarwad* property. [p. 108, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of North Malabar, in Appeal Suit No. 403 of 1909, preferred against that of the Court of the District Munsif of Cannanore, in Original Suit No. 22 of 1909.

Mr. *A. Sundaram*, for the Appellant.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents.

JUDGMENT.

COUTTS-TROTTER, J.—I regret to differ from my brother in a matter in which he has much greater experience than myself; but I came to a definite conclusion during the argument in this case, and subsequent reflection has not altered it.

My view is that Exhibit A was a gift to the four ladies absolutely, without the incidents of *tarwad* property. I do not base my opinion on the fact that there is no mention of the children of the donee in the instrument; I agree with Mr. Anantha Krishna Aiyar's argument that that consideration is irrelevant. Nor do I greatly rely on the fact that the donees in this case are not the wife, nor the wife and children of the donor, but his nieces; though I certainly think that the presumption in favour of a gift being subject to the incidents of *tarwad* holding is necessarily weaker when the objects of the gift are not the wife and children of the donor. I base my judgment on this; that the donor assigns to his nieces "in full all the rights I possess in respect of the lands aforesaid"; and that it is recited that he possessed "the right of holding with liberty to sell." This express right of alienation seems to me to be in direct conflict with the idea of the property being held with the incidents of *tarwad* tenure, the chief of which I understand to be that the property is inalienable. The respondents' answer to this I understand to be that the words conferring power to alienate are merely inserted to negative the idea of a life-estate. I do not assent to this contention, which seems to me to be merely an attempt to save one artificiality by means of another. It is an inherent danger of case-law that a doctrine laid down in a judgment is gradually expanded by succeeding decisions till the Court finds itself on the verge of a flat contradiction with the words of a Statute or the terms of an instrument. Somewhere short of that point the process must stop; and to my mind, the construction adopted by the lower Court oversteps the mark, and purports to convey an estate which is at once alienable and inalienable. I have studied with great care the judgments of the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) and *Chakkara Kannan* v. *Kunhi Pokker* (2), and I do not feel that my view of this case is in conflict with either of those decisions, by which, of course, I am bound. In my opinion, the appeal should be allowed as to three-fourths of the property; but as my brother is of a different opinion, the appeal will be dismissed with costs.

KUMARASWAMI SASTRI, J.—Twenty-second defendant is the appellant. The 19th and 20th defendants and their deceased sisters Patha Kutti Umma and Ayisha got the *kanem* right in certain properties under the deed Exhibit A, executed by Ammotti Mayan in their favour. Though the deed purports to be a deed of sale in consideration of Rs. 5,348-8, both the District Munsif and the Subordinate Judge find that it was really a deed of gift with an illusory consideration. This finding is binding upon us and the case has, therefore, to be considered on the footing that these four sisters were donees from their uncle.

2. The operative part of the deed is as follows:—"I have hereby assigned to you in full all the rights I possess in respect of the lands aforementioned, and have got the tenants to attorn to you and given the lands in possession and have herewith delivered to you in possession the *kanom* deed. Therefore you should hold (the same) in accordance with the provisions of the *kanom* deed aforesaid, pay Government assessment and enjoy (the lands)".

3. Plaintiffs and defendants Nos. 1 to 18 are the descendants of the four donees. The 21st defendant filed a suit and obtained a decree against defendants Nos. 19 and 20

(1) 15 M. 201; 2 M. L. J. 226.

(2) 30 Ind. Cas. 755; 29 M. L. J. 481; 18 M. L. T. 255; (1915) M. W. N. 740.

KUYYATTIL KUNDAN KUTTY *v.* VAYALPATH PARKUM.

and the deceased Patha Kutti Umma, Ayisha not being a party. In execution of the decree he attached the properties and brought them to sale, and the 22nd defendant was the purchaser. The plaintiffs, who are the heirs of Ayisha (one of the donees), put in a claim under section 278, Civil Procedure Code, objecting to the attachment but it was dismissed. They, therefore, filed the present suit for a declaration of their title to the property.

4. The case for the plaintiffs is that the properties in dispute are the *tavazhi* properties of themselves and defendants Nos. 1 to 20 and cannot be attached and sold in execution of a decree in respect of the personal debts of defendants Nos. 19 and 20 and the deceased Patha Kutti Umma and that the decree, which was not passed against the *tavazhi* so as to affect the *tavazhi* properties, does not bind them. The District Munsif held that the gift to the four sisters was not a gift to their *tavazhi* but conveyed to each of them an exclusive right to one-fourth share in the property and that, as Ayisha was not a party to the suit in execution of which the property was sold, the plaintiffs were only entitled to a declaration that the sale of their mother's one-fourth share was invalid. In effect the District Munsif held that the 22nd defendant acquired three-fourths of the interest in the property by the Court sale and that the other one-fourth vested in the plaintiffs. Both parties preferred an appeal and the Subordinate Judge held that the property given under Exhibit A was held by the four sisters subject to the incidents of Marumakkattayam Law and that the property was not liable to be attached and sold. He passed a decree in favour of the plaintiffs, holding that the 22nd defendant acquired no title to the property by the Court sale.

5. The question for decision in this appeal is whether the donees under Exhibit A took the property as *tavazhi* property with all the incidents attached to *tarwad* property or whether each of them took an absolute and specific fourth share.

6. In considering what estate the donees took under the deed the terms of the instrument have to be first considered. Where the terms are clear and are unambiguous and expressly confer an absolute estate, there is, so far as I can see, nothing in the Marumakkattayam Law or usage to prevent the donees from taking an absolute estate like any other donee in the Madras Presidency. So far as Exhibit A is concerned, it does not in express terms convey to the donees power of alienation nor does it contain any clear indication that the donor did not intend the donees to take it as *putravakasam* property.

7. The presumption to be raised where the deed of gift affords no clear indication of the estate intended to be conferred has been considered in several cases, a detailed consideration of which has, since the decision in *Chakkara Kannan* v. *Kunhi Pokker* (2), become unnecessary. Whatever doubts or difficulties might have existed before the recent Full Bench decision in *Chakkara Kannan* v. *Kunhi Pokker* (2), it may now be taken as settled law that where a person following the Marumakkattayam Law gives properties to his wife and children or to his children alone also following the same law, the presumption is that he intended the donees to take the properties with all the incidents of *tarwad* property. The decision follows and approves of the previous Full Bench decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1).

8. The mere fact that the donor states that he had a right to sell the property and that the donees should have all his rights, or the use of the words "with all my rights" or "as I was enjoying," will not take the case out of the general rule laid down in the Full Bench cases above referred to. Express words indicating that the donees were to take the property as tenants-in-common and not under ordinary Marumakkattayam Law are necessary. In *Chakkara Kannan* v. *Kunhi Pokker* (2) the deed of gift recited that the donees "were to hold the same in the same way I as (the donor) was holding the property paying *poruppad* due to the *jenmies* and getting renewals in their names." Though Sankaran Nair, J., was of opinion that the deed conferred an absolute estate, if its terms were considered, the Full Bench held that the terms of the deed did not preclude the application of the rule in *Kunhacha Umma* v. *Kunhi*

*Kutti Hajee* (1) as to the presumption to be raised. In *Kalliani Amma* v. *Govinda Menon* (3) though the deed expressly stated that the donee and her '*santanams*' should enjoy the property for ever along with the donor during his life-time and *in proprium* thereafter, Justices Abdur Rahim and Sundara Aiyar overruled the contention that the grant was not a *putravakasam* grant and held that the donee took the property with all the incidents of *tarwad* property. In the case of *Naku Amma* v. *Ragava Menon* (4) though the donor gave "the entire ownership" to the donee, the Court held that the grant was only a *putravakasam* grant. The correct principle is laid down by Sadasiva Aiyar and Tyabji, JJ., in Second Appeal No. 1415 of 1910 where they observe as follows:—"Of course if the donor (father in most cases) expressly states that he makes the gift to his children so as to be owned by them as tenants-in-common, and not under the ordinary Marumakkattayam Law, the children will own them as such tenants-in-common. But a gift *simpliciter* to children or wife and children will have the effect of making the gifted property to belong to the children as a *tavazhi* with the usual incidents of *tavazhi* property."

9. It has been argued by Mr. Sundaram that the principle enunciated by the Full Bench in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) and *Chakkara Kannan* v. *Kunhi Pokker* (2) does not apply to cases where (1) the donor is not the father and (2) where the deed of gift is not expressly to the donee *and his or her children*. I find it difficult to see why any such distinction should be drawn. The decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) proceeded on the general principle enunciated by the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (5) and *Mahomed Shumsool Hood* v. *Shewukram* (6), and if the ordinary notions and wishes of the donor may not improperly be taken into consideration in construing the nature of the estate intended to be conferred, there is no reason why the same test should not be applied to a gift by an uncle as to a gift by a father. The *ratio decidendi* of the decisions seems to be that a Hindu ordinarily intends to confer on the donee such an estate as the donee would take under the personal law governing him. The degree of propinquity is, therefore, immaterial and affords no test. The case may be different where a donor not following Marumakkattayam Law gives properties to those who do, but it is unnecessary to express any opinion in this appeal. It is sufficient for the purpose of this case to state that where a Marumakkattayam donor gives properties to the children of the same mother or to a member of a *tavazhi* without any express indication that an absolute alienable estate was granted, the presumption is that the donor intended to confer only an estate with all the incidents of *tarwad* property.

10. As regards the distinction sought to be drawn where the gift is to a person and his children and where no reference to the children is made, though it is no doubt true that in several of the cases that have come up for decision to the High Court the gift was to a person and his children or "*santanams*," the decisions do not turn on the presence or absence of reference to issue in the deed but on general considerations of the nature of the estate which a Marumakkattayam donor intended to confer.

11. In *Chakkara Kannan* v. *Kunhi Pokker* (2), the Full Bench case above referred to, the terms of the deed as set out in the judgment of Sankaran Nair, J., do not refer to the children of the donee. I think it will be introducing a new element of confusion if the criterion is to be the presence or absence of reference to children or issue in considering whether the gift is to be treated as a *putravakasam* grant or as conveying an absolute and alienable estate. No doubt the trend of the decisions is to treat reference to children as an indication that the donor intended the gift to be *putravakasam*, but the converse does not follow. Where there are expressions indicating that the donee takes an absolute heritable and alienable estate, there is no reason to treat the clauses as repugnant and unenforceable simply because the gift is to the donee and his or her children or heirs.

(3) 12 Ind. Cas. 492; 35 M. 649; 10 M. L. T 399; (1911) 2 M W. N. 487; 22 M. L. J. 23.

(4) 18 Ind. Cas. 1; 38 M. 79.

(5) 6 M. I. A. 526; 4 W. R. 114 (P. C.); 1 Ind. Jur (N. S.) 37; 1 Boulr. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583; 19 E. R. 198

(6) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226.

12. Turning to the document in question, the gift was, as already pointed out, by an uncle following the Marumakkattayam Law to his nieces, children of the same mother. There is nothing in the deed to indicate that an absolute alienable estate was intended to be conferred on the donees and applying the ordinary rules of construction referred to by me, I am of opinion that the property was intended to be given as *putravakasam* property. The District Munsif was of opinion that (1) the omission of any reference to the children of the donees though some of them had children and (2) the course of dealing by the donees, show that a contrary intention may be inferred. I do not think any subsequent dealing by the donees can be evidence of the intention of the donor though it may, as between them, create an estoppel. In construing a deed of gift what Courts have to see is the intention of the donor as evidenced either by the deed or by the surrounding circumstances at the time of the gift. No amount of dealing by the donees could convert a limited into an absolute grant. I have already given my reasons for coming to the conclusion that the mere omission to name children in the grant is no criterion.

13. I am of opinion that the decision of the Subordinate Judge is right and dismiss the appeal with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

**FULL BENCH.**

CIVIL APPEAL NO. 327 OF 1913.

CIVIL MISCELLANEOUS PETITIONS NOS. 3500 AND 3518 OF 1915.

November 19, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

October 18, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

April 30, 1915.

*Present*:—Mr. Justice Sankaran Nair and Mr. Justice Coutts-Trotter.

JEEVARATHNAMMAL – DEFENDANT—APPELLANT

*versus*

N. VARADA PILLAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Registration Act* (*XVI of* 1908), *ss.* 17, 49—*Document merely referring to gift previously made, if requires registration—Adverse possession—Ownership parted.*

A document which merely refers to a gift previously made cannot be considered as "declaring the rights of parties" within the meaning of section 17 of the Registration Act and is not rendered inadmissible by the terms of section 49 of the Registration Act. [p. 118, col. 1.]

*Sakharam Krishnaji* v. *Madan Krishnaji*, 5 B. 232, followed.

Possession parted with the intention of conferring an absolute right in the occupant who manages the property on her own behalf, is not permissive but adverse as against the previous owner, especially when the conduct of the previous owner proves beyond doubt that he retained no interest in the property. [p. 119, col. 2.]

Appeal against the decree of the District Court of Chingleput, in Original Suit No. 51 of 1912.

FACTS.—This appeal came on for hearing at the first instance before Sankaran Nair and Coutts-Trotter, JJ., when a question as to the admissibility of a petition in evidence came in and the Judges, after hearing Messrs. *T. Rangachariar* and *N. Chandrasekhara Aiyar*, for the Appellant and Mr. *C. Madhavan Nair*, for Mr. *T. Narasimha Aiyangar*, for the Respondents, referred the question to a Full Bench on the 30th April 1915 by the following Order of Reference

SANKARAN NAIR, J.—"The *mitta* of Kariamangarani, consisting of the two villages of Kariamangarani and Mambakkam, belonged to two brothers Gopalakrishna Pillai and Parthasarathi Pillai. Gopalakrishna before his death devised his share to his widow Rajammal. Parthasarathi who died in 1867 left his share to his widow Alankarammal *alias* Thayarammal. Thayarammal died in the year 1912 and it is alleged by the respondents that the defendant Jeevarathnammal, the granddaughter of Gopalakrishna Pillai, is in possession of the property after Thayarammal's death. The plaintiffs (respondents), who are the grandsons of one Varada Pillai, another brother of Parthasarathi, now bring this suit to recover possession on the ground that they are entitled to the property as the reversionary heirs of Parthasarathi on Thayarammal's death. In the alternative they say that, if Thayarammal had more than a widow's interest in the property under the Will executed by Parthasarathi, they are entitled to it as her heirs. It is conceded that in case of intestacy, the

plaintiffs (respondents) as the brother's grandsons are the persons entitled to succeed to the property either of Parthasarathi or Thayarammal in preference to the defendant Jeevarathnammal.

The defence is that Thayarammal obtained an absolute estate under the Will of Parthasarathi and that she had made a gift of the property in her life-time to the defendant's mother Doraisani Ammal and she also left a Will in her favour. The District Judge held that the Will conferred an absolute estate upon Thayarammal; but that she did not make a gift of the property to Doraisani Ammal, nor did she leave a Will in favour of Doraisani Ammal. He also found that Doraisani Ammal had not acquired title to the property by prescription. The defendant appeals against this decree. We are of opinion that the Judge is right in holding that Thayarammal had an absolute interest in the property left to her by her husband. The testator said in the Will, "I have given my half share in Kariamangarani Mitta to my wife (on account of her maintenance and other absolute use). She is at liberty to enjoy the same with powers of alienation by sale, etc." These words are quite clear and leave no room for doubt. The subsequent clause that is relied upon only makes the plaintiffs residuary legatees.

The next question is whether it has been proved that Thayarammal gave the property to Doraisani Ammal. The two brothers Gopalakrishna and Parthasarathi married two sisters who were living together. Thayarammal had no children of her own. On the 10th October 1895, they presented a petition alleging that the registry of the villages now in suit had been in their names and they had been enjoying them. Then they said in their petition "but as we have given the said villages as *stridhanam* to Doraisani Ammal *alias* Alamelammal, who is the daughter of Nayar Rajammal, *i. e.*, the daughter of the elder sister of Alangarammal *alias* Thayarammal, out of us on 8th October 1895, we request, etc." They also added afterwards "The said Alamelammal shall hold and enjoy them with the right of alienation thereof, by way of gift, mortgage, sale, etc." Doraisani *alias* Alamelammal presented a petition, Exhibit XII (*a*), to the same effect. I am of opinion that Exhibits XII and XII (*a*) are not admissible in evidence to prove a gift. It is conceded that the gifts must be made by a registered instrument and these, if put forward as instruments of gift, have not been registered. According to the recent decisions of this Court, they cannot be relied upon to prove the nature of the subsequent possession of the properties by Rajammal. See *Muthukaruppan* v. *Muthu Samban* (1). Under section 91 of the Evidence Act no other evidence to prove the gift is admissible. The next question is whether Doraisani Ammal has acquired any right to the property by prescription. In accordance with petitions, Exhibits XII and XII (*a*), the registry was transferred to the name of Doraisani Ammal (see Exhibit VIII). It is proved that *pattahs* were granted in her name and *muchilikas* from the tenants taken in her name. On the 2nd April 1901, Rajammal executed a Will, Exhibit I, by which she left this property to Alamelammal *alias* Doraisani Ammal. It was contended by the respondents' Pleader that these properties were not referred to therein, but I have no doubt that they were included in the Will and she purported to leave them to Doraisani Ammal. Any doubt that may exist on this point is removed by the terms of Exhibit II, to which I shall refer later. The Will recites that these villages were at that time in the enjoyment of Doraisani Ammal and to that exent it is decidedly in favour of the appellant and if the appellant were able to prove the gift of 1895, it might perhaps show that possession accompanied that gift and that Doraisani Ammal was in possession as donee. On the other hand, the respondents rely upon it to show that there was no gift as otherwise this Will would not have been executed. It is argued by the appellant's Vakil that the Will may have been executed to place beyond any dispute Alamelammal's title to the property as there was no registered instrument. This explanation pre-supposes that the Will

(1) 25 Ind. Cas. 772; 1 L. W. 754 at p. 758; 16 M. L. T. 344; (1914) M. W. N. 768; 27 M. L. J. 497.

conveyed title to the property at that time, whereas it would operate only on her death. It shows, on the other hand, that the testator not only treated it as her property at that time, but intended that the property should be hers till the date of her death. If she had in view the defect in Alamelammal's title, she would have executed a proper deed of transfer instead of executing a Will. Moreover, if it was to remove any cloud on the title, Alangarammal also would have executed an instrument, whereas her alleged Will was executed only 11 years afterwards. The appellant's explanation about this will is, therefore, not acceptable. In my opinion, this will show that Rajammal did not recognise Doraisani's possession as that of an owner. A month after this, Doraisani Ammal executed a power-of-attorney in favour of her husband, Doraisami Pillai, (Exhibit XI) to manage her properties. As defence 8th witness, Doraisami swears that as a manager he was collecting rents from the tenants for her for 13 years under this power-of-attorney. According to him the *Amin* used to bring collections to him and he used to hand them to his wife, who in her turn took them to Alangarammal for safe custody. He says, sometimes the *Amin* used to hand over the collections to his wife when she was in the village. He denies that the *Amin* at any time paid the rents over to Alangarammal. It is argued for the appellant that this really was a receipt of rent by Doraisani Ammal and that Alangarammal had the money only as her agent for safe custody. For the respondents, it is argued that this witness's statement that the rent was never paid to Alangarammal is unreliable and that she herself received rents for her own benefit. Even if this witness, Doraisami, paid the rent over to her, there is nothing to support his interested statement that she only received it on behalf of Doraisani Ammal and not for her own benefit. Receipt of income by Alangarammal being proved, it lay on the appellant to rebut by clear evidence the presumption that she did not receive it as the owner of the property which she then was. The witness on whose evidence the Judge relies on this point is defence 1st witness. He says that he is the defendant's servant and his evidence is that as long as Rajammal was alive, he was doing everything under her orders and paying collections to her and after her death he used to deliver the collections to Doraisani Ammal and if she were not present, to Alangarammal. He also added that he made no distinction between Rajammal, Alangarammal or Doraisani Ammal and he used to pay to whomsoever was present and take orders from her. The Judge believes this witness and I am of opinion that he is right. I accept Doraisami's evidence only where it is not in conflict with the evidence of this witness. The probabilities are that Rajammal being the senior lady, she continued in management till her death. It is also probable that after Rajammal's death, as this witness stated, rent was paid to either of the two others whosoever was present there. This payment is consistent with the case of either party. Doraisani Ammal as the successor of Rajammal would be a tenant-in-common with Alangarammal. Either of them then might receive rents from the tenants. This evidence is inconsistent with any exclusive title of Doraisani Ammal. The respondents then rely upon another circumstance in proof of the possession of Alangarammal in her own right. The sisters had a house in Sriperumbudur which is said to have been constructed both by Alangarammal and Doraisani Ammal from the income of the villages and with borrowed money. Certain houses were bought in the name of Rajammal from the income of the villages and the houses were sold by Alangarammal (see Exhibit B) in 1904 and the sale is attested by Doraisani Ammal. In that document Alangarammal is stated to have lived on the income of these two villages. The writer was the defence 1st witness who is a paid servant of the defendant. This witness clearly supports the plaintiffs' contention that Alangarammal's possession was in her own right; otherwise her sale of the property is inexplicable. She enjoyed the income, therefore, in her own right. She was treated as also the owner of the other property which she sold in the year 1909 (see Exhibit C). The same observations apply to this document as well.

The only other document that need be referred to is Exhibit II. It is alleged

to be a Will left by Alangarammal of her share of the property in favour of Doraisani Ammal. She devises some interest in the property to her husband. It admittedly includes these properties. There can, therefore, be little doubt that the Will, Exhibit I, also was intended to convey Rajammal's properties. The evidence shows that the two sisters entertained the idea that these properties should be enjoyed by Doraisani Ammal after their death, though she was held out as the ostensible owner that there might be no question raised about her title after their death. I am, therefore, of opinion that the gift is not proved and that no right has been acquired by adverse possession.

My learned brother is of opinion that, though Exhibit XII is inadmissible to prove the gift, it is admissible to prove the nature of the subsequent possession held by Doraisani *alias* Alamelammal or, in other words, that she held the property as full owner. This can only be so if Exhibit XII can be admitted to prove a transfer of *ownership* of the immoveable property therein referred to. This cannot be done under the decisions of this Court. Proof of transfer of possession is not enough, as it is the nature of that possession that is in question. But as my learned brother is of opinion that these decisions are wrong, I have no objection to the reference to a Full Bench which he proposes.

I reserve my opinion on the question whether adverse possession is proved if Exhibit XII is admissible. For the reasons given by the District Judge I come to the conclusion that Exhibit II is only a proposed draft and not a Will executed by the deceased.

COUTTS-TROTTER, J.—It is necessary for a comprehension of this case to understand the relations subsisting between the various parties with whose acts the suit is concerned. The grandfather of the plaintiffs, N. Varada Pillai, was one of three brothers. He separated from his other two brothers in 1845, leaving them in joint possession of family properties including the *mittah* of Kariamangarani which is the subject of the suit. The second brother, N. Gopalakrishna Pillai, and the third brother, N. Parthasarathy Pillai, married sisters Rajammal and Alangarammal, otherwise known as Thayarammal. Gopalakrishna Pillai and Rajammal had a daughter, Doraisani Ammal, who married Doraisami Pillai and had a daughter, Jeevarathnammal, who is the defendant in this suit. Parthasarathy Pillai had no children by Alangarammal. Parthasarathy Pillai made a Will dated the 26th February 1866 shortly before his death which, as he recites in that Will, was imminent. He disposed of several properties by the Will leaving the greater part of them to the sons of N. Varada Pillai, his eldest brother, through whom in due course they have descended to the plaintiffs. Of his half share in the Kariamangarani *mittah* he made a special disposition. He gave it to his wife Alangarammal "on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc." The first question in this suit is whether this conveyance gave Alangarammal an absolute ownership of the *mittah* or whether she only took a life-interest for her maintenance. If she only took a life-interest, then the plaintiffs would take her half share after her death, and the further questions argued before us would become irrelevant.

It is no doubt true that in the case of gifts to Hindu widows there is a presumption that no more than a life-interest for maintenance passes. See, for example, *Seshayya* v. *Narasamma* (2). In this instance I think that the strong words used, the specific grant without any limitation, the fact that there were no children, and the fact that ample provision had been made for his nephews are sufficient to rebut the presumption and I am of opinion that Alangarammal acquired under the Will full ownership of a half share of the *mittah*. It, therefore, becomes necessary to enquire into the subsequent devolution of the property.

In the year 1895 the position of the surviving members of the families of Gopalakrishna Pillai and Parthasarathy Pillai was as follows: Rajammal, by this time a widow, and Alangarammal were living together in a house at Sriperumbudur enjoying the income of the *mittah*, Rajammal having come into her late husband's share of it. Doraisani

(2) 22 M. 357.

Ammal had married and was living with her husband in Madras. On the 10th of October 1895, Rajammal and Alangarammal jointly signed and presented to the Collector of Chingleput a petition requesting that the *mittah* should be transferred on the register into the name of Doraisani Ammal. The petition contains the following recital: "As we have given the said villages as *stridhanam* to Doraisani Ammal on the 8th October 1895," and it concludes with the following statement: "The said Doraisani Ammal shall hold and enjoy them (the villages) with the right of alienation thereof by way of gift, mortgage, sale, etc." A similar petition was submitted by Doraisani Ammal herself on the same day containing a similar recital of a gift by her mother and aunt. The transfer of names on the register was duly carried out; and it is not disputed that as from that date the *pattahs*, which had hitherto been executed by one or both of the old ladies, were invariably executed by Doraisani Ammal. Further as from about that date Doraisani Ammal, who previously lived in Madras, came to Sriperumbudur and lived there with the old ladies for the greater part of the year, spending only one or two months in Madras with her husband. On the 2nd of April 1911, Rajammal who was then 60 years of age made a Will. By that Will, she recites the transfer of the registry to the name of Doraisani Ammal, and states that the two villages of the *mittah* "are in the enjoyment of the said Doraisani Ammal." Then the Will makes a remarkable provision: "My daughter, the said Doraisani Ammal, shall .....collect the *zamin sircar* arrears dues to me in the said villages up to the last *fasli* 1305 upon account from the tenants of the said villages." The Will then disposes of the various properties of the testatrix and, among other things, it clearly purports to bequeath the share of the testatrix in the *mittah* to her daughter, Doraisani Ammal. On the 2nd May 1901, Doraisani Ammal executed a power-of-attorney in favour of her husband authorising him to collect rents and act generally in relation to the villages in the *mittah* "which belong to me." After the death of Rajammal, Alangarammal and Doraisani Ammal continued to live together in the house at Sriperumbudur as before. In January 1912, Alangarammal was very ill and she died on Monday, the 7th January. Before or about the time of her death, a document came into existence which purports to have been her Will, and under that document, if it was valid, a disposition of the *mittah* property was made which would be fatal to the plaintiffs' case. The document like the earlier Will of Rajammal contains a recital that the *mittah* villages had, since the transfer in the register, been in the enjoyment of Doraisani Ammal. Like the earlier Will also it proceeds to make a bequest of the *mittah*. This document was not signed or executed by Alangarammal before her death. The circumstances in which it was drawn up have been carefully considered by the learned Judge, who has pointed out the contradictory nature of the evidence regarding it. There may be cases in which it is proper in accordance with the Indian Law to give effect to unexecuted or draft Wills as valid testamentary dispositions. It is sufficient to say that I am not satisfied that it has been proved that this document really represents the testamentary intentions of Alangarammal or that she meant the document to stand for her Will. At the same time I think that the plaintiffs may legitimately argue that she was purporting to dispose of the *mittah* villages while the defendant, if that is conceded to the plaintiffs, is equally entitled to rely upon the recital that the *mittah* villages had been in the enjoyment of Doraisani Ammal, the mother of the defendant. But as a Will I hold, as I have said, that the document is invalid and if the defendant's case fails on this point, it must be supported on other grounds.

Speaking for myself, I have not the slightest doubt that Rajammal and Alangarammal intended in 1895 to make a gift of the *mittah* villages to Doraisani Ammal and in this I differ from the learned Judge below. She was living with the old ladies and she was indeed their only blood relative, and the whole of the subsequent history appears to me to point conclusively to the inference that the old ladies in 1895 made what they believed to be a gift of the *mittah* villages to her. That gift was void by reason of section 123 of the Transfer of Property Act not

being effected by a registered deed. What is said for the appellant is that she has acquired a possessory title to the villages by continuous possession for more than twelve years from 1895. On behalf of the plaintiffs it is said that, assuming her to have been in some sense in possession, there is nothing to show that her possession may not have been either a joint possession with the others or a possession as their agent. In other words, there is nothing to show that her possession was adverse to them. In view of this contention it is necessary to examine the facts carefully.

In the first place, it seems to me significant that from 1895 onwards Doraisani Ammal should have left her husband in Madras and come to live with the old ladies. As far as the management of the *mittah* villages is concerned, the executing of *pattahs* would only involve her presence at Sriperumbudur twice a year. As regards the collection of rents and the management, that appears to have been done not by Doraisani Ammal at any time, but by the *monigar* and possibly after 1901 by Doraisami Pillai under the power-of-attorney of May 1901. Then there is the circumstance of the transfer in the register, which is some evidence of a change of ownership. The question of the recital in the petition to the Collector is one of greater difficulty which I will consider presently The fact that all the *pattahs* after 1895 were given in the name of Doraisani Ammal is also evidence of a change of ownership. It is urged that the ladies were too old for the management and that they merely wished Doraisani Ammal to relieve them of these duties. At the date in question, 1895, Rajammal was 54 and Alangarammal only 51; and there is no evidence that either of them was affected on that date by incapacity. The Will of Rajammal is no doubt against the defendant, inasmuch as it shows that Rajammal was purporting to bequeath to Doraisani Ammal property which according to the defendant's case already belonged to Doraisani Ammal. On the other hand, from this point of view the plaintiffs' case rests not on the invalidity of the gift but on possession, and the Will clearly recites the fact of her being in possession. It also contained a significant direction that Doraisani Ammal shall collect the arrears belonging to Rajammal up to *fasli* 1305, the very date of the alleged change of possession. This to my mind greatly outweighs the fact that Rajammal attempted to dispose of the property which, I think, is adequately and sensibly explained as an attempt to make assurance doubly sure. Then comes the power-of-attorney granted by Doraisani Ammal to her husband in 1901. It is clearly admissible as evidence of an act of ownership exercised by her and showing the nature and quality of her possession. Having regard to its date there can be no suggestion made that it was other than a perfectly genuine act on her part. No controversy as to her rights then existed, or could possibly have been foreseen; and it cannot for a moment be supposed that it was not executed with the full knowledge and consent of the old ladies I have already given my reasons for regarding the alleged Will of Alangarammal with suspicion; but if any reliance is to be placed upon it, I myself would attach more importance to the recital therein of the possession of Doraisani Ammal, for the reasons which I have already stated in dealing with the Will of Rajammal.

In my opinion, these considerations are by themselves sufficient to prove that Doraisani Ammal's possession was a possession exercised by her in her own right and neither jointly with the old ladies nor as their agent. The fact that rent was occasionally handed over to one of the old ladies if Doraisani Ammal was not there, is to my mind quite immaterial. The three of them were living amicably together, in all probability enjoying the income jointly and the fact that rent was sometimes handed to one, sometimes to the other, throws no light either on the question of ownership or of possession. I am, therefore, prepared to hold that on these materials alone the defendant has established a possessory title; and if I am right in this, it is not necessary to look at the terms of the petition to the Collector. If that petition is admissible, it obviously carries the case much further; and as a great deal of the argument addressed to us was concerned with this matter and as the point is

undoubtedly one of importance, I think it is right that I should give expression to the opinion I have formed about it notwithstanding that I am prepared to decide the case without relying upon it.

Its admissibility depends upon the construction of section 91 of the Evidence Act, and I propose to examine the section before referring to any of the decided cases. That section deals with two quite distinct things. The first part of it enacts that when the terms of certain transactions have been embodied in the form of a document, no evidence shall be admitted to prove those terms except the document itself. That part of the section has no application to the present case. The next part of the section enacts that when any matter is required by law to be reduced into the form of a document, no evidence shall be given of such matter except the document, from which it follows that if no such document exists, the facts which it embodies cannot be proved at all. From that there follows this conclusion and, in my opinion, no further conclusion: that if you make a gift of property without embodying it in a written document (in this case a registered gift-deed) you cannot prove the fact that you made such a gift, still less the terms on which you made it. It must be remembered that the Law of Evidence is adjective and not substantive law; the purport of the section is not to declare the gift invalid, but to declare it incapable of proof. The substantive law may and does make the transaction invalid; but that is not the function of the Law of Evidence.

Now by Indian Law, admissions are primary evidence except in the case provided for by section 22, which makes oral evidence of the contents of documents secondary evidence. And of course where proof of any matter is forbidden except by some special mode, the prohibition will obviously extend to admissions. Moreover if an admission is contained in a document which falls under the ban of the law by reason of being unstamped or the like, then because you cannot put the document in evidence you cannot prove the admission. [See *Keane* v. *Jones* (3).]

These principles must now be applied to the present document It is obviously not inadmissible *qua* document, it does not purport to be a disposition of property, it speaks of a past disposition, and it requires no stamp. Any admission contained in it will, therefore, be relevant, unless such admission is sought to be used as proof of some matter which the law forbids to be so proved. This distinction appears to me to be clear and fundamental; in the one case you must not use the document, in the other you may use it but you must not use it to prove a certain fact. What is the fact that you must not prove? The fact that a gift was made. Is that the fact that the document is invoked to prove? Clearly not. What is the fact that is sought to be proved? Simply the fact that as the signatories to the document believed themselves to have made a gift of the property to Doraisani Ammal, they must be taken to have recognised her possession as being exercised adversely to their own rights. Suppose at the end of 12 years' possession by Doraisani Ammal, they had signed a document in these terms: "as we thought we had effected a valid gift to Doraisani in 1895, we admit that her possession has been adverse to our right since then." Could it be contended that that was inadmissible? If not, I fail to see the distinction between that and the present case. In my opinion, the exclusion of evidence under statutory provisions should be confined strictly to the exclusion laid down in the Statute. If the exclusion is extended by judicial decisions, where is the process to stop? Suppose it is proved that *A* was in Madras on the 1st January, and it is sought to prove that *B* also was there on that day. Is it inadmissible to prove a writing by *B* in which he says "on the 1st of January, I made a verbal gift of my lands to *A*"? I see no escape from that conclusion, if once the prohibition of the Statute is extended beyond a prohibition of proof of the fact of a gift.

The view I take of the true construction is contrary to that taken in two decisions of this Court. As my brother, Sankaran Nair J., shares my doubts as to the correctness of those decisions, and as the point is one of very great importance, we have agreed to refer the following question to a Full Bench:—

"Whether the petition of the 10th October 1895 (Exhibit XII), though inadmissible to prove the gift, is admissible to prove the nature of the subsequent possession of Doraisani"?

(3) 2 Car. & K. 725.

JEEVARATHNAMMAL v. VARADA PILLAI.

This appeal coming on for hearing in pursuance of the above Order of Reference, upon perusing the said Order of Reference, and upon hearing the arguments of Mr. *N. Chandrasekhara Aiyar*, for the Appellant, and of Mr. *T. Narasimha Aiyangar*, for the Respondents, (Wallis, C. J., Abdur Rahim and Seshagiri Aiyar, JJ.,) expressed on the 18th October 1915 the following

OPINION.—We think that the petition is not a document requiring registration under section 17 of the Registration Act. It refers to a gift on the 8th October some days previously, and in spite of the concluding passage cannot, in our opinion, be considered as declaring the rights of the parties within the meaning of section 17; see *Sakharam Krishnaji* v. *Madan Krishnaji* (4). It is, therefore, not rendered inadmissible by the terms of section 49 of the Registration Act.

The appeal and the petitions, put in by the respondents in the appeal praying that for the reasons mentioned in the affidavits filed therewith, the High Court may be pleased to admit in evidence certain documents and to consider the same at the hearing of the aforesaid appeal, coming on for final hearing after the expression of the opinion of the Full Bench dated the 18th October 1915, the Court (Coutts-Trotter and Srinivasa Aiyangar, JJ.,) delivered on the 19th November 1915 the following

JUDGMENT.

COUTTS-TROTTER, J.—In spite of all that the learned Counsel for the respondents had urged, he has not persuaded me that the conclusion which I formed on the last occasion on the materials then before me is incorrect. I have been in fact unable to come to any other conclusion. I still feel that even if the Full Bench had not decided that Exhibits XII and XII (*a*) were relevant, I should come to the conclusion that an adequate case of adverse possession by Doraisani Ammal has been made out, especially after my learned brother has cleared up the obvious mistake which, I think, both the Counsel and the Judges committed at the last trial, namely, that the Will of Rajammal purported to deal with the suit property. I think there can be but one effect given to the recitals in the Will, and that is that they show the knowledge of the ladies that they were not in possession and that they received the rents not on their own behalf, but on behalf of Doraisani Ammal.

The appeal will be allowed with costs throughout.

The petitions are dismissed.

SRINIVASA AIYANGAR, J.—Now that the Full Bench has decided that Exhibits XII and XII (*a*) are admissible, I think that the case really admits of no doubt. In Exhibit XII, the two ladies Alangarammal and Rajammal say that they have already given the villages to Doraisani Ammal and wind it up by saying that Doraisani Ammal should hold and enjoy the villages with the right of alienation thereof by way of gift, mortgage or sale. It is admitted that in pursuance of that petition, the registry was changed to the name of Doraisani Ammal and from that time *puttahs* and *muchilikas* were exchanged with Doraisani Ammal. I am unable to appreciate why these two ladies, if they intended that Doraisani Ammal should not take the property from that time, should make the statements in Exhibit XII before the Collector and have the registry transferred. It appears that in the course of the arguments which were advanced at the previous hearing, the Counsel for the respondent suggested that because the ladies were old, they wanted to transfer the management to Doraisani Ammal. If they did transfer the management, it meant that they wanted to place Doraisani Ammal in possession of the properties. The learned Judge in the Court below has come to the conclusion that Doraisani Ammal was in possession, but that possession cannot be said to be adverse to her mother and aunt. I really do not understand how the possession of Doraisani Ammal, if it commenced in 1895, could be other than adverse possession against the other two ladies. It is not said that there was any such relationship between the two as mortgagor and mortgagee or as tenants-in-common or that the possession of one was the possession of the other. The possession of Doraisani Ammal if, as a matter of fact, she had possession, cannot be permissive; the suggestion is not that Doraisani managed for the two ladies. Strong reliance was placed on the evidence of defendant's 1st witness

(4) 5 B. 232.

who has been believed by the District Judge. He states that he used to pay the rents collected indifferently to any one of the three ladies who was present at the time of the payment. That to my mind shows nothing. It is proved by defendants' 1st witness that Doraisani Ammal, who was until the time of the gift living with her husband at Madras, immediately after the gift, practically lived at Sriperumbudur with her mother and aunt. She was not only living with them, but managing the whole of the property; looking to the relationship between the parties it seems to me to be but natural that rents would be received by the two ladies, the mother and aunt of Doraisani Ammal, and that Doraisani Ammal would not insist upon her sole right, more especially as she obtained that right from them. Such receipt must have been on behalf of Doraisani. The Will of Rajammal makes this conclusive. She recites in it that Doraisani Ammal has been in possession, and as I read that paragraph, I take it that she states Doraisani was in possession from the time of the transfer of the registry, which was in May 1896. There was a contention that Rajammal was attempting to make a devise or disposition of the village among others by her Will, Exhibit I. I have read it carefully and I do not think she does that. On the other hand, in the 1st paragraph she recites the previous gift in favour of the girl and the transfer of the registry and possession of the two villages by her. This is made still clear by the express devise in favour of Doraisani of the arrears of rent due down to *fasli* 1350 together with other properties. There is not a single word about the devise of these villages to her.

I now come to the only other documents in the case which are relied on, Exhibits B and C. They are two sale-deeds by Alangarammal of two houses which were originally purchased in the name of her sister, Rajammal. I find that, in the Will Exhibit I, Rajammal devised these two houses in favour of Doraisani Ammal. If, as a matter of fact, the house belonged to Rajammal, any alienation of them by Alangarammal in 1904 and 1909 could not in the position of Doraisani Ammal afford any indication of the consciousness of Alangarammal or Rajammal that they had not already given these villages. I am really unable to appreciate the argument as regards the inference sought to be drawn from the execution of these two documents. As I say that Alangarammal was under the impression that these two houses belonged to her, though purchased in the name of Rajammal, and that she ignored the gift under Exhibit 1. I think one of two presumptions is possible, either that Alangarammal disposed of the two houses with the consent of Doraisani Ammal, which consent may have been given by her in the belief that the money realized by the sale would not be utilised by Alangarammal, but would finally go to her or that Alangarammal did something which she was not entitled to do. Either way they do not prove that Rajammal and Alangarammal did not part with the possession of the villages. I agree in the judgment of my learned brother that Exhibit II could not be taken to be a completed Will of Alangarammal. I, therefore, agree that the appeal should be allowed with costs throughout and the petitions should be dismissed.

*Appeal allowed; Petitions dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1442 OF 1913.

May 10, 1915.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

BHUBAN MOHINI DASI—PLAINTIFF—APPELLANT

*versus*

GAJALAKSHMI DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pardanashin *lady, deed executed by—Document coming from lender or from borrower, effect of—Document drawn up and executed under her instructions—Document, explanation of, if necessary—Second appeal—Finding of fact—Deductions from fact, if made—High Court, jurisdiction of*—Am-mukhtear-namah *authorizing appearance in registration office, interpretation of.*

In the case of a deed executed by a *pardanashin* lady when the document comes from the side of the lender, it must be read over and explained to the executant, if the executant be an illiterate one; but when the document comes from the side of the borrower, it is amply sufficient to warrant the conclusion that the lady fully understood the document. [p. 120, col. 2; p. 121, col. 1.]

A *pardanashin* lady took a loan from another *pardanashin* lady and instructed her own men to draw a mortgage-deed and got it duly registered through her *mukhtear* and husband acting under an *am-mukhtear-namah*:

*Held*, that under the circumstances it was not necessary that the document should have been

explained after it had been drafted, provided that the draft in fact corresponded with what the lady understood before it was made. [p. 120, col. 2.]

In a second appeal a High Court is empowered to make deductions from facts without disturbing the findings arrived at by a lower Court. [p. 121, col. 1.]

An *am-mukhtear-namah* authorizing a person to appear at the Registration Office authorizes the person to appear before the Registrar for the purposes of the Registration Act. [p. 120, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 6th February 1913, reversing that of the Munsif, Serampur, dated the 8th November 1911.

Dr. *Dwarka Nath Mitter* (with him *Babu Baikuntha Nath Mitter*), for the Appellant.

Babu *Nagendra Nath Sen*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Subordinate Judge of Hooghly reversing the decision of the Munsif of Serampur. The plaintiff who is the appellant before us brought a suit to recover a certain sum of money on a mortgage security. The sum advanced was Rs. 500. Both the plaintiff and the defendant were *pardanashin* women. The Court of first instance decreed the suit. On appeal, the learned Subordinate Judge has set aside the decree of the Munsif. Hence this appeal to this Court.

There is only one question in this case and that is whether, on the findings of fact, the defendant is bound by the mortgage security. It has been found by the learned Judge, and that finding is not quarrelled with, that the lady borrowed Rs. 500 and received the money for her own purposes. That, of course, is a material finding. It has also been found by the learned Judge that the lady instructed her own men to draw up the mortgage-deed. It has also been found that her *mukhtear* and husband, acting under a document the proper name of which is, I suppose, *am-mukhtear-namah*, presented the document at the Registration Office and had it duly registered, the *am-mukhtear-namah* authorising the husband to appear at the Registration Office on behalf of the wife, the defendant. Of course, it is evident on a document like that that the person must have appeared before the Registrar for the purposes of the Registration Act. It has been suggested that the husband might have been authorised to appear for some purpose unauthorised by the Registration Act. I do not think that that is so. The appearance must obviously have been for the purpose of registering the document and acknowledging the signature on the document. That is the way in which a document can be registered when the executant is a *pardanashin* woman. But stress has been placed in this case on a judgment of the Privy Council [*Kali Bakhsh Singh* v. *Ram Gopal Singh* (1)]. The view expressed there is that a *pardanashin* lady has got to have the document explained to her. As I gather from that judgment, there is nothing in it which suggests that when a *pardanashin* lady has given instructions to her own men to draw up the deed in a particular way and when that document has been drawn up in that particular manner, anything further is required. It is not required that the document should be explained after it has been drafted, provided that the draft, in fact, corresponds with what the lady understands before it was made. It is suggested that the lady was an ignorant woman. I am not sure that her ignorance was so great as has been suggested by the learned Vakil for the respondent. She said that she never executed a document and she also kept back the evidence that would prove positively that she knew well about the contents of the document. It seems to me that, although the lady was not a literate one, she was gifted with a certain amount of intelligence. Be that as it may, the evidence offered in this case, namely, that the lady gave instructions for the preparation of the document and that she did, in fact, receive the advance of Rs. 500 and the subsequent registration of the document, do amply warrant the Court to come to the conclusion that the lady fully understood the document that she executed. In cases where the document comes from the side of the lender, it must, no doubt, be read over and explained to the executant if the executant be an illiterate one; but in this case, when the document came from the side of the defendant, the mortgagor, it was amply sufficient to

(1) 21 Ind Cas 985; 16 O. C. 378; (9 4) M W. N. N. 103; 12 A L. J. 105; 15 M. L. T. 130; 19 C. L. J. 173; 1 O. L. J. 67; 26 M. L. J. 121; 16 Bom. L R. 147; 36 A. 81; 18 C. W. N. 282 (P. C.).

warrant the conclusion that the lady fully understood the document. The learned gentleman who has conducted this case on behalf of the respondent says that this is a second appeal and that we are not entitled to interfere with the findings of fact. That is quite true. But there is no reason why the Appellate Court should not make deductions from facts without disturbing the findings arrived at by the lower Court. I have no doubt that the Court ought to find that this lady fully understood the document. The result, therefore, is that we set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance. The defendant must pay to the plaintiff her costs both in this Court and also in the Courts below.

RICHARDSON, J.—I agree that the judgment and decree of the lower Appellate Court should be set aside and the judgment and decree of the first Court should be restored.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1099 OF 1911.

October 18, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Leslie Jones.

SOHAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

SARDAR KHAN—PLAINTIFF—RESPONDENT.

*Custom—Alienation by father of ancestral property, ratification of—Sons, if bound*—Mala fides—*Civil Procedure Code (Act V of 1908), s. 11—"Claiming under," meaning of—Daughter's daughter's or son's marriage by widow—Legal necessity—Appeal—Court Fees Act (VII of 1870), s. 7 (iv), Sch. I, Art. 1.*

In a case in which the whole subject-matter of the suit is also the subject-matter of appeal, the amount or value of the subject-matter of appeal is nothing more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain. [p. 124, col. 1.]

A more remote reversioner is not bound by a ratification made by a nearer reversioner which is demonstrably improper and when *mala fides* on the part of the nearer reversioner is established, the next reversioner will not be bound even by a decree. [p. 125, cols. 1 & 2.]

Under the Customary Law a son has a right in his ancestral property independently of his father and has thus an independent right of suit with regard to the ancestral property and cannot be said to be "claiming under" his father within the meaning of section 11 of the Civil Procedure Code, 1908, and is not bound by anything done by his father with regard to such property. [p. 125, col. 2.]

The expenses incurred by a widow for the marriage of a daughter's daughter and a daughter's son out of her husband's property are not for valid necessity under the Customary Law of the Punjab. [p. 126, col. 1.]

First appeal from the decree of the District Judge, Sialkot, dated the 12th October 19 1, decreeing plaintiff's claim

Mr. *Nanak Chand*, for Rai Sahib Lala *Sukh Dayal*, and Rai Sahib Lala *Moti Sagar*, for the Appellants.

Mr. *Badr-ud-Din Kureshi*, for the Respondent.

JUDGMENT.—Shadi Khan and Nawab Khan, the sons of Achhe Khan, who were *Khokhar Rajputs* of the village of Malakpur in the Sialkot District, died some time before 1878. Shadi Khan left two widows, *Musammat* Sahibi and *Musammat* Karam Bibi. Nawab Khan left one widow, *Musammat* Begam. The area to which the widows succeeded on the decease of their husbands amounted in all to 1736 *kanals* of unencumbered land.

In 1878 the said widows commenced to alienate their property, four sales being effected by them on the 17th January of that year. On that date Karam Bibi and Sahibi sold land to Bhana Mal for Rs. 400, and *Musammat* Begam sold land to the same vendee for Rs. 270. Thakar Shah, again, obtained a sale of land from *Musammat* Karam Bibi and *Musammat* Sahibi for Rs. 100, and a sale of land from *Musammat* Begam for the same sum.

In November 1881, *Musammat* Begam sold land to Buland Khan *alias* Karam Elahi for Rs. 99, and in January 1882, Sahibi and Karam Bibi sold land, also for Rs. 99, to the same vendee. The last sale which was effected was in January 1886, by *Musammat* Begam for Rs. 1,500, in favour of Ishwar Das. The total area conveyed by these seven sales was 820 *kanals*.

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Meanwhile, however, the widows had commenced to mortgage other property. These mortgages commenced in 1882 and went on at intervals up to 1900. They were altogether nine in number and the area covered by them amounted to 560 *kanals*. The consideration for all the sales and mortgages totalled Rs. 6,934-12-0.

By January 1901, all three widows had died and mutation of the remaining property was then obtained by Sardar Khan, the nearest reversioner, who is the collateral in the third degree of the husbands of the deceased widows.

Within three years of attaining his majority, Sardar Khan instituted three suits to contest the alienations effected by the widows. In one suit he attacked all the mortgages. That suit was compromised. In the second suit he attacked the first six sales and obtained a decree not only for the land sold (subject to the payment of the value of certain improvements) but also for the possession of two houses in the village site. In the third suit he attacked the sale of 1886 but unsuccessfully.

As a result of this litigation we have before us three appeals. One is by the representatives of Bhana Mal and Thakar Shah against the decree in favour of Sardar Khan concerning the first four sales. (The representatives of Buland Khan did not appeal regarding the fifth and sixth sales. After the period of limitation for filing an appeal had elapsed, they applied to be made parties to the appeal. In the circumstances they can be treated only as respondents.)

According to the plaintiff, the two houses (which are the subject of the next appeal) were in the possession of defendants Nos. 12 to 21. Of these No. 12 only, namely *Musammat* Puran Devi, was concerned with the cases relating to the sale of land. She, however, has not joined in the appeal relating to the houses which has been conducted on behalf of defendants Nos. 13 to 21.

The third appeal is by Sardar Khan in regard to the dismissal of his suit for the land sold in 1886.

The first of these appeals (First Appeal No. 1093 of 1911) and the third (Second Appeal No. 2786 of 1914) are very closely connected. In order that the pleas may be understood, it is here necessary to refer at once to some previous litigation which occurred in 1887.

At that time the nearest reversioners of the widows' husbands were Sultan Khan, the father of the present plaintiff, and his brother, Sarfaraz Khan. Both of them were then sonless and eventually Sarfaraz Khan died without issue. Sardar Khan, the present plaintiff, was not born till 1900, his father dying about six months after his birth.

Early in 1887 Nabi Bakhsh and other reversioners, more remote than Sultan Khan and Sarfaraz Khan, instituted a suit for the usual declaration against the sale of 1886 by *Musammat* Begam. Up to that time Sultan Khan and Sarfaraz Khan had taken no steps against the widows or their alienees, but about two months after the institution of the suit by Nabi Bakhsh, etc., they themselves instituted a suit for a similar declaration. Nabi Bakhsh, etc., at once applied to be allowed to withdraw with permission to bring a fresh suit in case that by Sultan Khan and Sarfaraz Khan was not properly conducted. The desired permission was granted. At the very next hearing Sultan Khan and Sarfaraz Khan put in an application for the reference of their suits to arbitration. It was referred accordingly. The arbitrators found that *Musammat* Begam, according to the custom of her tribe, was "absolutely in possession of the property left by her husband," and they found further that even if her tenure was for life-time only, the alienation was valid as having been effected for necessity. The suit was then dismissed in accordance with the award.

Such of the pleas of the defendants concerning the sales as are still the subject of argument, are as follows :—

It is urged on their behalf as regards the sale of 1886 (1) that the suit of 1887 was genuinely conducted by Sultan Khan and Sarfaraz Khan and that Sardar Khan is, therefore, bound by its result, (2) that even if the suit was not conducted *bona fide* the subject of it is nevertheless *res judicata*, and (3) that in any case that sale was valid as having been effected for legal necessity.

In regard to the first four sales it has been argued (1) that so far at least as the alienations by *Musammat* Begam are concerned, the case is *res judicata* by virtue of the suit of 1887, because the arbitrators then held that *Musammat* Begam was in the position of an absolute owner, (2) that Sultan Khan acquiesced in the sales of 1878 and that his son is bound by his father's consent, (3) that even if the above pleas fail, it has still been shown that the sales in dispute were effected for valid necessity and (4) that the value of the improvements has been underestimated.

(In the lower Court there was also a plea that the plaintiff had no right to sue in the presence of certain descendants of a daughter of *Musammat* Karam Bibi. That plea has, however, been definitely abandoned in this Court, Counsel for the defendants-appellants admitting that the descendants of the widow's daughter have no rights. We may add that, as a result of this admission, Counsel for the plaintiff-respondent has withdrawn a preliminary objection that the daughter of Dina, one of the appellants in the appeal relating to the houses who died during the pendency of the suit, should be impleaded as an appellant.)

It is here necessary to deal with another preliminary objection. Part of the area included in the sales of 1878 has been planted by the alienees with a wood and an orchard. The defendants pleaded that even if their sales were set aside, they were still entitled to receive from the plaintiff a sum of Rs. 10,000 as the value of those improvements. Their right to the value of improvements was not contested, but their value was disputed and was fixed by the lower Court at Rs. 2,880 only. The defendants-appellants no longer claim Rs. 10,000 but urge that even if the sales are set aside, they ought to be allowed a further sum of Rs. 5,000. Counsel for the plaintiff-respondent then raised the objection, citing *Kirpal Singh* v. *Sant Singh* (1), that if the defendants-appellants claim this additional sum of Rs. 5,000 they ought to pay the full Court-fee on that amount, which is greater than the Court-fee which they have paid on the whole subject-matter of the appeal.

In reply Counsel for the defendants-appellants has cited *Waryam Singh* v. *Mahtab Singh* (2), *Hazari Singh* v. *Piran* (3), *Haidari Begam* v. *Gulzar Bano* (4) and *Abdur Rahman* v. *Charagh Din* (5). We are unable to see how the contention of the plaintiff-respondent is supported by *Kirpal Singh* v. *Sant Singh* (1). In that case the plaintiff had got a decree for the recovery of the principal and interest due on a bond. The defendant on appeal claimed that the amount of the decree should be reduced, and he was naturally required to pay the Court-fee on the exact amount of the relief which he claimed. Of the rulings cited for the defendants-appellants none is exactly in point. *Hazari Singh* v. *Piran* (3) related to an appeal in a suit for pre-emption by the vendee for a sum which had been disallowed out of the price stated in the deed of sale. The Court-fee was paid only on the value of the land in suit. In the judgment it was remarked that "it was not contemplated by the Legislature that the Court-fee payable on part of a whole claim in appeal is, in the absence of express direction to the contrary, to exceed the Court-fee payable on the whole claim." This decision was criticised in *Waryam Singh* v. *Mahtab Singh* (2) on the ground that it proceeded "upon the assumption that section 7, clause (*vi*), of the Court Fees Act was applicable to appeals in pre-emption suits, and upon grounds which, however, specially plausible, apparently overlooked the express terms of Article 1 of the Schedule which alone regulate matters connected with the fee to be paid upon memorandum of appeal in such suits."

That criticism may be well founded for this reason that the appellant in *Hazari Singh* v. *Piran* (3) did not appeal with the object of getting the whole decree set aside

(1) 13 Ind. Cas. 305; 71 P. R. 1911; 30 P. L. R 1912; 205 P. W. R. 1911.

(2) 19 Ind. Cas. 961; 141 P. W. R. 1913; 76 P. R. 1913; 240 P. L. R. 1913.

(3) 92 P. R. 1900.

(4) 25 Ind Cas. 325; 36 A. 322; 12 A. L. J. 481.

(5) 19 P. R. 1908; 129 P. L. R. 1908; 38 P. W. R. 1908.

but merely as regards the price. In cases where, however, the whole subject-matter of the suit is also the subject of the appeal, as in this case, it seems to us that the principle enunciated in *Hazari Singh* v. *Piran* (3) is perfectly correct and in that opinion we are fortified by *Haidari Begam* v. *Gulzar Bano* (4). That was a case in which the plaintiff obtained an unconditional decree for the possession of land against a widow. The widow appealed against the whole decree but also claimed that in any event the decree should be made conditional on the payment of a sum of Rs. 80,000 due to her as dower. The Court-fee on appeal was paid on the value of the land only and the plaintiff-respondent pretended that it should be paid on the sum of Rs. 80,000. His objection was disallowed. Tudball, J., remarking that "it seems to me impossible to hold that the amount or value of the subject-matter of this appeal is anything more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain."

We are of the opinion that in the present case the same principle should be applied and for this reason we disallow the objection.

To return to the merits, Counsel for the defendants-appellants has argued at great length the question of the acquiescence by Sultan Khan in the sales of 1878. His principal arguments are that acquiescence is shown by his inaction until the date of his death, by the fact that although he contested the later sale of 1886 he did not contest those of 1878, and by his allowing the vendees to plant their wood and orchard without raising any protest. We do not propose to discuss whether, if it be granted that the suit of 1887 was conducted *bona fide*, these facts would be sufficient to establish acquiescence. We are quite satisfied that Sultan Khan and his brother did acquiesce in all the sales effected by the widows, but our reason is derived solely from the conduct of the case of 1887. As already stated, both Sultan Khan and Sarfraz Khan were then sonless. Between them they ought to have been in possession of at least as much land as was held by the widows. That being so, it was probably a matter of very small importance to them if the widows chose to alienate the family property. If, on the other hand, they had been actuated by any desire to check the widows' alienations, it is difficult to suppose that they would not have attacked the sales of 1878 long before the sale of 1886 was effected, for, as we shall presently show, there was every reason to regard those sales as having been effected without any legal necessity. On the contrary, what we find is that Sultan Khan and Sarfaraz Khan took no steps to bring any suit until a suit had already been instituted by more remote reversioners and that when they did institute a suit they amply justified the suspicions of the more remote reversioners that it would not be genuinely conducted. One of the persons selected as an arbitrator was, as Counsel for Sardar Khan has successfully shown, Buland Khan, the alienee of the sales of 1881 and 1882, who was deeply interested in maintaining the widows' right of alienation, and although the plaintiffs in that case went through the formality of producing witnesses before the arbitrators, they nevertheless secured the failure of the suit by getting those witnesses to say that the sale by the widow had been effected for necessary purposes. Buland Khan, of course, was interested in going further than this and it is probably due to his influence that in the award it was held that *Musammat* Begam had absolute rights over her property. That decision is of so remarkable a character that it is hardly possible that it would have been given as the result of any *bona fide* litigation. It is a matter of common knowledge that the usual course of the party who is unsuccessful in arbitration is to raise objections to the award on the score of the misconduct of the arbitrators and on any other grounds of which he can lay hold. In this case, however, not only did the then plaintiffs raise no objection to the award which, however binding it may have been, they must have known to be preposterous in character; on the contrary they at once signified their full assent to the decision at which the arbitrators had arrived.

We have no hesitation in finding that the suit of 1887 was not conducted *bona fide*, but was instituted purely with the object of saving the interests of the widow and her alienee in the suit by the more remote reversioners. It is, of course, true that those

more remote reyersioners never availed themselves of the permission which they had obtained to re-institute their suit, but that is not surprising for this reason that owing to the birth of Sardar Khan within a few years they no longer possessed any interests which it was necessary for them to safeguard.

The conduct of Sultan Khan and Sarfaraz Khan in the suit of 1887 not only shows their attitude towards that particular alienation, but it also indicates quite clearly that they were ready to and did acquiesce in all the alienations by the widows which were open to them to contest, and further that the consent which they thus accorded amounted to an improper concurrence in the wrongful acts of the widows.

It is not now necessary to discuss in detail the reasons for which the suit of Sardar Khan concerning the sale of 1886 was dismissed by the first Court. Suffice it to say that the decree was maintained by the Divisional Judge, who was evidently of opinion that the suit by Sultan Khan and Sarfaraz Khan of 1887 was not conducted *bona fide*, on the bare ground that they ratified the sale. He remarked that "it is quite immaterial that the plaintiffs in the suit of 1887 chose a singularly tortuous and round-about way of ratifying the alienation. The fact remains that they did ratify it and that is sufficient."

Holding as we do that the consent of Sultan Khan and Sarfaraz Khan to the alienation of 1886 was not given *bona fide*, we are unable to agree that Sardar Khan is still bound by the ratification of his father and uncle. It is nowhere stated in *Jowala Hira Singh* (6), which is cited by the Divisional Judge in support of the proposition to which we have already referred, that a more remote reversioner is bound by a ratification which is demonstrably improper. Nor is Counsel for the defendants-appellants able to cite any authority for holding that he is any the more bound by the mere fact that the near reversioner has brought a suit the dismissal of which he has himself ensured. We need not in this connection do more than refer to remark No. 2 under paragraph 67, Rattigan's Digest, which indicates that when *mala fides* is established, the next reversioner will not be bound even by a decree.

We come now to the conclusion that whether or no Sardar Khan is bound according to the principles of Customary Law by the decision of 1887, he is nevertheless bound by the provisions of section 11, Civil Procedure Code. The fact is that it is impossible for us to regard Sardar Khan as the mere representative-in-interest of his father. He no doubt derives his right to possession through his father, and for that reasen would be bound by his father's consent if not improperly given. But he has also, as has been clearly demonstrated in *Sundar* v. *Salig Ram* (7), an independent right of suit which is derived, under Customary Law, from the common ancestor. Having that right independently of his father, it cannot be said that he is merely a party "claiming under" his father, and if it cannot, then section 11, Civil Procedure Code, is not applicable. He has rights under Customary Law of which he cannot be deprived by the Civil Procedure Code. If then, as we hold, the rule of *res judicata* does not apply even as regards the suit of 1887 to the land alienated in 1886, it is obvious that it cannot be applied to the sales of 1878, and further discussion on the point is unnecessary.

To come now to the question of necessity. As regards the sale of 1886, Counsel for the defendants-appellants relied entirely on the decision of 1887 and although the question of necessity as regards that alienation has not been decided by the lower Courts, he made no claim that necessity could be independently established, nor did he ask for a remand. On the other hand, there is excellent reason for thinking that in this matter he had been rightly advised, for we find in a statement by *Musammat* Begam during the course of litigation of 1887, that her object in selling that land was to pay the debts of her brother-in-law, Sultan Khan, son of Waris Khan, and to pay the expenses of the marriage of his son. In face of that statement it would not be possible for the defendants to establish anything in the shape of legal necessity.

With one exception the sales of 1878 contained no reference to the objects for which they were effected. The exception is that

(6) 55 P. R. 1903; 117 P. L. R. 1903.

(7) 9 Ind. Cas. 300; 26 P. R. 1911 (F. B.); 34 P. L. R. 1911; 33 P. W. R. 1911.

f the sales for Rs. 400 by *Musammat* Karam Bibi and *Musammat* Sahibi in favour of Bhana Mal. In that deed of sale it was recited that the greater part of the consideration was to be devoted to paying the principal and interest on two bonds held by a certain Sultan Khan. Counsel for the defendants-appellants has assumed that this Sultan Khan was the son of Kamal Khan and the father of the plaintiff. For this assumption, however, there does not appear to be any foundation. It is far more probable that the Sultan Khan in question was Sultan Khan son of Waris Khan, for whose benefit the sale of 1886 was apparently effected. That Sultan Khan was not only the brother-in-law of *Musammat* Begam but also the son-in-law of *Musammat* Karam Bibi and it is noticeable that he was one of the attesting witnesses in the case of all of the sales of 1878.

There is some oral evidence which was tendered with the object of showing that the sales of 1878 were effected for necessary purposes, but it is of no value to the defendants-appellants. It shows rather, if it is true, that at least some of the objects to which the money was devoted were not necessary, as for instance the marriage of a daughter's daughter and a daughter's son. It is obvious that the widows were in possession of a very large property which was more than sufficient to meet any reasonable expenditure, and we have no hesitation in concurring with the finding of the learned District Judge that necessity as regards the sales of 1878 has not been established.

So far as the sales are concerned, the only remaining question which is necessary to discuss is that relating to the value of the improvements. The defendants-appellants rely on the report of a local Commissioner, who estimated the value of the fruit and other trees at Rs. 9,590. The District Judge, rejecting this estimate, assessed their value at Rs. 2,880. The latter sum was the value at which the local Commissioner would have assessed the trees if he had regarded them merely as fuel, and the District Judge in discussing the report made a somewhat unguarded remark, which Counsel for the defendants-appellants takes as indicating that he thought that fruit trees are never more valuable than trees grown for fuel and like purposes. We do not think that this was what the District Judge really meant, but apart from that we have examined the evidence ourselves and we can find no good reasons for supposing that the value which he has placed upon the trees has been underestimated. The estimate of the local Commissioner, who saw the trees at a time when they were not in fruit, was based very largely on oral statements that the value of the fruit in the orchard might be as much as Rs. 564 per annum, but this annual value, even if the statements be accepted as correct, was not the value to the owners of the orchard but the retail price of the fruit in the hands of lessees. The maximum sum which, according to the evidence, the owners ever received in one year was Rs. 250, but admittedly its sale value has fallen as low as Rs. 28. Even these prices take no account of the cost of labour which the owners of the orchard must have employed and it seems to us, having regard to all the material before us, that the sum allowed by the District Judge represents fairly enough the capitalized value of any income which the defendants-appellants are likely to have realized.

It remains to discuss the appeal relating to the two houses. From the plaint it would seem that when he instituted his suit, Sardar Khan thought that these houses had been transferred by the sales of 1878. Admittedly this was not the case. The plea of the defendants was that the houses had been acquired by their fathers from Shadi Khan and Nawab Khan, the husbands of the widows. No separate issue concerning these houses was framed by the District Judge, nor was any question relating to them separately discussed in his judgment. He ordered, however, that the plaintiff should get a decree for the houses as well as for the land, and then by a further oversight omitted to mention the houses when framing the decree. Subsequently as a result of a representation by the plaintiff, the decree was amended so as to bring it in accordance with the judgment.

Defendants here appeal on two grounds. The *first* is that the District Judge had no

authority to amend the decree to make it agree with the judgment. That contention is obviously untenable. The second is that no issue was framed and there has been no discussion regarding the houses on the merits. Technically these last contentions are correct, but nevertheless after hearing Counsel we see no reason for a remand. We find that there is ample material on the record to enable us to dispose of the point ourselves. We have already stated that the contention of the defendants was that these houses were obtained by them from the predecessors of the husbands of the widows. Counsel for the plaintiff-respondent has, however, been able to show us that in 1865 one of the houses was in possession of *Musammat* Sahibi and *Musammat* Karam Bibi, their husband Shadi Khan being already dead, and that in the same year the other house was in the possession of Nawab Khan, the husband of *Musammat* Begam. More than that, however, as is amply clear from the evidence on this point tendered not only by the plaintiffs but also by the defendants, that the latter did not obtain possession of these houses until after the decease not only of Shadi Khan but also of Nawab Khan. The result is then that, however the defendants obtained these houses, whether by sale or otherwise, they obtained them from the widows. In the circumstances there can be no question of adverse possession and in view of the plea set up by the defendants themselves, it is not open to them to plead a valid transfer from the widows.

We dismiss Appeals Nos. 1099 of 1911 and 1352 of 1911 by the defendants, with costs. We accept Appeal No. 2786 of 1914 by the plaintiff, who will get a decree for possession of the land in suit with costs throughout.

*Appeals Nos.* 1099 *and* 1352 *dismissed*;
*Appeal No.* 2286 *allowed.*

## ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS REFERENCE No. 328 OF 1915.

December 9, 1915.

*Present*:—Mr. Justice Tudball and Mr. Justice Walsh.

RAM SINGH—DEFENDANT—PETITIONER

*versus*

*Musammat* BHANI—PLAINTIFF—RESPONDENT.

*Hindu Law—Inheritance—Insane, exclusion from inheritance of—Heir of such insane, whether has any legal title—Illegitimate child, whether can inherit father's property as against legitimate child—Suit for declaration and possession—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 141.

A person is disqualified under the Hindu Law from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable. A daughter of such lunatic has no legal title to the estate left by her grandfather. [p. 128, col. 1.]

Under the general principles of Hindu Law an illegitimate daughter cannot succeed to her father's property as against a legitimate daughter by a lawful wife. [p. 128, col. 2.]

A suit by a Hindu daughter for possession of her share in her father's estate on the death of the mother falls within Article 141 of the first Schedule to the Limitation Act and time begins to run from the date of the mother's death. [p. 128, col. 2.]

Reference by the Local Government under rule 17 of the Kumaon Rules, 1894.

Mr. *Baldeo Ram Dave*, for the Petitioner.

Mr. *A. H. C. Hamilton*, for the Respondent.

JUDGMENT.— This is a reference under rule 17 of the Rules and Orders relating to the Kumaon Division, 1894. The facts of the case are as follows. One Lachman Singh, *Subedar*, acquired the property now in suit. He died some fifteen or sixteen years prior to the suit leaving an idiot son, Ram Singh Thapa. Ram Singh had a wife *Musammat* Tara. Ram Singh died subsequently to his father, leaving three daughters by his wife, *Musammat* Tara. He had what has been described as a *dhauti* wife, *Musammat* Yasuli, and by her a daughter, the plaintiff in the suit. After the death of Lachman Singh, *Musammat* Tara took possession of the estate and prior to her death in the end of 1906 she made certain transfers of the property in favour of her three daughters and of the contesting defendant, the husband of her third daughter, *Musammat* Debki. She retained a portion of the property, which on her death in 1906 was taken by one of her daughters. The plaintiff instituted the suit on the allegation

that she was the legitimate daughter of Ram Singh and as such entitled to a share in his estate on the death of his widow, *Musammat* Tara. *Musammat* Debki having died prior to the suit, she claimed a one-third share in the property. It was pleaded in defence that her mother was not the lawful wife of Ram Singh but only his mistress and that, therefore, the plaintiff was not entitled to inherit at all. It was further pleaded that the suit was barred by limitation. The Court of first instance dismissed the suit. The Court of first appeal decreed it. The Court of second appeal upheld the decision of the Deputy Commissioner, and the matter has now been referred to us under the rules with a request to favour the Government with this Court's opinion on three points. The *first* point is whether, in view of the fact that the plaintiff's father was a lunatic, the plaintiff had any right to maintain the suit. The *second* point is whether or not the Commissioner was right in holding that daughters of *dhaiti* wives could succeed to their father's property, in view of the general principle of the Hindu Law and of the fact that no custom was set up in the plaint and none was proved. The *third* is whether the Commissioner was right in holding that Article 141 of the Limitation Act, Schedule I, applied to the suit, in view of the fact that the suit was one for a declaration of title and for delivery of possession with reference to the ruling cited in paragraph 6 of the letter of reference. The ruling mentioned is the case of *Francis Legge* v. *Rambaran Singh* (1). The reply to the first question is simple. In *Deo Kishen* v. *Budh Prakash* (2), which was subsequently followed in *Tirbeni Sahai* v. *Muhammad Umar* (3), it was clearly held that a person is disqualified under Hindu Law from succeeding to property, if he is insane when the succession opens whether his insanity is curable or incurable. The facts found are that Ram Singh Thapa was insane when his father died and that the property was acquired by his father Lachman Singh. It was, therefore, clear that Ram Singh Thapa did not inherit the property and that the plaintiff as his daughter has no legal title to the estate which was left by Lachman Singh. In the case of the second question, it is clear that under the general principle of Hindu Law an illegitimate daughter could not succeed to her father's property as against a legitimate daughter by a lawful wife. The plaintiff came into Court alleging herself to be the legitimate daughter. The point was found against her. She did not plead any special custom either in the family or caste under which she as an illegitimate daughter would be entitled to take her father's estate. There is no evidence to prove such a custom. It is, therefore, clear that the Commissioner's finding on the point is wrong. On the question of limitation, it is also clear that the ruling mentioned in the letter of reference, namely that of *Francis Legge* v. *Rambaran Singh* (1), does not and cannot apply to the present suit. In that suit the plaintiff came into Court alleging that he was in possession and that a slur had been cast upon his title and asked the Court to declare both that he was the owner and possessor of the property. That suit was purely declaratory in its nature. The present suit is a suit for possession. On the face of the plaint it was a suit by a Hindu daughter for possession of her share in her father's estate on the death of the mother. Suits of this nature really fall within Article 141 of the first Schedule to the Limitation Act and time begins to run from the date of the mother's death. The Commissioner was, therefore, right in holding that this Article applied to the suit as brought. We, therefore, answer the questions (*a*) and (*b*) in the letter of reference in the negative and question (*c*) in the affirmative. We consider that the plaintiff should be ordered to pay the costs of the contesting defendant in all Courts. The costs of this Court will include the fee of Rs. 32 certified by the respondent's Counsel.

*Reference answered.*

(1) 20 A. 35; A. W. N. (1897) 193.
(2) 5 A. 509; A. W. N. (1883) 105.
(3) 28 A. 247; A. W. N. (1905) 265; 3 A. L. J. 4.

## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 473 OF 1915.
CRIMINAL REVISION PETITION No. 375 OF 1915.
November 11, 1915.

[*Present*:—Mr. Justice Kumaraswami Sastri.

BUGTHA SIMHADRI NAIDU—COMPLAINANT—PETITIONER

*versus*

BEHAVA SITHARAMA PATRUDU AND OTHERS—ACCUSED—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), ss. 350, 435, 439*—De novo *trial, if cancels charge previously framed—Order subsequently passed in favour of accused, whether amounts to discharge or acquittal—Revision against acquittal by private party, whether competent.*

A *de novo* trial held under section 350, Criminal Procedure Code, does not imply the cancellation of a charge previously framed against the accused and consequently an order subsequently passed letting off the accused is one of acquittal and not of discharge.

*Tanguturi Sriramulu* v. *Nalam Krsshna Row*, 25 Ind. Cas. 1001; (1914) M. W. N. 646; 27 M. L. J. 589; 15 Cr. L. J. 673; 38 M. 585; 16 M. L. T. 303, followed.

Though the High Court has power to interfere on revision with an order of acquittal at the instance of a private party, that power is only exercised when the order has resulted in grave injustice.

*Vellayanambalam* v. *Solai Servai*, 30 Ind. Cas. 152; 28 M. L. J. 692; 16 Cr. L. J. 600; (1915) M. W. N. 540, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 2nd Class Magistrate of Parvatipur, in Calendar Case No. 324 of 1914.

FACTS.—The petitioner preferred a complaint against the accused to the 2nd Class Magistrate of Parvatipur in Calendar Case No. 324 of 1914. This complaint was duly enquired into by the Magistrate and charges were framed against the accused. That Magistrate being transferred the case came on before the new Magistrate. The accused then claimed a *de novo* trial and this was granted. Subsequently the new Magistrate let off the accused. Against this latter order the complainant preferred this criminal revision petition.

The Hon'ble Mr. *B. N. Sarma*, for the Petitioner. It is clear law that once a *de novo* trial has been ordered, the Judge is bound to try the whole case anew. He cannot have the evidence of some of the witnesses in the first trial and examine only the remaining witnesses again. By analogy it follows that the charge previously framed must be deemed to have been cancelled by the order for a *de novo* trial and the whole trial must be deemed to have begun anew.

Mr. *C. Sidney Smith*, for the *Public Prosecutor*, for the Government and Mr. *Janakiramayya*, for Mr. *V. Ramesam*, for the Respondent, were not called upon.

ORDER.—It has been held in *Tanguturi Sriramulu* v. *Nalam Krishna Row* (1) that the recommencement of a trial under section 350, Criminal Procedure Code, does not imply the cancellation of a charge already framed and that an order passed subsequently is one of acquittal and not discharge. The case should, therefore, be treated as a revision against an acquittal.

Though the High Court has power to interfere on revision, the power will only be exercised when the order of acquittal has resulted in grave injustice. I have dealt with the matter fully in *Vellayanambalam* v. *Solai Servai* (2).

I see no grounds for interference in this case. The Magistrate did not believe the prosecution evidence and was of opinion that there was considerable doubt as to the guilt of the accused.

The petition is dismissed.

*Petition dismissed.*

(1) 25 Ind. Cas. 1001; 16 M. L. T. 303; (1914) M. W. N. 646; 27 M. L. J. 589; 15 Cr. L. J. 673; 38 M. 585.

(2) 30 Ind. Cas. 152; (1915) M. W. N. 540; 28 M. L. J. 692; 16 Cr. L. J. 600.

## BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 202 OF 1915.

September 30, 1915.

*Present*:—Mr. Justice Batchelor and Mr. Justice Hayward.

BABILAL BALWANT - ACCUSED—APPLICANT

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Bombay Prevention of Gambling Act* (*Bom. Act II of* 1887), *s.* 10—*Examination of accused person as witness, legality of—Evidence of such accused, admissibility of.*

A Magistrate is not justified, under section 10 of the Bombay Prevention of Gambling Act, to examine and therefore commits an irregularity, if he examines an accused person while he is still in the position of an accused person and has obtained no order of discharge or acquittal.

Statements made by accused persons under such circumstances are not admissible in evidence.

Criminal application for revision from conviction and sentence passed by the Honorary Magistrate, first Class, at Ahmedabad.

Mr. *G. N. Thakor*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

BATCHELOR, J.—In this case the learned Magistrate in examining two of the accused persons, while they were still in the position of accused persons and had obtained no order of discharge or acquittal, committed an irregularity. His action is not to be justified under section 10 of the Bombay Prevention of Gambling Act. The statements of these two accused persons were, therefore, inadmissible in evidence, and if those statements are discarded from the record, there is nothing in evidence which, despite the presumptions arising under sections 5 and 7 of the Act, would warrant the conviction of this applicant. For those presumptions in this particular case are weakened by the circumstance that the gambling was taking place not in a close room, but in an open shed.

The Rule, therefore, must be made absolute, the fine, if paid, being refunded.

*Rule made absolute.*



## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 261 OF 1915.

CRIMINAL REVISION PETITION No. 212 OF 1915.

October 27, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

*In re* M. MUTHAYA—ACCUSED—PETITIONER.

*Madras Abkari Act* (*I of* 1886), *ss.* 56, 64—*Depôt-writer actual offender, liability of.*

Section 56 of the Abkari Act when read with section 64 makes also a depôt-writer (not a licensee under the Act), if an actual offender, liable for an offence under the former section.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Mangalore Division, in Criminal Appeal No. 100 of 1914, preferred against that of the Court of the Stationary 2nd Class Magistrate of Mangalore Taluq, in Calendar Case No. 301 of 1914.

Mr. *K. Ramanath Shenai*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

ORDER.—It is argued that petitioner being merely the depot-writer and not the licensee is not liable to prosecution under section 56 of the Abkari Act. It has been held by a Bench of this Court in an unreported case (Criminal Revision Case No. 650 of 1886) that sections 64 and 56 must be read together, and that not only the licensee but the actual offender (in this case petitioner) is liable to prosecution for an offence under section 56. Following this we must reject petitioner's contention. No other ground for inteference is shown. Petition is dismissed.

*Petition dismissed.*

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 32 OF 1915.

June 17, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

EMPEROR—APPLICANT

*versus*

USMAN WALAD DATO—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 439—High Court, power of, to enhance sentence—Laches of prosecution, effect of—Penal Code (Act XLV of 1860), ss. 380, 454.*

Where a person is convicted under sections 380 and 454, Indian Penal Code, and subsequently it is discovered that he has been previously convicted seven times, a High Court would not enhance the sentence under section 439, Criminal Procedure Code, in the absence of any irregularity or impropriety in the Magistrate's proceedings.

The powers of revision are not to be invoked to supply the laches of the prosecution.

*Emperor* v. *Nur Mahomed*, 3 Cr. L. J. 341; 43 P. R. 1905 Cr.; 42 P. L. R 1906, referred to.

*Emperor* v. *Allahrakhio*, 17 Ind. Cas. 412; 13 Cr. L. J. 780; 6 S. L. R. 101, distinguished.

Reference made under section 430, Criminal Procedure Code, by the District Magistrate, Hyderabad.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.

PRATT, J C.—The accused was convicted by the City Magistrate, Hyderabad, of offences under sections 454 and 380, Indian Penal Code, and sentenced to suffer rigorous imprisonment for four months. The District Magistrate refers the proceedings to us for enhancement of the sentence, because after the trial and convictions it was discovered that the accused had been previously convicted seven times. We do not think we should exercise our power of enhancement under section 439, Criminal Procedure Code, in cases where there was no irregularity in the Magistrate's proceedings and where the Magistrate's order was a proper order on the materials before him. Even if we did exercise the power of enhancement of the sentence, we could only do so up to a period of 2 years which would be quite inadequate in view of the many previous convictions. If the previous convictions had been known before the trial, the case would, no doubt, have been committed to the Court of Session. We do not think it fair to the



accused that we should reverse the conviction and direct him to be so committed after he has undergone the full period of the sentence inflicted by the trying Magistrate.

The Public Prosecutor refers to the case of *Emperor* v. *Allahrakhio* (1), where a conviction in a summary trial for cattle-lifting was set aside and a re-trial ordered on the ground that the offence was a serious one and should not have been punished by the Magistrate in a summary trial. But there the Magistrate exercised a wrong discretion in trying the case in a summary manner and this Court ordered a re-trial to correct that error. But here no error by the trying Magistrate has occurred. It was the duty of the prosecution to put all the facts before the Magistrate and our powers of revision are not to be invoked to supply the laches of the prosecution.

The Punjab Chief Court on similar facts refused to interfere, see the case of *Emperor* v. *Nur Mahomed* (2).

We, therefore, discharge the warrant issued against the accused and direct the record and proceedings be returned to the District Magistrate.

*Record returned.*

(1) 17 Ind. Cas. 412; 6 S. L. R. 101; 13 Cr. L. J. 780
(2) 3 Cr. L. J. 341; 43 P. R. 1905 Cr.; 42 P. L. R. 1906.

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## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 522 OF 1915.

CRIMINAL REVISION PETITION No. 417 OF 1915.

November 11, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*In re* MADASAMY NADAN—ACCUSED—PETITIONER.

*Regulation IX of 1816, s. 10—Punishment of putting in stocks—Test for determining whether it is degrading to inflict the punishment*—Shanars.

In determining the question whether the punishment of putting in stocks shall be inflicted on any

SUMANTA DHUPI *v.* EMPEROR.

particular class of people, the test is whether that class would at the present day regard themselves degraded by the infliction of such punishment.

A sentence of putting in stocks is unwarranted by law in the case of *Shanars* who have improved in social status and regard being put in stocks as a degrading form of punishment.

*Rettigadu* v. *Konda Reddi*, 24 M. 271; 1 Weir 928, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Village Magistrate of Nagaram, Tinnevelly District, in Calendar Case No. 1 of 1915.

Mr. *M. D. Devadoss*, for the Petitioner.

Mr. *P. R. Grant*, for the Government.

ORDER.

ABDUR RAHIM, J.—In this case the petitioner is a *Shanar* by caste and he was convicted by the Village Magistrate of insult and assault and put in stocks by way of punishment.

The question we have to consider is whether the sentence was a proper one or not. We are of opinion that *Shanars* do not belong to "any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment", to use the words of section 10, Regulation XI of 1816. In the case of *Rettigadu* v. *Konda Reddi* (1), it was held that a *Mala*, a Hindu *pariah*, was a person on whom it may not ordinarily be improper to inflict so degrading a sentence, but it would be otherwise if it could be shown that on adopting Christianity he adopted also the Christian moral and social standards instead of those of his caste. In the case of *Shanars* we would not be far wrong in saying that they would at least at the present day regard themselves degraded by the infliction of such punishment. That is one important test for determining the question whether the second condition applies. Many members of that community have now taken to trade and business or are landowners and farmers and with improved material prosperity a greater sense of self-respect has come to them. Considerable members of them have adopted Christianity, in many cases perhaps as a protest against the rigidity of the ancient caste system. As a caste they are said to occupy a place somewhere between the *Vellalas* and the *Pariahs* and their traditional occupation has been toddy-drawing (see Bhattacharjee on Hindu Castes and Sects, page 26). But they themselves claim to be *Kshatriyas*. Whether that claim be well founded or not, the fact that it is made is evidence to show that *Shanars* as a community would regard being put into stocks as a degrading form of punishment. In this case the sentence has already been suffered and there is no reason to interfere with the conviction itself. All that was necessary was to record our opinion that the sentence that was inflicted was not warranted by law.

AYLING, J.—I agree that the *Shanars* are not a "servile caste" [*Vide Queen* v. *Nabi Saheb* (2)] but one on the members of which it is improper to inflict so degrading a punishment as confinement in stocks.

(1) 24 M. 271; 1 Weir 928.

(2) 6 M. 247; 1 Weir 927.

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CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 552 OF 1915.

August 31, 1915.

*Present*:—Mr. Justice Chapman and Mr. Justice Roe.

SUMANTA DHUPI AND OTHERS—APPELLANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 201, 302—Principal, if convicted as accessory after the fact—Mere suspicion, if bar to conviction—Murder, evidence of, causing to disappear—Alternative indictments, propriety of.*

A principal cannot be convicted as an accessory after the fact. [p. 133, col. 2.]

Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201. [134, col. 1.]

SUMANTA DHUPI v. EMPEROR.

But if in a case of murder it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn. [p. 134, col. 1.]

Per *Chapman, J.*—It is unsatisfactory to have an alternative indictment, one count charging the accused as principal and the other as accessory after the fact. [p. 134, col. 2.]

Appeal against the order of the Sessions Judge of Noakhali, dated the 11th May 1915.

Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.

ROE, J.—The facts of this case as set forth in the judgment of the learned Sessions Judge are as follows:—On the 3rd February one Girish Kahar disappeared and was never seen again alive. On the 12th February a dead body was found in a pond which appears to be an overflow from a tidal river. The body was lying under three feet of mud and on it was a heavy ladder. It was so far decomposed that the Medical Officer who held the *post mortem* examination was unable to give any cause of death: but from its clothing it was identified as the body of Girish by his relations. As soon as the body was discovered, a first information was lodged before the Police in which it was stated that the undoubted cause of the killing of Girish Kahar was that his cousin was an idiot and that his wife Nandarani was an immoral woman, her chief visitors being Sumanta Dhupi and Bhagwan Dhupi, two of the accused now before us, and that Girish was an obstacle to these intrigues. After investigation two other Dhupies, Bharat Dhupi and Pyari Dhupi, were arrested by the Police and were brought before the Deputy Magistrate for the recording of statements which for the purpose of the present case it is not necessary to consider. It is sufficient to say that they are not admissible in evidence against the two accused Sumanta and Bhagwan. Evidence was placed before the Committing Magistrate to the effect that from the condition of the rice in the stomach of the deceased he must have died three or four hours after his last meal, which was taken at 6 P. M. A number of witnesses gave evidence that they saw Sumanta and Bhagwan, Pyari and Bharat between 6 and 8 P. M. loitering near the house of Girish and two boatmen saw Sumanta the same night at 11 P. M. with two other men at a spot a short distance from the place where the body was found. The men that they saw were muddied to the waist. Other witnesses saw Sumanta and Bhagwan about midnight returning to their homes with mud upon their legs. Upon this evidence the four accused Sumanta, Bhagwan, Bharat and Pyari were committed to the Sessions Court under sections 302 and 201, Indian Penal Code.

On the case coming on for trial it was at once evident that it would be illegal to try both these offences together. Accordingly the charge under section 201, Indian Penal Code, was first investigated, the charge under section 302 being postponed for future consideration.

The facts as found by the Sessions Judge amount to this, that the Medical Officer is wrong in his deductions from the digestion of the food in the stomach of the deceased as to the exact hour of his death. That hour would more rightly be fixed at between 7 and 8 P. M. The Sessions Judge finds on the evidence that it is conclusively proved that Bhagwan and Sumanta disposed of the body of Girish by sinking it in the pond. He finds that it is conclusively proved that Girish was murdered between 7 and 8 P. M. on the night of the 3rd February. He is satisfied that Sumanta and Bhagwan had a sufficient motive for killing him. He finds that they were loitering near the house of Girish at the exact hour of the murder. On these facts he has convicted them under section 201.

Section 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory after the fact. The learned Judge recognises this. His argument is that the evidence on the record is insufficient to justify him in saying definitely

that either Sumanta or Bhagwan was actually guilty of the murder and that, therefore, there is no bar to their trial under section 201. I have considered carefully the opinion of many learned Judges upon this section, particularly the opinion of Jardine, C. J., and Ranade, J., in the case of *Queen-Empress* v. *Limbya* (1). I accept with confidence the rule laid down in that case that, where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201. But I am satisfied that if it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.

We must take it as a fact conclusively proved that the accused on the night of the murder of Girish disposed of his dead body. We must take it that before any investigation had been made by the Police Sumanta and Bhagwan were clothed with a motive for the murder. We must take it as proved beyond dispute that the murder was committed between 7 and 8 P. M. and that between 7 and 8 P. M. Sumanta and Bhagwan were seen by numerous witnesses loitering near the house of the deceased. If all these facts are accepted as being conclusively proved, it is beyond question that they amount to a chain of circumstantial evidence amply sufficient to justify the conviction of the accused as principals. If we accept the facts found the appellants were certainly principals. If we do not accept the facts found they are on the merits of the case not guilty. There is in this case no escape from that position. The appellants Sumanta Dhupi and Bhagwan must be acquitted.

(1) Unreported Cr. Case Bom. H. C. R., 1895 at p. 799.

With regard to Pyari Dhupi there are two flaws in his conviction. In the first place on the facts found by the Sessions Judge all that he did was to tie the body of Girish to a ladder. In one part of his judgment he says that it is not shown for certain whether Girish was dead when he was tied to the ladder. In another part of his judgment he says that Payari helped to tie the body to the ladder because he was abused Accepting these findings of fact it is clear, in the first place, that when Pyari lent his assistance it is not certain that the offence of murder had been committed. In the second place, if indeed he only tied the ladder to the body of the deceased to avoid being abused it cannot be said that he assisted in disposing of the body with the intention of screening the murderers.

For these reasons I am of opinion that the three appellants should be acquitted and released.

CHAPMAN, J.—I agree that the appellants must be acquitted and released. I desire, however, to guard myself from saying what my opinion would be if this case were one of first impression. I consider that I am bound by the decision of *Torap Ali* v. *Queen-Empress* (2). I am unable to distinguish the facts of the present case from the facts of that case. The Crown might well consider in a case of this kind which charge to prove and proceed upon that charge alone. It is unsatisfactory to have an alternative indictment, one count charging the accused as principal and the other as accessory after the fact.

*Appeal allowed.*

(2) 22 C. 638.

## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 976 OF 1915.

September 2, 1915.

*Present*:—Mr. Justice Shadi Lal.

PARS RAM—PETITIONER

*versus*

JALAL DIN—RESPONDENT.

*Practice—Point at issue to be appropriately decided by Civil Court—Criminal case, stay of Jurisdiction.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. [p. 135, col. 2.]

*Emperor* v. *Bishen Das*, 8 Ind. Cas. 1161; 57 P. L. R. 1911; 33 P. R. 1910 Cr.; 12 Cr. L. J. 50, followed.

A Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it and section 344, Criminal Procedure Code, empowers the Court to adjourn an inquiry or trial for any reasonable cause. [p. 136, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Shahpur, dated the 21st May 1915, confirming that of the Magistrate, first Class, Shahpur, dated the 14th May 1915, rejecting the application of petitioner for stay of execution of proceedings.

Messrs. *W. C. Asquith* and *Gokal Chand*, for the Petitioner.

Mr. *Obedulla*, for the Respondent.

JUDGMENT.- The dispute between the parties relates to certain monetary transactions and is the subject matter of two cross-cases now pending in the Courts of first instance. The respondent filed a complaint against the petitioner charging him with cheating and criminal breach of trust in respect of some money, and it appears that the accused was summoned in that case to appear on 13th May 1915. Before that date he had instituted a civil suit for the recovery of Rs. 2,500 and upon the strength of that suit he applied on the 13th May to the Criminal Court for stay of further proceedings pending the decision of the civil suit. The Magistrate did not pass any orders on the merits of the application and merely directed it to be placed on the record. Another application made on the succeeding day met with the same fate. Now it appears that the controversy in the two cases has relation to the same matter and that the civil case is nearly ripe for final decision, the plaintiff having closed his evidence and the defendant having a few witnesses more to examine. In these circumstances it seems that the principle enunciated in a Division Bench judgment of this Court, reported as *Emperor* v *Bishen Das* (1), is fully applicable here. The Hon'ble Mr. Justice Rattigan, who delivered the judgment of the Court, made the following weighty observations:—

"We might add in conclusion that it is a very sound general principle that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. There is unfortunately a tendency on the part of persons who consider themselves aggrieved to rush to the Criminal Courts either for the purpose of obtaining at small cost to themselves a decision on matters which ought, in the ordinary course of things, to be adjudicated upon by the Civil Courts or of prejudicing the course of proceedings already instituted, or about to be instituted, in a Civil Court by the other side. This tendency should be checked and Criminal Courts should be on their guard not to lend their aid in cases of this kind. In the present case the complainants sought the aid of the Criminal Courts before proceedings were taken by the accused in the Small Cause Court, but we are of opinion that the Magistrate would have exercised a wise discretion if he had, of his own motion, stayed proceedings in his Court pending the decision of the Civil Court, and had accepted that decision as finally settling the dispute between the parties. At the best, if he had thereafter proceeded with the trial, he would almost necessarily have felt bound to acquit the accused, for if a Civil Court had, upon the same facts, decided in the latter's favour, it would have been, if not technically wrong, at all events almost impossible for a Criminal Court to hold that there was no *doubt* whatever about the accused's guilt, and if there was a doubt, the accused would, of course, have been entitled to it."

(1) 8 Ind. Cas. 1161; 33 P. R. 1910 Cr.; 57 P. L. R. 1911; 12 Cr. L. J. 50.

EMPEROR v. PANCHU.

The learned Pleader for the respondent does not dispute the applicability of the rule in *Emperor* v. *Bishen Das* (1) to the present case, but argues that the law laid down therein is incorrect. To this contention I cannot accede. It is abundantly clear that a Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it, and section 344, Criminal Procedure Code, empowers the Court to adjourn an enquiry or trial for any reasonable cause. The question of the desirability or otherwise of staying criminal cases has often come up for adjudication before the High Courts, and it has been repeatedly laid down that a Court has jurisdiction to pass such orders as it thinks fit.

The decision of the Division Bench in *Emperor* v. *Bishen Das* (1) is absolutely clear on the subject and I am, therefore, constrained to hold that the criminal action be stayed pending the disposal of the civil suit. I accept the application and order accordingly. The civil case is, as observed above, nearly ripe for judgment and the Subordinate Judge is directed to decide it as quickly as possible.

*Application accepted.*

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 508 OF 1915.

October 25, 1915.

*Present*:—Justice Sir George Knox, KT.

EMPEROR—APPLICANT

*versus*

PANCHU AND ANOTHER—OPPOSITE PARTY.

*Evidence Act (I of 1872), s. 27—Confession—Pointing out of* dhatura *tree by accused to Police—Statement, if admissible.*

In a Police investigation of a case under section 328, Indian Penal Code, the accused said to the *Darogha* "I gave seed of *dhatura*." On being asked from where the seed came, the accused pointed out to the officer a *dhatura* tree.

*Held*, that the statement was inadmissible in evidence.

Revision of an order of the District Magistrate of Gorakhpur.

JUDGMENT.—Read explanation furnished by the District Magistrate. It appears that in the course of a Police investigation into a charge under section 328 of the Indian Penal Code, the prisoner Indrason pointed out a *dhatura* tree and said "from this I took the fruit." The fact of pointing out the *dhatura* tree and the words accompanying it were deposed to by the witness Ablakh. The same witness was allowed to say further:—"He (meaning the Sub-Inspector) asked Indrason who gave the *gur* and Indrason said he gave it. He also said 'I gave seed of *dhatura*.' The *Darogha* said 'where did you bring the seed.' He said 'there was a tree at Chillor Ahir's Kala.' The *Darogha* said 'come and point out.' All of us went." There can be no doubt whatever that the whole of the statement above recited was inadmissible as evidence. No fact is deposed to as discovered in consequence of the information said to be given by Indrason. If we take it that the fact of the *dhatura* tree was a discovery in consequence of the information received from Indrason, then and then only such information as related distinctly to the fact thereby discovered might be proved. The fact that Indrason pointed out the tree and said that from it he took the fruit is all that related to the fact thereby discovered. But, as pointed out by Mr. Justice West in *Reg.* v. *Jora Hasji* (1): "It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. .....Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the Police. For instance, a man says 'you will find a stick at such and such a place. I killed Rama with it.' A Policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible." By similar reasoning the evidence

(1) 11 B. H. C. R. 242 at pp. 244, 245

of Ram Gobind quoted by the learned Magistrate is equally inadmissible as evidence and should have been rigorously excluded. Let the record be returned.

*Record returned.*

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CALCUTTA HIGH COURT.
GOVERNMENT APPEAL No. 3 OF 1915.
September 2, 1915.
*Present*:—Mr. Justice Chitty and
Mr. Justice Richardson.
DEPUTY LEGAL REMEMBRANCER, BEHAR AND ORISSA—PLAINTIFF—APPELLANT
*versus*
MATUKDHARI SINGH AND OTHERS—ACCUSED—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), ss. 417, 256—Acquittal, appeal from—Evidence, consideration of, in criminal cases—Presumption of innocence—Burden of proof—Appellate Court's duty in regard to findings of fact by trying Court—Unlawful assembly—Common object to enforce right—Riot—Mischief*—Bona fide *claim of right—Penal Code (Act XLV of 1860), ss. 141, 147, 148, 149, 324, 326, 430—Written statement by accused persons, filing of—Practice.*

No distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. [p. 137, col. 2.]

An appeal from an acquittal may lie on a question of fact and there are no special rules for dealing with the evidence in such appeal. [p. 137, col. 2; p. 138, col. 1.]

In all criminal cases the innocence of the accused person must be presumed; and the burden lies upon the prosecution of completely rebutting that presumption. [p. 137, col. 2.]

If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of the accused, he is entitled to the benefit of that doubt. [p. 137, col. 2; p. 138, col. 1.]

An Appellate Court should give weight to the opinion of the trying Court which had the witnesses before it and was, therefore, able to judge from their demeanour whether or not they were telling the truth. [p. 138, col. 1.]

There cannot be a conviction under section 430 where there is a right or a *bona fide* claim of right. [p. 141, col. 2.]

The Code of Criminal Procedure does not provide for filing written statements by the accused. Such statements are entirely irresponsible and should not be allowed to be filed. [p. 143, col. 1]

Appeal against the order of acquittal passed by the Sessions Judge of Gaya, dated the 1st February 1915, against the conviction and sentences passed by the Deputy Magistrate of Gaya, on the 15th January 1915.

Sir *S. P. Sinha*, Mr. *Sultan Ahmed* and Mr. *Khurshed Hossain*, for the Crown.

Mr. *Caspersz* and Babu *Monmotha Nath Mukherjee*, for the Respondents.

JUDGMENT.

CHITTY, J.—Matukdhari Singh and nine other persons were convicted by Babu Har Sahai Lal, Deputy Magistrate, 1st Class, of Gaya, under various sections of the Indian Penal Code and sentenced to various terms of imprisonment. They appealed to the Sessions Judge of Gaya who allowed the appeals of all the ten persons. From that order of acquittal, the present appeal has been filed by the Local Government.

It is urged on behalf of the Local Government that the matter is one of considerable public importance, inasmuch as the accused in this case claimed to use force in asserting their rights of irrigation. It is argued that there would be considerable danger to the public peace if such action on behalf of private individuals was allowed to go unpunished. For the defence it is argued that an appeal from an acquittal stands on a different footing with regard to the consideration of evidence to an appeal from a conviction. Reference was made to the cases of *Empress of India* v. *Gayadin* (1) and *Emperor* v. *Madan Mondal* (2). These decisions were considered in Government Appeal No. 8 of 1914 by a Bench of which I was a member. It is sufficient for me here to say that no distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. It is expressly provided that an appeal from an acquittal may lie on a question of fact. Only one broad rule can be laid down with regard to the consideration of evidence in all criminal cases, and that is that the innocence of the accused person must be presumed; and the burden lies upon the prosecution of completely rebutting that presumption. If after the

(1) 4 A. 148.
(2) 22 Ind. Cas. 731; 18 C. W. N. 668; 15 Cr. L. J. 155; 41 C. 662.

consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person, he is entitled to the benefit of that doubt, and the verdict must be in his favour. There are, however, no special rules for dealing with the evidence in an appeal from an acquittal. Of course due weight must be given to the decision of the Court below and the reasons advanced for that decision. Apart from this, however, an appeal from an acquittal must be considered in precisely the same manner as all other cases are considered and it must be determined whether the evidence is such as to warrant a conviction of the accused.

This is an appeal from an Appellate order. There is a salutary rule which says that an Appellate Court should give weight to the opinion of the trying Court which had the witnesses before it and was, therefore, able to judge from their demeanour whether or not they were telling the truth. In an appeal like this from an acquittal passed upon appeal, this Court is obviously in as good a position as the lower Appellate Court to form an opinion with regard to the credibility of the witnesses. We must have, as the Appellate Court ought to have had, due regard to the opinion on this question formed by the trying Magistrate. The facts of this case are not seriously in dispute. There was undoubtedly an occurrence of the nature described by the witnesses in the early morning of Sunday, 4th October 1914. It arose in consequence of the reluctance on the part of the people of Mauza Nimsar to allow the *mauzas* above them to take water from what is called the Nimsar Pyne. The Sessions Judge himself, who has acquitted the accused, says: "The Nimsar people, as is admitted and proved beyond a shadow of doubt, demolished the dam at Sikaria claiming that their turn had come for the use of the water."

Only two questions arise in this case, *first*, whether the action of the Nimsar people amounted to an offence under section 147, Indian Penal Code, and the kindred sections, that is to say, whether there was in fact a riot; and, *secondly*, whether the accused, or any and which of them, participated in that riot?

The learned Sessions Judge has, in my opinion, fallen into an error with regard to the *parabandi* system which is in vogue in this locality and also with regard to the legal rights of the parties. These errors have undoubtedly vitiated his whole judgment and, in my opinion, driven him to an entirely wrong conclusion.

From the Mortar river flows what is known as the Nimsar Pyne, a channel constructed many years ago for purposes of irrigation. It flows southwards past several villages. Those villages originally all belonged to the Tikari Raj. Now some of the villages in question have passed to other owners. The several villages with which we are concerned in the present case are Noni, Maksudpur, Kalyanpur, Sekaria and Nimsar-Hasanpur. Nimsar-Hasanpur still form part of the 9-anna Tikari Raj. Maksudpur, Kalyanpur and Sekaria which lie below Noni to the north, have passed to the ownership of Babu Ishwari Per-ad Singh, whose people are the complainants in this case and who himself resides at Gaya. The only document relating to the system of irrigation is the *Lal Bahi*, an old book of the Tikari Raj, of which an extract has been put upon the record as Exhibit 6. The system, as we find it proved in this case, is that the villages lying in proximity to the Nimsar Pyne are permitted in rotation each to erect a *bundh* across the Pyne when the water is flowing low, so as to collect it and permit of its flowing into the *bhoklas* or distributories which thus pass the water from the Pyne into their fields. The rotation commences from the northernmost village which lies highest and descends in turn to the villages lying lower and to the south. Thus, in this case, the first village which has a right to construct a dam is Noni. Below Noni are some other villages with which we are not concerned. Then comes the group of three villages, Maksudpur, Kalyanpur and Sekaria. They lie, Maksudpur and Kalyanpur to the west of the Pyne and Sekaria to the east. Maksudpur and Kalyanpur have one *bhokla* on the western bank and Sekaria one *bhokla* on the eastern bank. Into these two *bhoklas* the water is compelled to flow by the construction of a single dam. Below these three villages, to which we

may for the purposes of this case refer as Maksudpur, lie the villages of Nimsar-Hassanpur. The water is drawn off by the several villages in the *paras* or turns which are specified in the *Lal Bahi*. Thus Noni is allowed to take the water for two days, Maksudpur, Kalyanpur and Sekaria together for two days and Nimsar-Hassanpur for three days. These *paras*, in my opinion, clearly mean the actual time during which water is flowing into the *bhoklas*. When the water is running low, some time must necessarily be allowed both for the construction of the *bundh* and the period required for the filling of the *handar*, or space behind the *bundh*, so as to permit the water to rise high enough to flow into the *bhoklas*. It was suggested on behalf of the defence, but not in any way proved, that no time could be allowed for the erection of the *bundh* and the filling of the *handar*. This is clearly not the case. In September 1914 there had been a dearth of water, but some 10 days or so before the occurrence there appears to have been a very heavy storm and a consequent rush of water which carried away the *bundhs* which had been erected by Noni, Maksudpur and Nimsar. Noni, whether by reason of the heavy rainfall or for some other reason, did not require to re-erect its *bundh* or to draw water from the Pyne for its irrigation. Maksudpur and Nimsar, on the other hand, seem to have required water and to have taken steps to erect their *bundhs*. It may be that the Nimsar *bundh* was commenced before the Maksudpur *bundh*. As to this there is no certain evidence. It is, however, in evidence and proved beyond doubt that the Maksudpur people began constructing or reconstructing their *bundh* on Wednesday, 30th September 1914. The Nimsar people, who wanted to draw the water for themselves at that time, objected. Some of their men came to the Maksudpur people who were constructing the *bundh* and asked them to desist. They declined to do so. Remonstrance was again made by the Nimsar people on Thursday, 1st October. The Police were also informed with the result that the Sub-Inspector paid more than one visit to the *bundh* and ultimately 3 constables and 4 *chowkidars* were put to watch the Maksudpur *bundh* with a view to preventing any breach of the peace. On Thursday, 1st October, a notice was given by the Sub-Inspector to Matukdhari Singh, the first accused who was the Circle Officer of the Tikari Raj. In that he was asked to assist in preventing any breach of the peace which was apprehended at Maksudpur between the Nimsar *raiyats* and Tikari *ambas* on the one side and the *raiyats* of Maksudpur on the other. The Maksudpur people continued to erect their *bundh*. There is some slight discrepancy in the evidence as to at what precise hour it was completed; but, putting it as much against the prosecution and as favourably for the accused as possible, there can be no doubt whatever that it was not completed until Thursday, 1st October, and that the water did not commence to flow into the *bhoklas* until the morning of Friday the 2nd. The general body of the prosecution witnesses puts the time when the water began to flow into the *bhoklas* at noon on Friday; but, assuming that it was 4 or 5 hours before that, it would not, in my opinion, make any difference to the position of the parties in the present case. If it began to flow on the morning of Friday the 2nd, the *para* of two days would expire on the morning of Sunday the 4th. It would, in any case, not expire until, say, 7 A. M.; in all probability, it did not expire until noon on Sunday. On the Friday and Saturday, no objections were taken by the Nimsar people. On the night of Saturday and Sunday, there were 12 men of the three villages appointed to watch the completed *bundh*. The evidence shows that there were seven on one side and five on the other. We are unable to accept the evidence of the Police constable and *chowkidar* which would put the number at anything from 25 to 100. It is extremely improbable that so many men would be left there simply for the purpose of watching the *bundh*. Besides these watchers were the three constables and four *chowkidars*. At about 2 or 3 A. M. on Sunday morning a large crowd of Nimsar people—the number has been variously estimated at 100 to 200 or even more—came from the south on the western bank of the river headed by a man on an elephant. The evidence shows that one of them at least carried a sword, another a *garasa*, while many were armed with *lathis*. They came up to the *bundh*; and the man on the elephant—who was evidently in authority called upon the watchers to demolish the *bundh*. They replied that their *para* had not

terminated and that it should not be demolished till the *para* was over, when, they said, the Nimsar people might demolish it themselves. It should be stated that according to the *parabandi*, it is the right of the village below to demolish the *bundh* of the village above directly the *para* of that village has terminated. It would, therefore, be within the rights of the Nimsar people to demolish the *bundh* at Maksudpur when the Maksudpur *para* was over. As the Maksudpur people declined to accede to their request, the elephant was directed to the *bundh* which it proceeded to demolish under the orders of its *mahuts*. It trampled down or removed with its tusks the bundles of sugarcane and the earth forming the *bundh* and made a breach through which the water began to flow. The flow of water rapidly increased the breach and the *bundh* was soon demolished, the water flowing southwards. In consequence of the action of the Nimsar people, the Maksudpur people made a small show of resistance. Some of them were pursued by the elephant and frightened away. That was before it had actually demolished the *bundh*. Others were attacked by the persons who carried the sword, the *garasa* and *lathis*. The evidence is clear—and, indeed, the fact cannot be disputed—that Kunja Singh and Enayet Khan of the Maksudpur people were very seriously injured by the sword, *garasa* and *lathi* blows. After the *bundh* had been demolished and the Maksudpur people had been put to flight the Nimsar people dispersed. One of the constables Ram Dahim Singh, who was pronounced a hostile witness in the trying Court, instructed one of the *chowkidars* Gopi Dusadh, who also appears to have been a hostile witness and not being called by either side was examined by the Court, to lodge a first information. This he did at the Tikari Police Station—three miles from Bhaismera, the place of occurrence. In that information, he did not identify any of the rioters except Beni Singh who, he then said, was seated on the elephant with another man whom he could not identify. He was, in my opinion, clearly in error in putting Beni Singh on the elephant, and the trying Magistrate has given good reasons for holding that he did this deliberately with the object of shielding Matukdhari Singh. That information was lodged at about 4 A.M. Soon after that Matukdhari Singh was undoubtedly arrested at his residence, which is not very far from the *thana*, by the Police officials of their own motion. His arrest must have taken place at about 6 or 6-30 A.M. Thakur Singh—the *gomasta* of Maksudpur and Kalyanpur—distrusted the Tikari Police who, he thought, might be unduly favourable to the Raj and so to the Nimsar people who were tenants of the Raj. He accordingly took steps to bring the occurrence to the notice of the authorities without the intervention of the Tikari Police. He sent Kunja Singh and Enayet Khan to the hospital and at about 8 A.M. caused to be written out the telegram Exhibit 9 to the District Magistrate of Gaya. In that telegram he accused all the eight persons who are now before the Court other than the two *palwans*. An information also was laid by Kunja Singh said to be of Mauza Sekaria on 4th October 1914 in which he, too, named the eight accused other than the two *palwans*. The consequence was that all the 10 accused persons were put upon their trial with the results as above stated.

As I have said, the learned Sessions Judge has fallen into an error both with regard to the *parabandi* and the legal rights of the parties. What his precise finding is as to the *parabandi* it is difficult to say; but he apparently holds that the *para* of Maksudpur had in fact commenced at the time of the occurrence because he says that they had no right to erect the *bundh* and dam up the water for irrigation at all at that time. His reason for this appears to be that Noni had not exercised its right of taking the water and, therefore, the right had in some manner been lost to Maksudpur and passed to Nimsar who had commenced he says. to erect their *bundh* shortly before the Maksudpur people commenced to erect theirs. I fail to see how the waiver by Noni, if there was such a waiver, of its right to erect a *bundh* and take the water for its *para* could possibly affect the right of Maksudpur as between Maksudpur and Nimsar. The Maksudpur people were undoubtedly entitled to take the water before the Nimsar people. They had, therefore, the right to erect their *bundh* and have their *para* completed before the Nimsar people could insist on having

the channel opened for the irrigation of their fields.

The learned Sessions Judge has also fallen into an error with regard to the legal rights of the parties, which the Counsel for the accused did not attempt to support. The learned Judge says that, in his opinion, the riparian owners were entitled to the free flow of the water and that anything which stopped that flow amounted to a nuisance which they were entitled to abate. Therefore, he says, the Nimsar people were entirely within their rights in demolishing the dam erected by the Maksudpur people because it constituted a nuisance so far as Nimsar was concerned. It need hardly be pointed out that this is not a question of nuisance or abatement of nuisance at all. The view also of the learned Sessions Judge entirely overlooks the rights of the Maksudpur people which, after all, are co-ordinate with the rights of the Nimsar people and are governed by the same system.

I am clearly of opinion that the Maksudpur people were within their rights in erecting their *bundh* as they did. I also find that their *para* would last until at least 7 A. M. on Sunday, 4th October and that the Nimsar people had no right whatever to demolish it before that hour.

I, then, pass to the consideration of the question whether there was, in fact, a riot within the definition of section 141, Indian Penal Code. As to this there cannot be the shadow of a doubt. The common object of the mob in this case was by means of criminal force or show of criminal force to deprive the cultivators of Maksudpur and Sekaria of the use of water of the Nimasar Pyne of which they were in enjoyment, or thereby to enforce their right or supposed right to the said water. That the Nimsar people—the mob which came from the south that night—formed an unlawful assembly, there can be no doubt. They came with that object and they insisted on demolishing the *bundh* in spite of the remonstrances of the Maksudpur people. Even if the Maksudpur *para* had, in fact, terminated, it would still be a riot within the meaning of section 141, Indian Penal Code. But in this case there can be no doubt whatever that the Maksudpur *para* had not terminated when the occurrence took place. At the very least it had three or four hours more to run. Even the learned Sessions Judge does not hold, as I read his judgment, that there could be any right of private defence in those circumstances. I, therefore, hold without any hesitation that this band formed an unlawful assembly and were guilty under section 147, Indian Penal Code.

It is also clearly proved that violence was used and Kunja Singh and Enayet Khan were both seriously wounded by the rioters. This was in furtherance of the common object and that would render them liable to punishment under sections 324 or 326 read with sections 149, and whoever of them was armed with a deadly weapon or with anything which used as a weapon of offence was likely to cause death was also punishable under section 148. They were further charged under section 430, Indian Penal Code, that is to say, with mischief by injury to works of irrigation or by wrongly diverting water. The learned Counsel for the Crown said that he did not press for a conviction on this charge, as the question of public importance was the charge of rioting. The learned Counsel for the accused claimed to be convicted under section 430. By that I take it that he meant that, if the charge under section 430 was not established, there would be no unlawful assembly and that they would be entitled to an acquittal on the other charges. That, however, by no means follows. There may be an unlawful assembly and a riot in respect of a right which the rioters desire to enforce. There cannot be a conviction under section 430 where there is a right or a *bona fide* claim of right. We do not think that we need consider the question of a conviction under section 430 in view of the attitude taken up by the Crown in this case with regard to it.

I, then, pass to the second question as to the participation of the several accused in this riot. The principal offender is no doubt Matukdhari. He is a Circle Officer of the Tikari Raj and a man in authority. We are told that he draws a salary of Rs. 200 per mensem and has other emoluments which bring his monthly income to more than double that sum. It is com-

plained that he has been falsely accused in this case, that he was not present and that the identification of him as being present is wholly insufficient. We have been taken through the whole of the evidence by one side or the other and we think that it is proved beyond all doubt that Matukdhari Singh was the man on the elephant, who was directing the proceedings on that night. He is identified as having been there by eight eye-witnesses and we see no reason to take a different view of the evidence of these men to that which was taken by the trying Magistrate. It was suggested by the learned Counsel for the accused that they had no proper means of identifying Matukdhari at that time, because it was said that the face of the man on the elephant was concealed in a *galaband* or muffler and that the elephant was at a very great distance from the Maksudpur people who purported to recognise Matukdhari Singh. There is really no force whatever in this contention. It is clearly proved that the elephant pursued and chased away from the Pyne a number of these eye-witnesses. They were, therefore, at very close quarters to the elephant and not, as the Counsel suggested, at a distance of 75 yards, *i. e.*, on the other side of the Pyne. Further, it is clear from the evidence of Thakur Singh the *gomasta*—that he had conversations with the man on the elephant and that the muffler which he is said to have had on was a *galaband* or comforter wrapped round his throat. It may possibly have concealed a portion of his face: but on that night the moon was full. There was, therefore, ample light and ample opportunity for these persons to recognise Matukdhari Singh, whom they well knew as the Circle Officer of the Tikari Raj. He was named both by Thakur Singh and Kunja Singh as having taken the lead in the attack on the Maksudpur people. It was argued for him that when Thakur Singh sent the telegram (Exhibit 9) at 10-30 A. M., he must have known of the arrest of Matukdhari and took his cue from that and included him among the persons implicated. We were taken through the evidence bearing on this point by the learned Counsel for the accused and I may say that it is not at all proved that Thakur Singh knew of the arrest when he sent his telegram. On the contrary, it would appear from the fact that he was working behind the back of the Tikari Police and had no communication whatever with them, that he could not have learnt of the arrest but spoke to Matukdhari being present from his own knowledge. It is true that the evidence with regard to the detection of Matukdhari when passing the *thana* is not such as the Court can rely on. There was a story put forward by the Sub-Inspector and several of the Police witnesses that Matukdhari Singh, when hurrying away from the scene of the occurrence, passed the *thana* on his elephant at an early hour. He was seen by one of the men at the *thana* who communicated it to a constable, with the result that he was followed up at once and arrested at his residence when alighting or just as he had alighted from the elephant. These witnesses have undoubtedly told their story in such a way that it cannot be accepted without some corroboration of the fact. The learned trying Magistrate very properly rejected their evidence in detail, but he accepted it as to the cardinal point that Matukdhari Singh was arrested by the Police on their own responsibility at about 6 or 6-30 A.M. as having taken a part in this riot. That fact is proved to demonstration and there can be no doubt whatever about it. When we asked the learned Counsel for the accused what Matukdhari's explanation was as to his whereabouts on that night, he replied that he was in bed and asleep until he was roused in the morning and was arrested by the Police. Now, that is not only not supported by any evidence but is directly contrary to other evidence in the case. Not only have we the evidence of the eye-witnesses that he was seen at the place of the occurrence and directed the operation, but it is proved conclusively by the evidence of Bikoo Misser, a Head Constable of Tikari, that Matukdhari Singh was a spectator of a play at Bahelia Bigha on the night of 3rd-4th, and that he was present at that play up till about 1 A. M. on Sunday when he left it almost at the same time as the witness. In this connection we may point out that the accused declined to make any statement in the trying Court. All the accused denied their guilt and said that they would file written statements. This Court has recently animadverted on this practice of filing written statements, which is not provided for by the

Code of Criminal Procedure and enables statements to be put before the Court as statements of the accused when such statements are not, in fact, drawn up by the accused themselves but by their legal advisers or friends and are entirely irresponsible. In his written statement, Matukdhari does not profess to explain what he was doing on that night. He merely says that he was not there, and that the charge against him was due to his being on bad terms with the Tikari Police. With regard to this last statement, it appears to be incorrect so far as the evidence of the Police in this case is concerned. The constable Ram Dahim Singh has undoubtedly proved hostile to the prosecution and given evidence to some extent in favour of the accused. Gopi Dusadh, the *chowkidar*, is in much the same position. Taking the evidence against Matukdhari as a whole and giving it our most careful consideration, we have no doubt whatever that he was the man on the elephant who directed the proceedings and was, as the person in authority, directly responsible for the riot.

With regard to Beni Singh, it is suggested that he was not there. Now, Gopi Dusadh in his first information says that there were four men on the elephant, that is to say, the two *palwans* and two others of whom Beni Singh was one. As I have above stated, this appears to be a deliberate falsehood spoken by Gopi Dusadh for the express purpose of shielding Matukdhari Singh. There is, however, no doubt whatever on the evidence that Beni Singh, who is one of the *gomastas* of that side, was present on that occasion and that he was armed with a sword with which he struck Enayet Khan. His presence there is proved by a number of witnesses, the same who speak to the presence of Matukdhari Singh; and we see no reason whatever to disbelieve their statements. We think, therefore, that he was a member of the unlawful assembly and that he is guilty under sections 148, 324/149 and 326/149, Indian Penal Code.

Bahadur Singh, the other *gomasta*, was admittedly at the scene of the occurrence. He was armed with a *garasa* with which he wounded Kunja Singh. His complicity is clearly proved and his guilt is the same as that of Beni Singh.

With regard to Punnit and Kamla they also were admittedly present on the occasion as members of the Nimsar *bundh*. They were armed with *lathis* and must, therefore, be taken to be guilty under sections 147, 324/149 and 326/149, Indian Penal Code.

Chhedi, Harekku and Kuldip have been satisfactorily proved to have been present and to have been members of the unlawful assembly. Their complicity is proved by the same witnesses as speak to the other accused. They are, therefore, guilty under the same sections as Punnit and Kamala.

The only two remaining accused are Noor Khan and Mahammad Jan—the two *palwans* or *mahuts*. It may be noted that they were only sentenced each to one month's rigorous imprisonment. The learned Sessions Judge had, therefore, no jurisdiction to entertain appeals by them against their conviction. Their offence was undoubtedly of a lesser nature inasmuch as they were merely the drivers of the elephant and, no doubt, acted under the orders of their master, Matukdhari Singh. At the same time they must, we think, be held to have been members of the unlawful assembly in the act in which they undoubtedly took part by directing the action of the elephant in destroying the *bundh*.

We accordingly set aside the order of acquittal in the case of all the 10 accused. Matukdhari Singh is convicted under sections 147, 324/149 and 326/149, Indian Penal Code, and sentenced under section 147 to a fine of Rs. 2,000 or in default six months' rigorous imprisonment. Beni Singh and Bahadur Singh are convicted under sections 148, 324/149 and 326/149, Indian Penal Code, and are each sentenced under section 148 to nine months' rigorous imprisonment. Chhedi, Punnit, Harekku, Kamala and Kuldip are convicted under sections 147, 324/149 and 326/149, Indian Penal Code, and sentenced each under section 147 to six months' rigorous imprisonment. We pass no separate sentences under sections 324/149 and 326/149. Noor Khan and Mahammad Jan are convicted under section 147, Indian Penal Code, and sentenced each to one month's rigorous imprisonment.

CHANTAN *v.* CHAKKAPAYYAN MATHU.

RICHARDSON, J.—I concur in the conviction and sentences and think that the case is a clear one against all the accused.

*Appeal allowed; Acquittal set aside.*

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MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 573 OF 1915.

CRIMINAL REVISION PETITION No. 456 OF 1915.

December 1, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

M. CHANTAN—COUNTER-PETITIONER—PETITIONER

*versus*

CHAKKAPAYYAN MATHU—PETITIONER—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 488—"Unable to maintain itself", meaning of—Well-to-do child, whether entitled to order for maintenance.*

The words "unable to maintain itself" in section 488 of the Code of Criminal Procedure apply as much to the case of a child, which has got means of its own or which is entitled in law to be maintained and is being maintained, as to a child which is able to earn a living by its own exertions.

A child which possesses a legally enforceable right to maintenance from its mother's *tarwad* is in the same position as a child which possesses property in its own right and neither is entitled under section 488 to an order for maintenance against its father.

*In re Parathy Valappil Moideen*, 21 Ind. Cas. 469; 14 M. L. T. 223; 25 M. L. J. 355; 14 Cr. L. J. 597; (1913) M. W. N. 997, dissented from.

*Kariyadan Pokkar* v. *Kayat Veeran Kutti*, 19 M. 461; 2 Weir 621, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Tellicherry, in Miscellaneous Case No. 52 of 1915.

Mr. *C. Kunhiraman*, for the Petitioner.

ORDER.

ABDUR RAHIM, J.—This petition raises a question of the interpretation of section 488 of the Criminal Procedure Code. It is contended before us by the learned Pleader who appears for the petitioner, that he was not liable to any order for the maintenance of his four children because they are entitled to maintenance from their mother's *tavazhi* and are in fact being maintained by that *tavazhi*. Section 488 compels the father to maintain his legitimate or illegitimate child "unable to maintain itself". The words "unable to maintain itself", it is pointed out, have been interpreted in this Court by Sadasiva Aiyar, J., in *In re Parathy Valappil Moideen* (1), to mean that the child should be physically unable to earn a livelihood; and if the child is not of sufficient maturity to earn a livelihood, then even if that child belongs to a well-to-do *tarwad* which is liable for its maintenance, the liability of the father under section 488 is not taken away. With all respect to the learned Judge, I am unable to accept this narrow meaning of the words "unable to maintain itself." I think the ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case, as to a child which is able to earn a living by its own exertions. This is a summary procedure provided by section 488, and it does not cover entirely the same ground as the civil liability of the father to maintain his child. It does not seem to have been within the contemplation of the legislature that a child which is well-to-do should be entitled under section 488 to an order for maintenance as against its father. This view derives some support from the decision in *Kariyadan Pokkar* v. *Kayat Veeran Kutti* (2), where the learned Judges seem to suggest that children who are actually being maintained by their mother's *tarwad* are not entitled to maintenance from their father under section 488 of the Criminal Procedure Code. In this view of the law, the order of the Joint Magistrate ordering the petitioner to maintain the children is wrong and should be set aside.

AYLING, J.—I agree. I think that a child which possesses a legally enforceable right to maintenance from its mother's *tarwad* stands in the same position as a child which possesses property in its own right; and that neither can be regarded as "unable to maintain itself" within the meaning of section 488.

*Petition allowed; Order set aside.*

(1) 21 Ind. Cas. 469; 14 M. L. T. 223; 25 M. L. J. 355; 14 Cr. L. J. 597; (1913) M. W. N. 997.

(2) 19 M. 461; 2 Weir 621.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 659 OF 1915.

November 27, 1915.

*Present*:—Mr. Justice Piggott.

CHUTTA—ACCUSED—APPELLANT

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 284, 326, 327—Trial by assessors—Summoning of assessors for particular date—Selection on another date, legality of—Procedure—Trial if valid.*

A person was summoned to serve as an assessor on the 14th of June 1915 in a particular case. He failed to appear in Court on that date but appeared on the 17th *idem* when another trial had to commence. He was selected to act as one of the assessors in that trial:

*Held*, that his selection was not improper and the trial in which he took part was not invalid. [p. 146, col. 2.]

Appeal against an order of the Additional Sessions Judge, Aligarh, dated the 29th June 1915.

Mr. *T. N. Chadda* (with him Mr. *Iqbal Ahmed*), for the Appellant.

The *Government Advocate*, for the Crown.

JUDGMENT.—This is an appeal by one Chutta who has been convicted on a charge framed under section 397, Indian Penal Code, and on a further charge under section 75 of the same Code. The appeal raises in the first instance a question of procedure. It is contended that the trial as held was invalid, because it took place before a Court which was not properly constituted in accordance with law. It was required by law that the trial should be held before the Sessions Judge and at least two assessors, the latter to be chosen as the Judge might deem fit from persons summoned to act as such. In this case the trial took place before the first Additional Sessions Judge of Aligarh sitting with two assessor. As regards one of those there is no doubt that he was properly summoned and properly chosen in accordance with law. The question raised is as to the other assessor, Mr. Hafiz Muhammad Ghulam Hyder. I find that this gentleman's name was at the time of the trial duly entered in the list of assessors for the Bulandshahr District. He was summoned to attend and to serve as an assessor for the criminal sessions to commence on June 14th, 1915. I am satisfied that there was no irregularity whatever in connection with the summoning of that gentleman for the above date. On June 14th, 1915, he failed to appear but he presented himself in Court on June 17th. 1915. On that date the trial of the appellant Chutta was about to commence. Summons had been issued requiring the attendance of four assessors on that particular date, but two of those gentlemen failed to appear, and a third presented himself only to ask the learned Sessions Judge to excuse him from attendance. Owing, however, to the appearance of Mr. Hafiz Muhammad Ghulam Hyder on that day, the Sessions Judge actually had before him five assessors, who had been summoned to act as such. He considered himself justified in choosing two of these to act as assessors, that is to say, Mr. Muhammad Ghulam Hyder and one out of the four assessors who had been duly summoned for June 17th. The question which I have to determine is whether Mr. Hafiz Muhammad Ghulam Hyder had been "summoned to act" as an assessor within the meaning of that expression under section 284, Criminal Procedure Code. The circumstances of the present case are clearly distinguishable from the case of *Man Singh* v. *Emperor* (1), to which I have been referred on the part of the appellant. The suggestion put forward in argument is that Mr. Hafiz Muhammad Ghulam Hyder had not been summoned to act as assessor for the 17th June 1915. It is contended, therefore, on the principle laid down in the ruling referred to, that it should be held that the assessor in question had not been summoned to act in accordance with law. The object and purpose of the provisions of the Code of Criminal Procedure with regard to the summoning and selection of assessors seems clear enough. There must be no reason for suspicion that any one of the assessors sitting on a particular trial has been, if I may be allowed to use the expression, "planted" on the Court by any person interested in the success or in the failure of the prosecution. Judged by this test, the circumstances of the present case offer no ground for adverse comment. The presence of Mr. Hafiz Muhammad Ghulam Hyder in Court on June 17th, 1915, was

(1) 21 Ind. Cas. 894; 11 A. L. J. 930; 14 Cr. L. J. 654; 35 A. 570.

purely fortuitous, and no one could possibly suspect that his attendance in Court that day had anything to do with the fact that the appellant Chutta was about to be tried on a charge of dacoity. Nevertheless, I am quite prepared to concede to the appellant that the provisions of the law on this point require to be strictly observed. The real question is whether in the present case there has been such compliance with the provisions of sections 326 and 327, Criminal Procedure Code, as is requisite for the validity of the trial. The wording of these sections lends no colour whatever to the suggestion that an assessor cannot be held to have been lawfully summoned to act as such on a particular day, unless the summons issued to him was for his attendance on that day and no other. On the contrary, it seems to me that what the Legislature contemplated as the ordinary or normal procedure is that all assessors should be summoned for the first day on which a criminal sessions commences, however many trials (I note specially the use of this word in the plural number in section 326, Criminal Procedure Code) it may be proposed to hold in the course of that sessions. I am quite aware that this procedure has been found unnecessarily burdensome for the persons summoned to act as assessors in view of the length to which criminal sessions are apt to run in many districts of these provinces. The section which I am considering provides for the modification of what I may call the normal procedure in order to meet such difficulties as the above. The practice commonly followed, therefore, is to summon four or more assessors for each date, in the course of a criminal sessions, on which the Sessions Judge thinks it likely that he will commence a fresh trial. There is no objection in law to this procedure; but, in my opinion, it is so far from being obligatory that it is not even the normal procedure contemplated by the law. In the present case I find that the criminal sessions of the Additional Sessions Judge of Aligarh held at Bulandshahr commenced on the 7th June 1915. continued without interruption up to the 12th of June 1915, and then after an adjournment over a Sunday continued further without interruption to the close of June 18th, 1915. Such assessors as were summoned for June 14th, 1915, were summoned in order that they might give their assistance in connection with any trial which might be held on that date or on succeeding dates up to the close of the sessions. The learned Sessions Judge would have been perfectly in order if he had caused to be summoned for June 14th, 1915, the requisite number of assessors for the trials which remained for disposal on his list according to the programme which he had prepared for his June sessions. Suppose, moreover, that the learned Sessions Judge had made a miscalculation and that the trial commenced by him on the 11th of June 1915 had not come to an end until the close of the 14th of June 1915, it would scarcely be suggested that any error or irregularity had been committed if the Sessions Judge had commenced a new trial on the 15th June 1915 by the selection of the requisite number of assessors from amongst the persons duly summoned to act as such on June 14th, 1915. The present case is, in my opinion, covered by the above considerations and objection to the constitution of the Court by which the appellant Chutta was tried, therefore, fails.

It remains for me to consider the appeal on the merits. The fact that a dacoity was committed in the house of Dal Chand, *bania*, at the time specified in the charge is proved by overwhelming evidence and is not contested in appeal. The question is whether the complicity of the appellant Chutta in the commission of this offence is satisfactorily proved by the evidence. He is implicated directly in the evidence given by the approver Debi Singh and indirectly in the statement of another accomplice witness Ganga. Besides this, two of the eye-witnesses to the dacoity depose that they recognised Chutta amongst the dacoits and were able to identify him at the jail subsequently to his arrest. The evidence satisfied both the assessors as well as the Sessions Judge. I can find no ground for discrediting it. It is further contended that the conviction has been wrongly recorded under section 397 of the Indian Penal Code and that the sentence is too severe. There is no doubt that the appellant was armed with a pistol. The dacoity

in the present case was a serious one and grievous hurt was caused to Chhidda. Moreover the appellant is an old convict. Under the circumstances, the sentence of ten years' transportation passed in the case appears to be justified. I dismiss the appeal.

*Appeal dismissed.*

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MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 545 TO 547 AND 637 OF 1915.

December 6, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*In re* SANGAN—ACCUSED NO. 2—APPELLANT IN CR. A. NO. 545 OF 1915

*In re* RAMASAMY NAICK—ACCUSED NO. 3—APPELLANT IN CR. A. NO. 546 OF 1915

*In re* KADAKKARAYANDI SERVAI—ACCUSED NO. 8—APPELLANT IN CR. A. NO. 547 OF 1915

*In re* MOTHAYAN *alias* ANTONY AND OTHERS—ACCUSED NOS. 1 TO 4 AND 6 TO 8—APPELLANTS IN CR. A. NO 637 OF 1915.

*Criminal Procedure Code (Act V of 1898), ss. 297, 298, 299—Charge to Jury—Trial of several accused together—Omission to place defence evidence regarding each accused before Jury, effect of—Misdirection.*

Sections 297 to 299 of the Code of Criminal Procedure make it imperative on a Sessions Judge to place in his summing up to the Jury the evidence both for prosecution and defence .[p. 147, col. 2:]

A charge to the Jury, therefore, in the following words "as for the defence made by the other accused, the Vakils for the accused have not laid much emphasis upon it; and so it is unnecessary to go into it. You have heard how, when I now asked them if they want me to place the defence of the other accused before you, they said that the defence on the whole would rather be content with challenging the credibility of the prosecution evidence than to rely upon the evidence they have put in" omitting to place before the Jury the evidence regarding the *alibi* set up by the defence when the question turned entirely upon the identity of the accused, and to sum up separately the evidence against the accused when many persons are involved, is a clear misdirection likely to prejudice the accused at their trial. The fact that the Vakils did not lay much emphasis upon the defence evidence is no reason why the Judge himself should not place it before the Jury. A conviction on such a charge is illegal and must be set aside. [p. 148, col. 1.]

Appeals against the sentence of the Court of Session of the Ramnad Division at Madura, in Sessions Case No. 19 of 1915.

Dr. *S. Swaminadhan*, for the Appellants.

The *Public Prosecutor*, for the Crown.

JUDGMENT.

ABDUR RAHIM, J.—Eight accused persons in this case were tried by the Jury on a charge of dacoity. Of these, one, that is, accused No. 5, has been found not guilty and acquitted.

The learned Sessions Judge in his charge to the Jury has gone up to a certain point very fully into the matter. Perhaps he has gone into some features of the case in more detail than was necessary. The chief objection taken by the learned Counsel for the accused to the charge is, in the first place, the absence of any reference to the evidence in support of the defence of the 4th, 7th and 8th accused. All these persons produced evidence of *alibi* which, if believed by the Jury, would lead to their acquittal. The learned Sessions Judge deals with their case apparently in paragraph 13. All that he says about their defence is this: "As for the defence made by the other accused the Vakils for the accused have not laid much emphasis upon it; and so it is unnecessary to go into it. You have heard how, when I now asked them if they want me to place the defence of the other accused before you, they said that the defence on the whole would rather be content with challenging the credibility of the prosecution evidence than to rely upon the evidence they have put in." The learned Sessions Judge is required by law to place the evidence of the prosecution, the defence of the accused before the Jury and to draw their attention to the important points arising in connection with the evidence of the accused no less than of the prosecution. It may be, as he states, that the Vakils for the accused did not lay much emphasis upon the evidence adduced on behalf of these accused persons; but nevertheless it was his duty to place the evidence before the Jury and draw their attention to such features of the evidence as in his opinion called for observation. The fact that the Pleaders thought it unnecessary to place much reliance upon the defences of the accused did not absolve the learned Sessions Judge from his duty. Sections 297, 298 and 299 of the Criminal Procedure Code make this clear. There can

be no doubt that in a case like this where the case for the prosecution entirely rested on the identification of the dacoits at night, the failure of the learned Judge to deal with the defences and the evidence in support of the defence must have prejudiced these accused persons. It is difficult to say in a case of this nature having regard to the evidence of the prosecution that if the Jury believed the evidence in support of the *alibi* of the 4th, 7th and 8th accused showing that they were not at the scene of dacoity as alleged by the prosecution, their verdict as regards the other accused might not have been influenced by that fact.

The learned Counsel for the appellants has also pointed out that the learned Sessions Judge did not analyse the evidence of the prosecution as against each accused and did not place it separately and clearly before the Jury. In a case of this nature where a number of accused persons were concerned and the question was purely one of identification, it would have been of much help to the Jury if the learned Sessions Judge had summed up the evidence for the prosecution against each accused separately and drawn the special attention of the Jury to the facts alleged against each accused person. The learned Counsel for the appellants has also drawn our attention to several omissions on the part of the Sessions Judge in not having drawn the attention of the Jury to certain statements in the evidence of the prosecution witnesses which might have been of service to the defence of the accused. It is unnecessary to go into all these in detail. But having regard to the fact that the defence of several of the accused persons was not placed before the Jury, and the evidence of the prosecution against the accused was not summed up separately in a clear and satisfactory manner, I think the conviction and sentence should be set aside and the case should be remanded for re-trial.

AYLING, J.—I think the failure of the Sessions Judge to sum up the defence evidence to the Jury must be regarded as a substantial misdirection which may, and probably did, prejudice the case not only of the accused on whose behalf the *alibis* were set up but of the other accused also. I further agree that he would have facilitated the task of the Jury if he had analysed the prosecution evidence against the individual accused, though I should hardly be prepared to say that his failure to do so would by itself constitute misdirection. I agree in the order proposed by my learned brother.

*Conviction set aside; Re-trial ordered.*

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PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 404 OF 1915.

May 29, 1915.

*Present:*—Mr. Justice Rattigan and Mr. Justice Leslie Jones.

*Musammat* BUDHO—CONVICT—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 299, Expl. 3—Culpable homicide of newly born child—Human being, what necessary to constitute—English Law—Complete emergence, if necessary Proof that child was living after complete or partial emergence necessity of.*

Under the English Law complete emergence is necessary to constitute the child a human being but under section 299, Explanation 3, of the Indian Penal Code, though the causing of the death of a child in the mother's womb is not homicide, it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born. [p. 150, col. 2.]

Even under section 299, Explanation 3, of the Penal Code, however, it must be shown not only that the child breathed and was, therefore, a living being for it is possible that the child breathed while still entirely in its mother's womb but that such breathing necessarily took place after it had wholly or partially emerged from its mother. [p. 150, col. 1.]

Appeal from the order of the Sessions Judge, Amritsar, dated the 25th of April 1915.

Mr. *Qamar Din*, for the Appellant.

The Additional Government Advocate, for the Respondent

JUDGMENT.—*Musammat* Budho, wife of Dina, a young *Jat* woman, aged 20, has been convicted by the Sessions Judge of Amritsar Division of having on or about the 11th February 1915 murdered the child to which she had given birth, and has been sentenced to transportation for life.

It appears that Dina, the husband of *Musammat* Budho, is employed in the Military Police at Port Blair and that he returned to his home on three months' leave

after an absence of $3\frac{1}{2}$ years in January last, and according to the prosecution the woman gave birth to an illegitimate child about the middle of February (probably on the 14th of that month), caused its death immediately thereafter and buried the body (or rather put it into a hole) on the bank of the pond outside the village. On the morning of the 15th February Natha Singh (P. W. No. 5) discovered the body of an infant and promptly gave information of the discovery to Thakar Singh, *zaildar* (P. W. No. 6). In due course the Police were informed and the body sent for *post mortem* examination to the Civil Surgeon, Lieutenant-Colonel Smith. This officer received the body and examined it on the 17th February. His evidence as recorded by the Committing Magistrate is unfortunately not very detailed, but is to the effect that "the neck and part of the belly was eaten by animals; the placenta and chord were attached. The lungs swam in water". (We presume the Civil Surgeon meant by this expression that the lungs *floated* in water.) "Child was born alive. Actual cause of death I could not say owing to the condition of the child and the time it had been dead. It appeared to have been dead about seven days. Death was due to asphyxia, whether from drowning or suffocation."

The defence set up was a denial that the woman had given birth to any child recently and this plea was supported by Dina (P. W. No. 3), who states positively that his wife was not pregnant when he arrived home in January last. The assessors accepted this plea and gave it as their unanimous opinion that the woman had not given birth to the child or had any hand in causing its death.

This opinion is, of course, entitled to weight but we cannot possibly agree with it. The woman was examined by Lieutenant-Colonel Smith, a medical officer of great experience, on the 19th February and in his evidence he deposes that she had given birth to a child about seven or eight days prior to his examination of her and his evidence is corroborated by the statements of witnesses, apparently quite impartial, who swear that on the 11th February the woman admitted to them that she had been delivered of a still-born child (see the evidence of Jagdev Singh, P. W. No. 7, Narain Singh *lambardar*, P. W. No. 8). We agree, therefore, with the Sessions Judge's finding that the appellant had been delivered of this child and we see no reason to doubt the truth of the allegation that she left it in the hole in the bank by the pond.

The next and more important question is whether it is proved that the child was a "living child" within the meaning of Explanation (3) to section 299, Indian Penal Code, and was murdered by the appellant. As to this we have the evidence of the two witnesses, Jagdev Singh and Narain Singh, that the woman told them that as the child did not move, she left it at the spot where her delivery took place. On the other hand, we have the statement by the Civil Surgeon that the child was born alive and that its death was due to asphyxiation. Very unfortunately the Civil Surgeon was not asked to explain how he arrived at these two conclusions and we can only surmise from his evidence and from the *post mortem* report that he inferred that the child was born alive because the lungs floated in water. Now it is to be remembered that the child had been dead (according to the Civil Surgeon) about seven days before he saw the body and that in the meantime part of the belly and the neck had been eaten by animals. In these circumstances we are faced with the difficulty that there is no sufficient proof that the child had "extra-uterine life," that is to say, a life independent of its mother. In Taylor's standard work on Medical Jurisprudence (6th Edition, Volume 2) we find the following passages:—

"A child may breathe in the *uterus* or *vagina*, or with its head at the outlet, and die before its body is born; the discovery of its having breathed would not, therefore, be proof of its having enjoyed what has been termed extra-uterine life. The death of a child which has breathed in the womb or *vagina*, from natural causes before its entire birth, is a possible occurrence; but its death from natural causes before birth, after it has breathed by the protrusion of its head from the outlet, is an unusual event. All we can say is—it may take place but the death of a child under these circumstances would be the exception to a very general rule..... It is now certain that, for criminal purposes, at any rate, the law will assume—until the contrary appears from other circumstances—that the respiration of a child, established by the best of evidence, was carried

on before it was entirely born and not afterwards. Let the witness, then, in a case of alleged child-murder ever so clearly establish the fact of respiration and, therefore, of life, at the time the violence was used, this evidence is not always sufficient. He is asked whether he will undertake to swear that the child had breathed *after* its body was entirely in the world. Unless he can go as far as this—which, for obvious reasons, he can rarely be in a condition to do—it will be legally assumed that although the child had breathed, it had come into the world dead" (pages 206, 207). That these quotations accurately represent the law as propounded in England is clear from the authorities cited in Roscoe's Criminal Evidence (11th Edition at page 705), and from Halsbury's Laws of England, Volume 9, paragraph 1155, and notes thereto. So far as the *legal* aspect of the question is concerned, the law in this country is somewhat wider than the English Law, as Explanation (3) to section 299 of the Indian Penal Code provides that the causing of the death of a child in the mother's "womb is not homicide. But it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born." Under the English Law *complete* emergence is necessary to constitute the child a human being.

But even under the Penal Code it must be shown that the child *lived*, as the explanation refers to the death of a *living* child. This brings us back to the crucial question whether in the present case the child was living when any part of its body had been brought forth. As to this, according to Taylor, it is possible that the child breathed while still entirely in its mother's womb and yet may have died before any part of its body had been brought forth; and if it is not homicide to kill a child in its mother's womb, it can hardly be urged that it is homicide to kill (if such an expression can be used) a child that has breathed in the womb and died while yet in the womb and has been brought forth still-born. The hydrostatic test applied by the Civil Surgeon shows that the child actually breathed, but it does not in itself prove (so far as we can understand) that such breathing necessarily took place after it had wholly or partially emerged from its mother. Furthermore, it must be kept in mind that the body, when examined by the Civil Surgeon, had been exposed for some seven days and that during this period it had been partially consumed by wild animals. Part of the belly had been eaten and according to the evidence of the Head Constable (Obeidullah, P. W. No. 10) its head was almost entirely separate from the body, being attached to the body by the skin of the front of the neck. In these circumstances would the fact that "the lungs swam in water" necessarily prove that the child had ever breathed, even in its mother's womb? In the *post mortem* report we note that the body is described as 'fresh" and we do not lose sight of the fact that the death took place in the cold weather. But is it at all improbable, regard being had to the state in which the body was found, that decomposition had not begun? If it had, then the hydrostatic test would be of no great value. As observed by Messrs. Hehir and Gribble in their work on Medical Jurisprudence, "This point of decomposition, however, is one about which the medical witness may be carefully cross-examined, because if decomposition has set in at the time of the test being applied, the lungs will probably generate gases, etc., which will make them float. Now this is a question which is very seldom asked, and, as generally speaking such examinations in this country are made twenty-four or thirty hours after a body has been found when it had probably been hidden for some time, it is exceedingly likely that decomposition may have set in by the time the examination is made. *If that is the case, no reliance can be placed upon the hydrostatic test, even after the application of pressure*" (5th Edition, page 364).

The Civil Surgeon in his evidence states positively that death was due to asphyxia, but here again we are left in the dark as to the grounds upon which this conclusion is based. The entry in the *post mortem* report is as follows:—"*Actual cause of death not known* but child did not die a natural death." Speaking with all respect we find it somewhat difficult to understand how it was possible

for the Civil Surgeon to state when giving evidence in Court with such certainty that death was due to asphyxia. Assuming that the child had been born alive, the body when seen by the Civil Surgeon had been partly eaten by animals. Is it impossible to hold in such circumstances that death was due to the injuries caused to the child by such animals as it lay helpless and possibly half dead on the bank of the pond? or, again, is it beyond the limits of possibilities that the child's death was due to its neck being cut by some sharp-edged weapon? The Head Constable in his evidence states that it appeared "as if the neck had been almost entirely severed by means of some sharp-edged instrument." It seems to us, therefore, that there are hardly sufficient *data* to justify us in concluding that the cause of death was asphyxia. Taking everything into consideration, we are of opinion that there is doubt whether the child ever lived as a human being and the appellant is entitled to the benefit of this doubt. We accordingly accept the appeal and, setting aside her conviction and sentence, we acquit her and direct her discharge.

*Appeal accepted.*

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## ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 818 OF 1915.

December 7, 1915.

*Present*:—Mr. Justice Piggott.

ABDUL AZIZ—ACCUSED—APPELLANT

*versus*

EMPEROR—PROSECUTOR RESPONDENT.

*Evidence Act (I of 1872)*, s. 114 -*Circumstantial evidence—Proof Prosecution, duty of.*

In criminal cases, as a rule, it is for the prosecution to prove their case and an accused person should not be convicted merely because he has told lies in his defence. In cases of circumstantial evidence, however, where facts are put forward on behalf of the prosecution which unless explained justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence. [p 152, col. 2.]

Appeal against an order of the Sessions Judge of Bareilly, dated the 9th August 1915.

Mr. *Alston*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.—The appellant Abdul Aziz has been convicted on charges framed under sections 409 and 467, Indian Penal Code, in connection with a fraud perpetrated at the City Post Office of Barreilly where the appellant was at the time serving as Head Clerk. That a fraud was committed and committed by the aid of forgery is proved beyond doubt and I need not recapitulate the details given in the careful and well-considered judgment of the learned Sessions Judge. The fraud was rendered practicable by a practice which had been permitted to grow up in contravention of departmental rules. The Sub-Postmaster is ordinarily in charge of the Savings Bank rack in an office of this class, but he has been permitted to delegate his responsibility to the Head Clerk for three hours every day during his absence from duty. Assuming that the Post Office can secure the right class of men for the post of Head Clerk there would be no particular objection to this, provided the matter were so arranged that the person actually responsible for the proper conduct of the business should also make himself formally responsible by signing the payment order and the necessary entries in the journal. If, however, the department does not feel itself able to trust officials of the standing of Head Clerks in a Sub-Post Office to conduct business of this sort and requires the Sub-Postmaster on his return to duty to assume responsibility for work done in his absence by signing the payment orders and attesting the entries in the journal, then care should be taken to make his responsibility a real one by insisting on his exercising an effective check on the work done during his absence. In the case of withdrawals from Savings Bank accounts, this could only be secured by insisting on his personally comparing the signature on the withdrawal application with the specimen signature in the custody of the office. I am satisfied, however, on the evidence that in practice a perilous division of responsibility had been permitted to grow up. During the three hours of the day in which he held charge of the Savings Bank work, the Head Clerk

made all the necessary entries and disbursements and was supposed to satisfy himself before making any payment on an application for withdrawal as to the identity of the signature on the application with the specimen signature deposited in the office, but when the Sub Postmaster returned it was the practice for him to sign the payment order and to attest the entry in the journal as a mere formality, reliance being placed on the Head Clerk for having taken all necessary precautions. I am confident that the fraud which has been brought to light in the present case would never have been attempted if the accused had known that he could not perpetrate it without taking on himself the responsibility of signing the payment order and attesting by his signature the entries in the journal. I am satisfied that the fraud is brought home to the appellant by the evidence on the record. The evidence is mostly circumstantial, but there are many converging lines of testimony which point to the appellant Abdul Aziz as the criminal. The evidence given by the Sub-Postmaster Debi Pershad is strongly corroborated by the documentary evidence, such as the handwriting of Abdul Aziz in the journal, and puts it beyond doubt that the transaction by which a sum of Rs. 180 purported to be withdrawn on behalf of the depositor Narain Debi from her Savings Bank account was effected at a time when Abdul Aziz was in charge of the Savings Bank work. I consider it very much against him that he has denied this fact and endeavoured to make out that the entire transaction was conducted by the Sub-Postmaster although he himself had written up the entries in the journal. The circumstantial evidence points irresistibly to a fraud committed by some Post Office official and consequently all the evidence on the record which tends to exonerate the Sub-Postmaster and other officials who might conceivably have been concerned is evidence against the appellant. Finally there is the evidence given by the handwriting expert as to the identity of the handwriting in the admittedly forged entries on the application for withdrawal with the specimens of the handwriting of Abdul Aziz submitted for his consideration. On this point I feel bound to note that the prosecution was not well managed. The proper course would have been to submit specimens of the handwriting of all the officials in the City Post Office or in the Head Office who could conceivably have been parties to this fraud to the handwriting expert along with the forged document. If upon the materials thus submitted to him the expert had given a clear opinion that the forged entries corresponded with the admitted handwriting of that one amongst all the officials to whom the circumstantial evidence independently pointed, the case would have been a much stronger one. It so happens, however, that the appellant himself has gone out of his way to nullify the effect of the mistake made by the prosecution in submitting to the handwriting expert specimens of his handwriting only and not of all the officials in the two offices. He has made it a part of his defence that the specimens of his handwriting submitted to the expert were in fact elaborate imitations of the writing on the forged document perpetrated by him at the instance of the investigating Police Officer and the Inspector of Post Offices. I have no doubt whatever that this plea is false in fact. It is a circumstance very much against the accused that it should have been put forward by him. I have no desire to derogate from the general principle that it is for the prosecution to prove their case and that an accused person should not be convicted merely because he has told lies in his defence. At the same time in cases of circumstantial evidence, where facts are put forward on behalf of the prosecution which unless explained justify an inference of guilt being drawn against the accused, then it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence. This principle is clearly recognised in the explanations to section 114 of the Indian Evidence Act. The statement of Abdul Aziz on this question of handwriting amounts to an admission that there is in fact a marked resemblance between the writings on the forged application for withdrawal and the specimens of the

accused's own writing in English, Hindi and Urdu characters which were submitted to the expert for consideration. As to the existence of this resemblance and his offering an explanation which is false in fact, his position is strictly analogous to that of a person found in the possession of stolen property shortly after the theft who puts forward an explanation of his possession which is inquired into and found to be false.

On the evidence as a whole I am satisfied that the offences put forward in the charges were brought home to the appellant Abdul Aziz. The sentence, in my opinion, is not unduly severe. I dismiss this appeal.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 910 OF 1915.

December 13. 1915.

*Present*: Justice Sir George Knox, KT.

MUHAMMAD IBRAHIM—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Proof—"Believe," meaning of.*

In a charge under section 411 of the Penal Code it is not sufficient for the prosecution to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the same had been honestly acquired. The word "believe" is a very much stronger word than "suspect", and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. [p. 154, col. 2.]

Criminal revision against an order of the Magistrate of Cawnpore.

Mr. *Dillon*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—Muhammad Ibrahim, who appears to be some kind of a merchant in metals in the Cawnpore bazar, has been convicted of an offence under section 411, Indian Penal Code, and sentenced to two years' rigorous imprisonment. The finding of the Magistrate who tried the case is that Muhammad Ibrahim knew or had reason to believe that the material called copper cloth was stolen property. Muhammad Ibrahim was tried along with one Ram Narain who also appears to be a second hand dealer in metals and other such materials in the Cawnpore bazar. The property stolen is described as 8 pieces of very fine copper netting known as copper cloth used for the lining of tube wells. There appears to be no room for doubt that this copper cloth was stolen from the Generalganj Station on the 20th or 21st June of the present year. It had been put in a waggon and brought to the Generalganj Mill siding on the 20th of June. On the 21st of June it disappeared. The finding of both the Courts below is that it is stolen property, and I agree with that finding, and I shall not go into that part of the case any further.

Ram Narain has been convicted of an offence under section 411, Indian Penal Code, in connection with this copper cloth. He appealed, his appeal was dismissed and he has not applied to this Court in revision. I also agree with the Courts below that the channel through which Muhammad Ibrahim received the copper cloth was Ram Narain. It was Muhammad Ibrahim who produced the copper cloth and sold it to the Empire Engineering Company for Rs. 112-8-0. The question which is pressed on me in revision is that there is no evidence to show that Muhammad Ibrahim possessed or retained this copper cloth with guilty knowledge such as is essential to a conviction under section 411, Indian Penal Code. A further point was taken that the joint trial of Muhammad Ibrahim with Ram Narain has prejudiced Muhammad Ibrahim, and that at any rate he should be given an opportunity of being tried separately and apart from Ram Narain. I considered that question. It was I think a mistake on the part of the Magistrate who tried the case to have tried both the accused in one and the same trial. Very little reflection should have led the Joint Magistrate to the conclusion that Muhammad Ibrahim would probably, if not certainly, cite Ram Narain as a witness in his defence, but I do not see sufficient ground for interfering on that matter—the more so as any interference would simply lead to the trial of Muhammad Ibrahim a second time for one and the same offence.

I now go back to the question whether there is any evidence of dishonesty on the

part of Muhammad Ibrahim. When he was called upon to account for the possession by him of this copper wire he at once said that he had bought it from Ram Narain for Rs. 48. He further said that a certain *ghumnewala*, apparently the broker Gaya Prasad, had brought a sample of copper cloth and asked him if he would purchase it. Muhammad Ibrahim further said that he offered Re. 1 per seer, the current price according to him being at that time 13 annas or 14 annas per seer, and it was according to this rate that he paid Ram Narain Rs. 48. To this account of the transaction he has throughout practically adhered. He says that he took the copper cloth to be second-hand stuff, and that the only use that he could make of it would be to melt it down. Gaya Prasad was cited as a witness by the prosecution, and so far as his evidence goes, it supports what Muhammad Ibrahim has said. He says he was present at the final transaction when the copper cloth passed from the hands of Ram Narain into the hands of Muhammad Ibrahim. There is further evidence which cannot be overlooked, namely the evidence of Mr. O'Conor, an employee of the Empire Engineering Company, and there is the evidence of Rahmat Ali who describes himself as a contractor for the Empire Engineering Company and is described by Mr. O'Conor in the same terms. Mr. O'Conor's evidence is valuable so far as it relates to the fact of the copper cloth being stolen property. He also says that this specially manufactured article is manufactured to the order of the Empire Engineering Company. This particular copper cloth should have arrived somewhere in the middle of June. But on the 20th of June as there was urgent need of it, and it had not arrived, he asked Rahmat Ali to see if he could get any such article in the bazar. Three or four days after Rahmat Ali came to Mr. O'Conor and said that a man undertook to get similar netting from Bombay. On the 15th of July Rahmat Ali brought a sample from somebody and was told to get more of it as quickly as possible. Mr. O'Conor was convinced that the copper cloth which was procured to the Company was the copper cloth which had been stolen. I do not think it necessary to set out here the evidence of Rahmat Ali. It was disbelieved by the Joint Magistrate, and I think rightly disbelieved. The more one reads it, the more he feels very doubtful about Rahmat Ali's *bona fides* about this transaction. The evidence given, which connects Muhammad Ibrahim with the offence for which he had to answer is 1) possession of the copper wire, but possession some 5 weeks after it had been stolen, (2) the account which Muhammad Ibrahim gives as to how he came to be possessed of this copper wire.

On behalf of the prosecution it is contended (1) that Muhammad Ibrahim must have known that this copper wire which was found with him was not second-hand property, (2) that he purchased it from a suspicious character, (3) that he purchased it far below what he knew to be its real value. The ground on which I am asked to draw the inference that the copper wire was not second-hand property and could not have been mistaken as being a second-hand property is the peculiar nature of the copper wire and its appearance. The account given by Muhammad Ibrahim, supported as it is by the evidence of Gaya Prasad, even supposing this article to be of a very peculiar nature, is not, in my opinion, sufficient to show that Muhammad Ibrahim must have known it to be not second-hand property but the original property stolen. In *Empress* v. *Rango Timaji* (1), Mr. Justice Melvill says that it is not sufficient for the prosecution to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the same had been honestly acquired. The word "believe" is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. In the present case the property being put before a person of the trade and profession to which Muhammad Ibrahim belonged, its appearance would not be sufficient to show that it necessarily was stolen property. The copper cloth may have been of a very peculiar kind, but there is evidence on the record to show that property of the same kind or very like it had been to the Cawnpore market on other occasions. The property had been sold to him

(1) 6 B. 402.

at 10 o'clock in the morning and the sale was in the Cawnpore bazar. At any rate there was the witness Gaya Prasad. We are not dealing with property sold under cover of night or in any place other than that where we would expect such property to be sold. While the evidence shows that Muhammad Ibrahim did ask Ram Narain where he had got this property from, he was met with the answer that it had remained for sometime at his shop. That might or might not be in itself an answer which ought to have put Muhammad Ibrahim upon his guard. But I am not prepared to hold that looking to the profession of the two men, the time of the sale, and the place of the sale, it was the duty of Muhammad Ibrahim to have said to Ram Narain "I do not believe you and insist upon knowing whence you have got it in the first instance". A prudent man might have put such a question, but simply upon the fact that Muhammad Ibrahim did not further press the question I am not prepared to hold that he had conceived guilty knowledge regarding this article. We are not dealing with organised rules about the reception of doubtful property such as prevail in London or other cities in Europe, and the evidence does not show and I know of no rule at present in existence in India unless there be one in Presidency towns where a dealer in second-hand goods is bound to make a detailed inquiry before he takes over property sold to him by another second-hand dealer. There remains the question of price. Muhammad Ibrahim did give Rs. 48 for what a few days afterwards he sold to the Empire Engineering Company for Rs. 112-8. This is suspicious, but I gather Mr. O'Conor did expect to have to pay Rs. 2-4 or something thereabout per running foot for this material. He was in urgent need of it and was pressing Rahmat Ali to get it anyhow. Rahmat Ali may or may not have passed on information as to what Muhammad Ibrahim might expect to get. I do not suppose he would have any scruples in selling the material at whatever price he might get for it. To hold specially in India that, because a second-hand dealer if he sees his purchaser eager, would feel any compunction about asking any possible amount for which he would sell would be very dangerous. The prosecution contends that Muhammad Ibrahim ought to have at any rate suspected the property to be stolen property and that he ought to have referred the matter to the Police. I am not able to follow this. One would gladly follow it, but one's experience in India shows that it will be dangerous to suspect a man of retaining stolen property knowing it to be stolen merely because he had a price offered to him and the offer was far above what he had paid for the article. After carefully considering the evidence, I have come to the conclusion that it is not sufficient evidence of guilty knowledge. The matter is very suspicious, but it is not beyond the possibility of a doubt, and I am bound to give the accused the benefit of the doubt. I find Muhammad Ibrahim not guilty of the offence with which he was charged, and I direct that the bail bond which he entered be discharged.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1260 OF 1915,

October 22, 1915.

*Present:*—Mr. Justice LeRossignol.

EMPEROR—PROSECUTOR

*versus*

*Musammat* NAURATI—ACCUSED.

*Criminal Procedure Code (Act V of 1898), ss. 408, 413 Appeal—Co-accused—One sentenced to 4 months' imprisonment other to fine of Rs. 50.*

It is not in the fitness of things that a Sessions Judge should be able to decide a case involving a sentence of four months' imprisonment and at the same time be forced to refer to the Chief Court a petitier sentence based on the same or closely similar incidents. [p. 156, col. 2.]

*Bu Thaw* v. *Emperor*, 9 Cr. L. J. 356; 4 L. B. R. 354 referred to

Two persons were tried together before a first Class Magistrate. One was sentenced to imprisonment exceeding one month and the other to a fine not exceeding Rs. 50:

*Held*, that both had a right of appeal to the Sessions Court under section 408 of the Criminal Procedure Code and that the right was not taken away by section 413 of the Code. [p. 156, col. 2.]

Case reported by the Sessions Judge, Umbala Division, with his letter No. 1144 G. of 29th July 1915.

FACTS.—*Mussammat* Naurati has been convicted of abetting the enticing away of

a woman named *Musammat* Parsanni. Ishar Singh was alsc convicted and acquitted by the Sessions Judge on appeal. The woman is said o have been seen going away with these two and has not been seen since, but the evidence that these two had anything to do with enticing her away seems insufficient.

The accused on conviction by Sardar Bahadur Sardar Harnam Singh, exercising the powers of a Magistrate of the first class in the Umbala District, was sentenced, by order dated 14th June 1915, under sections 498/109 of the Indian Penal Code, to pay a fine of Rs 50 only, or in default to undergo one month's simple imprisonment.

GROUNDS. The appellant in this case is a man named Ishar Singh and he has been convicted of abetting the enticing away of a woman named *Musammat* Parsanni said to be the wife of a man named Harnam Singh, an offence under sections 109/498, Indian Penal Code. With him was convicted a woman named *Musammat* Naurati who has been fined Rs. 50—a non-appealable sentence.

A man named Kalu was convicted in Patiala State of the offence. The facts, as alleged by the prosecution, are that *Musammat* Parsanni was married to Harnam Singh by *karewa*, and one night she went off and left him and has not been seen since. She was seen leaving the village that night in company with the accused and two other persons. There seems some doubt as to whether the alleged *karewa* ceremony, which is said to have taken place, is a marriage sufficiently binding to justify a conviction under section 498, Indian Penal Code. But apart from that it is, I think, clear that the evidence against the accused is not sufficient to justify his conviction. Two witnesses depose to having seen the woman going off at night with the accused and *Musammat* Naurati and two other persons. They could hardly have really identified *Musammat* Naurati and *Musammat* Parsanni who would have been all muffled up. And it is curious that they could be certain of the identity of Ishar Singh and not of the other persons. I regard this evidence as far from satisfactory. The Magistrate has remarked that one person alone could not have enticed away *Musammat* Parsanni; I should have said it was more likely one person did it than several. The man who wanted a woman to come away from her husband to live with him would try and get her to come with as little trouble and as few accomplices as possible. I am of opinion that the case has not been made out against the appellant, and I accept the appeal and acquit him. Fine, if paid, to be refunded. The case of *Musammat* Naurati will be reported to the Chief Court.

Mr. *Gokal Chand Narang*, for the Accused.

ORDER.—For the reasons set forth by the learned Sessions Judge, I set aside the order of conviction and acquit the petitioner, to whom the fine, if recovered already, shall be refunded.

But in this connection, I would point out that the petitioner had a right of appeal to the Sessions Court under section 408, Criminal Procedure Code. That right is not taken away by section 413, Criminal Procedure Code, for this latter section withholds right of appeal only in cases, *i. e.*, trials, in which the only sentence passed is imprisonment of one month or less, or a fine of Rs. 50 or less, or whipping.

In this case the petitioner was sentenced to pay a fine and in the same case or trial, Ishar Singh, her co-accused, was sentenced to four months' imprisonment and fine.

Further, on general grounds, it is not in the fitness of things that the Sessions Judge should be able to decide a case involving a sentence of four months' imprisonment and at the same time be forced to refer to this Court a pettier sentence based on the same or closely similar incidents. *Cf. Ba Thaw* v. *Emperor* (1).

*Revision accepted.*

(1) 9 Cr. L. J. 356; 4 L. B. R. 354.

## ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 880 OF 1915.

December 2, 1915.

*Present*:—Mr. Justice Piggott.

RAHMATULLAH—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195 (b) — Sanction to prosecute Procedure.*

In a proceeding under section 195 of the Criminal Procedure Code, a Sessions Judge sitting as a Court of Appeal proceeded to hold a very thorough and searching enquiry, in the course of which he examined on oath the person against whom the sanction was sought and recorded a quantity of other evidence, and having done this he rejected the application for sanction:

*Held*, that the Sessions Judge was right in adopting the procedure which he did. [p. 158, col 1.]

Criminal revision against an order of the Sessions Judge of Badaun.

Mr *Howard*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT. The essential facts connected with this application for revision are simple. The applicant Rahmatullah was sent up for trial on a charge under section 295, Indian Penal Code, and in the course of his trial evidence was given against him by a Sub-Inspector of Police of the name of Jaigobind Pershad. His defence was that a false case had been got up against him and that the Sub-Inspector had lent himself to the prosecution knowing it to be false. He gave certain reasons for the alleged conduct of the Sub-Inspector—reasons which involve specific allegations of fact. The Sub-Inspector in the witness-box denied the existence of the facts thus alleged. The trying Magistrate came to the conclusion that the charge against Rahmatullah was not proved. He seems to have thought that a false case had been brought against the man and with regard to the matters of fact as to which the Sub-Inspector had been cross-examined he recorded his opinion that the Sub-Inspector had not spoken the truth.

Rahamatullah having been acquitted on these findings presented a petition to the Magistrate for sanction to prosecute the Sub-Inspector on a charge framed under section 193, Indian Penal Code, in respect of certain statements on matters of fact made by the Sub-Inspector in the course of his evidence. That application was rejected by the Magistrate and I may say at once that the reasons given for rejecting it are not adequate or valid in law. I think it unnecessary to say more than this. Rahmatullah thereupon brought the matter before the Sessions Judge under clause (6), section 195, Criminal Procedure Code. Under that section the Sessions Judge had discretion to give or to refuse the sanction which the Magistrate had refused to grant. He evidently thought that the matter was one which called for further investigation before a sanction was rather given or refused. He accordingly proceeded to hold a very thorough and searching enquiry in the course of which he examined the Sub-Inspector on oath and recorded a quantity of other evidence. Having done this he rejected Rahmatulla's application. For the petition of revision presented to this Court by Rahmatullah there are a number of paragraphs which challenge the soundness of the conclusion arrived at by the learned Sessions Judge on the merits *i. e.*, on the materials before him and actually used by him in arriving at his conclusion. With regard to all these pleas I am content to say that even supposing matters of this sort could with propriety be gone into by this Court on an application like the present, I am of opinion that the learned Sessions Judge has given strong and satisfactory reasons for holding that the prosecution of the Sub-Inspector on this matter ought not to be sanctioned. What remains for my consideration is whether my interference is called for either by reason of the unsatisfactory nature of the order passed by the Magistrate or by reasons of the alleged impropriety of the Sessions Judge's conduct in instituting an enquiry and taking evidence in the manner already explained. Section 195 of the Criminal Procedure Code does not in itself lay down anything as to the materials upon which a Court is to proceed when considering an application for sanction. It does not say that the Court is bound to proceed on such materials as may be on the record at the time when sanction

*In re* APPADURAI AYYAR.

was applied for, neither on the other hand does it in terms empower the Court to hold an enquiry before granting or refusing sanction: at the same time it does invest the Court with a discretion to proceed either by way of sanction or by way of complaint and section 476 of the same Code expressly empowers a Court to make any preliminary enquiry that it may consider necessary before taking action under that section. The matter now in question had certainly been brought under the notice of the Sessions Judge in the course of a judicial proceeding. If he had seen fit to record a memorandum to the effect that under the circumstances, he was not prepared either to grant the sanction asked for by Rahmatullah or to confirm the Magistrate's order refusing sanction without first making some enquiry, with a view to satisfying himself whether the matter was not one in which it was more expedient for him to proceed by way of complaint under section 476, Criminal Procedure Code, there could not, in my opinion, have been any doubt as to the legality of his action. It seems to me that the Sessions Judge in the present case adopted in substance a course which was legally open to him and I also incline to the opinion that it was a very proper course for him to adopt under the circumstances. The Magistrate had expressed in clear terms his opinion that the evidence given before him by the Sub-Inspector was false on plain matters of fact well within the knowledge of the witness. At the same time he had refused to sanction the prosecution of that witness and had given no valid reasons for so refusing sanction. The Sessions Judge can scarcely be blamed for thinking that he had better make some enquiry not merely into the facts, but with regard to the nature of the evidence available in the event of a prosecution being instituted before either granting or refusing the application made by Rahmatullah to his Court. In this view of the matter I am satisfied that my interference is not called for. I reject this application.

*Application rejected.*

## MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 206 AND 207 OF 1915.

CRIMINAL REVISION PETITIONS NOS. 165 AND 166 OF 1915.

December 1, 1915.

*Present:*—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*In re* APPADURAI AYYAR—ACCUSED PETITIONER.

*Criminal Procedure Code (Act V of 1898), ss. 222, 234, 403 Misappropriation of money entrusted to more than one person—Joint trial, whether legal—Separate trials for misappropriating different items of money during the same period, whether allowed—Construction of Statute.*

Where in a trial for criminal misappropriation, it appears that there are several false entries in the accounts, that is sufficiently good evidence to show that the accused, who had the charge of the money and kept the accounts, misappropriated the sums of money to which the false entries or omissions relate. [p. 159, col 1.]

If a person entrusts a sum of money to more than one person and those persons in collusion commit criminal breach of trust or dishonestly misappropriate the amount, all of them being accused of the same offence committed in the course of one transaction can be tried jointly, and there is nothing in the language of section 222 of the Code of Criminal Procedure which makes it compulsory that there should be a separate trial of each accused. [p. 159, col. 2.]

*Emperor* v. *Datto Hanmant Shahapurkar*, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578 followed.

*Girwar Narain* v. *Emperor*, 15 Ind. Cas. 650; 16 C. W. N. 600; 13 Cr. L. J. 506, distinguished.

The intention of the Legislature by enacting section 222 of the Criminal Procedure Code is that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation. [p. 160, cols. 1 & 2.]

Where, therefore, a person was tried and convicted for misappropriating certain sums of money during a certain period and was again put on trial in respect of certain other sums of money alleged to have been misappropriated during the same period:

*Held*, that the charge in the previous case should be taken to include all the items misappropriated by the accused in the course of the same transaction during that period and that the subsequent trial was barred by section 403 of the Code. [p. 160, col. 1.]

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Sessions Court of Tanjore, in Criminal Applications Nos. 9 and 6 of 1915, preferred respectively against the judgments of the Court of the Sub-Divisional First Class Magistrate of Kumbakonam, in Calendar Cases Nos. 137 and 73 of 1914.

*In re* APPADURAI AYYAR.

Mr. *W. Barton*, for the Hon'ble Mr. *T. Richmond*, and Mr. *P. R. Narayanasami Aiyar*, for the Petitioner.

Mr. *R. Grant*, for the Government.

Mr. *T. Ranyachariar*, for the Complainant.

ORDER.

ABDUR RAHIM, J.—The subject-matter of the charge out of which Criminal Revision Case No. 207 arises was a gross sum of Rs. 2,738 which was said to have been misappropriated by the 1st accused, who is petitioner before us, during the period from 18th March 1911 to the 26th October 1911. The subject-matter of the charge in the case out of which Criminal Revision Case No. 206 has arisen, is another gross sum which is said to have been misappropriated by the same accused between the 14th April 1911 and 26th October 1911. So that the period included in the latter case is entirely covered by the period comprised in the former charge. The 1st accused was employed by a firm, and was in charge of the accounts and the cash of the firm during the above period, and he was charged with having misappropriated the above sums of money in collusion with two other men who have been acquitted on appeal by the Sessions Judge.

In Criminal Revision Case No. 207, it is first of all argued on the merits that there is no evidence to sustain the conviction for dishonest misappropriation.

The evidence in the case mainly consists of false entries and omissions in the accounts kept by the 1st accused; in some cases he has not credited moneys which he collected on behalf of the firm and which ought to have been credited to the firm, and in others he has credited amounts less than what he collected. In my opinion the number of false entries in the accounts is sufficiently good evidence to show that the accused who had the charge of the money and kept the accounts, misappropriated the sums of money to which the false entries or omissions relate. We are dealing with this case in revision and not in appeal; and it is sufficient for us in revision to say that there is no justification for interfering with the conviction, as we find that there is *prima facie* good evidence which, if believed by the Magistrate and by the Appellate Court, as it has been in fact, is sufficient for conviction.

It is also argued by Mr. Barton in support of the petition for revision that the trial was bad, inasmuch as the three accused persons were tried together in this case, that is, in Criminal Revision Case No. 207. The other two persons, as I have already said, have been acquitted; and it does not appear to us that the 1st accused was in any way prejudiced by the joint trial. Apart from that, I do not think that the law debars a joint trial in a case of this nature. The charge is that all the three persons in collusion misappropriated a total sum of Rs. 2,738. They were all employed together, and it was not possible for the employer to say how much of the money was misappropriated by a particular person. As it happened, the evidence for the prosecution was not sufficient to bring home the responsibility to the 2nd and 3rd accused. But that is another matter. Mr. Barton cited a ruling of the Calcutta High Court, *Girwar Narain* v. *Emperor* (1), in support of his proposition. It is laid down that section 222 of the Code of Criminal Procedure shows that the trial contemplated there is of one person only at a time. I must confess that I find nothing in the language of that section which compels such an inference. If a person entrusts a sum of money to more than one person, and those persons in collusion commit criminal breach of trust or dishonestly misappropriate the amount, surely one would expect that the Legislature would have used very clear and explicit language if it intended that in such a case those persons ought not to be tried together. The transaction is one and the same, and the evidence would probably be the same. Besides, the matter is also covered by section 239, Criminal Procedure Code, which expressly authorises the joint trial of more than one person who are accused of the same offence committed in the course of one transaction; and I should say that, having regard to the case alleged against the three accused, a joint rial was the only proper trial in the case. Otherwise the same evidence would be repeated and the same accounts would have to be

(1) 15 Ind. Cas. 650; 13 Cr. L. J. 506; 16 C. W. N. 600.

gone through in the case of each accused. See *Emperor* v. *Datto Hanmant Shahapurkar* (2). That disposes of the objections to the conviction so far as Criminal Revision Case No. 207 is concerned.

In Criminal Revision Case No. 206, the first objection—and in my opinion a fatal objection—to the conviction is that the accused could not be tried for misappropriating another gross sum of money covered by the period for which he has been already tried and convicted in the other case. The second clause of section 222 of the Code of Criminal Procedure says that "when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234." Section 234 permits the trial of a person in one and the same trial for three offences committed within a space of twelve months. The question is whether section 403, which bars a second trial for the same offence of a person who has once been tried and convicted, applies. Here the accused has already been tried and convicted for misappropriating a gross sum of money during the same period and the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period. I think that ought to be the interpretation of the section, because otherwise it seems difficult to conceive that the Legislature should have intended that under section 222 the prosecutor should be at liberty to prosecute for a gross sum misappropriated during a particular period consisting of certain items more than 3 in number and obtain a conviction for the same, and then choose another gross sum consisting of different items alleged to have been misappropriated during the same period and have a separate trial for the second group of items.

What the Legislature apparently intended was that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation. I think, therefore, that the conviction and sentence in Criminal Revision Case No. 206 should be set aside and the fine, if paid, will be refunded and the bail bond discharged. The conviction and sentence in Criminal Revision Case No. 207 will be maintained.

AYLING, J.—I agree.

*Petition partly allowed.*

(2) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

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## LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 267-B OF 1915.

November 25, 1915.

*Present*:—Sir Charles Fox., KT., Chief Judge.

HUSEIN—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Evidence Act (I of 1872), s. 114, ill. (a)—Presumption—Possession of stolen property.*

Where a thief got into a house by house-breaking and the stolen property was found in his possession, he may be presumed not only to have committed the theft but also house-breaking.

Review of the order of the Additional Magistrate, Pantanaw, dated the 14th June 1915, passed in Criminal Regular No. 134 of 1915.

Mr. *Halkar*, for the Applicant.

ORDER.—The Magistrate and the Sessions Judge had found that the *longyi* was the complainant's property. It was missed after the thief escaped from the complainant's house. It is justifiable to infer that the thief took the *longyi* from the house. The thief got into the house by house-breaking. The presumption that a person found in possession of the stolen *longyi* committed not only theft of it but also that he committed housebreaking on the occasion is justifiable under section 114 of the Evidence Act. Illustration (*a*) to the section is merely an example, and it cannot be read as limiting the presumptions which may be drawn from recent possession of stolen property.

I can find nothing to support the contention that the *longyi* was admittedly left on a heap of firewood outside the house.

The application is dismissed.

*Application dismissed.*

UMED SINGH *v.* SOBHAG MAL DHADHA.

## PRIVY COUNCIL.

APPEAL FROM THE COURT OF CHIEF COMMISSIONER, AJMER-MERWARA.

November 2, 1915.

*Present*:—Viscount Haldane (Lord Chancellor) Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

*Thakur* UMED SINGH AND ANOTHER—APPELLANTS

*versus*

*Rai Bahadur Seth* SOBHAG MAL DHADHA AND ANOTHER—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 115, 114, 121, O. XLVII, r. (1), Sch. II, paras 15, 16—Arbitration—Agreement—Guardian ad litem—Signature on application for reference, absence of, effect of—Arbitration—Umpire—Award.*

A minor represented by a guardian *ad litem* was a party to a suit .The guardian *ad litem* entered into an agreement signed by all the parties to the suit including himself to refer the matters in dispute to two arbitrators and in case of difference between them to an umpire. The parties made an application for reference which was not signed by the guardian although he was present in Court. The Court made an order of reference to two arbitrators whose award being challenged an umpire was appointed. An application against the umpire's award was unsuccessfully made under para. 15, Schedule II of the Civil Procedure Code, 1908. On review of this order the arbitration proceedings were set aside on the grounds that the application for arbitration was not signed by the guardian *ad litem* and that the umpire had opened the case *de novo* and had not taken the evidence called for:

*Held*, that the application for order of reference did not require signature as of necessity and that no injustice was caused to the minor whose guardian was present in Court at the time the application was presented. [p. 163, col. 2]

*Held*, further, that an award under arbitration proceedings could be set aside only on the grounds provided in Schedule II of the Civil Procedure Code of 1908. [p. 163, col. 2.]

Appeal by special leave, heard *ex parte*, against the order of the Officiating Commissioner of Ajmer-Merwara, dated May 23rd, 1912, setting aside on review certain arbitration proceedings confirmed by the lower Court and remanding the cause to the Court of the Commissioner and District Judge of Ajmer-Merwara.

FACTS.—A suit was instituted in the Court of the Commissioner and District Judge of Ajmer-Merwara on a mortgage bond for the recovery of a certain sum, to which the defence was that the bond was without consideration. By an agreement, dated July 31st, 1910, the parties agreed to refer the matter in dispute to arbitration. An application was accordingly made before the case was tried for the appointment of arbitrators, whose award was challenged on the grounds of the arbitrators' proceeding clandestinely without hearing each party, omitting to give notice of their proceedings, if any, and failing to give an opportunity to one party of producing witnesses. An umpire was, thereupon, appointed, to whom the aggrieved party made an application through Pleader with respect to the manner in which the arbitration had been conducted and asking him indirectly to take evidence, but he did not do so even though the importance and necessity of so doing was urged upon him. He made his award without taking the said evidence. An application was then made to set aside the award. This was refused. An application for revision under section 115 of the Civil Procedure Code was made, but this was refused too. An application for review was then presented to the Court of the Chief Commissioner who ordered the parties to be represented by Counsel. The appellants then filed a petition stating that they did not wish to be represented. Order was then made on hearing Counsel for respondents setting aside the award made by the umpire and remanding the case to the lower Court for trial according to the law.

Mr. *De Gruyther*, *K.C.*, (with him Mr. *Dube*) then applied and obtained leave to appeal to His Majesty in Council,

Mr. *Dube*, for the Appellants:—The award could only be interfered with under section 15 of Schedule II of the Civil Procedure Code of 1908. By section 16 of Schedule II the Court was to pronounce the decree in certain cases and it was final when made. Under the old Act there was neither an appeal nor revision. It was not necessary for the parties to sign the application for reference to arbitration. In this case the guardian *ad litem* was present in the Court.

[LORD PARMOOR: Does it appear that the minor was represented before the arbitration?]

[LORD WRENBURY: Agreement was signed by all.]

[LORD HALDANE: Appeal lies only when the decree is in excess of, or is not in accordance with, the award.]

[LORD HALDANE: Before the Chief Commissioner all these points were taken.

[SIR JOHN EDGE: The Chief Commissioner had no jurisdiction.]

[LORD PARMOOR: The Chief Commissioner does not deal with the question of jurisdiction; but with the manner in which the award was made.]

There lay no appeal against the award. It was final.

[SIR JOHN EDGE: No irregularity to justify any interference.]

[LORD PARMOOR: The appeal was against the decree on the ground of misconduct of the umpire and before the Trial Judge the question of misconduct had been taken. Surely you cannot appeal against a decree on the ground of misconduct].

[LORD WRENBURY: The Court which had no jurisdiction at all set aside the decree of the Court which had jurisdiction.]

Their Lordships did not wish to hear the argument any further.

Reference was made to *Ghulam Khan* v. *Muhammad Hassan* (1) and *Hansraj* v. *Sundar Lal* (2).

The respondents did not appear.

JUDGMENT.

VISCOUNT HALDANE.—In this appeal the question is, whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondents had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The Trial Judge appointed one Bhur Singh guardian *ad litem* of this minor appellant. Before the trial came on all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand, excepting in the case of the minor appellant, on whose behalf it was signed by the guardian *ad litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian *ad litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly. The umpire made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of section 15 of the Second Schedule of the Code of Civil Procedure, 1908, to set the award aside. The Trial Judge refused the application. He held that all the parties to the suit, including the guardian *ad litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was made under section 16 of the Second Schedule to the Code already referred to. This section provides that—

"(1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award. (2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree, except in so far as the decree is in excess of, or not in accordance with, the award."

The respondents then presented an application to the Chief Commissioner under section 115 of the Code of Civil Procedure. This section provides that:—

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears (*a*) to have exercised a jurisdiction not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, or (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

(1) 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 25 P. R. 1902.

(2) 35 I. A 88; 10 Bom. L. R. 581; (P. C.): 12 C. W. N. 585; 7 C. L. J. 520; 138 P. L. R. 1908; 18 M. L. J. 266; 99 P. W. R. 1908; 14 Bur. L. R. 146; 80 P. R. 908; 35 C. 648; 4 M. L. T. 25.

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian *ad litem*, was not a good one having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

The respondents then applied to the Court of the Chief Commissioner for a review of this order, relying on section 114 of the Code which, subject to such conditions and limitations as may be prescribed, allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Order XLVII (1) of the First Schedule to this Code, which provides that he may apply for such review on:—

"the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason."

These rules are, under section 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton, who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review the High Court was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit, did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides by section 1 that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application, it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

*Appeal allowed.*

Solicitors for the Appellants: Messrs. *Barrow, Rogers* and *Nevill.*

AKBAR ALI KHAN *v.* ABBAS.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2549 TO 2598 OF 1912.

April 20, 1915.

*Present*:—Mr. Justice Holmwood and Mr. Justice Walmsley.

AKBAR ALI KHAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Syed* ABBAS—PLAINTIFF—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 105—Incidents of holding, decision as to—Second appeal, maintainability of.*

A second appeal lies to the High Court from the decision of a Special Judge affirming the decision of an Assistant Settlement Officer on the question as to the incidents of the holding. [p. 164, col. 1.]

Appeals against the decree of the District Judge, Patna, dated the 22nd January 1912, affirming that of the Assistant Settlement Officer, Barh, dated the 24th September 1910.

Dr. *Sarat Chandra Bysack* and Babu *Ambica Pada Choudhury*, for the Appellants.

Babu *Jogesh Chandra Ray* and Moulvi *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.—These appeals are preferred by the tenants-defendants. The landlord-respondent instituted cases against them under section 105 of the Tenancy Act asking that their rent should be increased under sections 31, 32, 33 and 52. When the three cases came on for trial the landlord withdrew his claims under sections 31 and 52, and gave no evidence regarding improvements. The question that remained between the parties was whether the rents were liable to enhancements, for the tenants asserted that they held at fixed rates. The learned Special Judge has found that they did not hold at fixed rates, and has upheld the enhancement allowed by the Assistant Settlement Officer. The defendants prefer these second appeals. A preliminary objection is raised on behalf of the landlord-respondent that no appeal lies, but having regard to the cases of *Pirthi Chand Lal Chowdhury* v. *Basarat Ali* (1) and *Bisseswar Ray* v. *Rajendra Kumar Singha* (2), we think that an appeal does lie on the question as to the incidents of the holding.

The finding of the lower Courts is that the tenants-defendants are ordinary occupancy *raiyats*, and not, as they allege, *raiyats* holding at fixed rates. It was conceded that they were entitled to the presumption arising under section 50 (2) of the Tenancy Act. The learned Special Judge, however, held that the presumption was rebutted by a *bandobast robkar* and its connected papers of the year 1841; in these papers all the lands in the villages where the holdings are situated are described as *bhaoli*. The inference is that the holdings in suit were *bhaoli*, and the landlord argues that the conversion from *bhaoli* to *nagdi* must have taken place since 1841, and that it must be a change in the rent, of such a nature as to rebut the presumption under section 50 (2).

The tenants-defendants rely upon the case of *Miterjeet Singh* v. *Toondun Singh* (3), where the learned Judges held that the fixing of a cash rent in lieu of what was paid in kind was "tantamount to saying that that money rate of rent represented and was equivalent to what had been paid before in another way." We may remark that there are other cases in which a contrary view was taken, but it is not necessary for us to consider them. It appears to us that the present appeals must be distinguished from *Miterjeet Singh's* case (3) in this way. The tenants here produced rent receipts for cash-rents and said that they had been always paying rent at the same rate: that amounts to an assertion that they had always paid a cash-rent, although, it is true, they do not seem to make such a statement in so many words. This assertion is disproved by the fact that in 1841 the lands were held on the *bhaoli* system, and, therefore, at some date since 1841 there was a change. Ordinarily converson from *bhaoli* to *nagdi* is a very great change, and about this change the tenants in these cases have nothing to say. In *Miterjeet Singh's* case (3), however, the change was by written agreement, and the money-rent was accepted in lieu of the produce-rent. This difference we think a substantial one, and it prevents us from applying the principle laid down in *Miterjeet Singh's* case (3) to the present cases.

We hold, therefore, that there is no reason for interfering with the judgment of the

(1) 3 Ind. Cas. 449; 10 C. L. J. 343; 13 C. W. N. 1149; 37 C. 30.

(2) 25 Ind. Cas. 228; 18 C. W. N. 949.

(3) 12 W. R. 14.

lower Appellate Court, and we dismiss these appeals with costs.

*Appeals dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 907 OF 1914.

November 2, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MANJAPPA AJRI AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

MARUDEVI HENGSU AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Aliyasantana Law—Inheritance—Self-acquired property—Members of deceased's own branch, right of.*

The self-acquisition of a member of a family governed by the Aliyasantana Law devolves upon his death, not upon all the members of the larger family to which he belonged, but upon the members of his own branch in the larger family. Among the members of his own branch themselves, no distinction is made between persons nearer in blood to or remoter in blood from the deceased acquirer. All the members of the nearest non-extinct branch are the heirs of the self-acquirer. [p. 166, col. 1.]

*Antamma* v. *Kaveri*, 7 M. 575; *Krishnan Nair* v. *Damodaran Nair*, 17 Ind. Cas. 769; 13 M. L. T. 166 38 M. 48; 24 M. L. J. 249, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 429 of 1912, preferred against that of the Court of the Subordinate Judge of South Canara, in Original Suit No. 32 of 1911.

Messrs. *J. L. Rozario*, *K. P. Madhava Rao* and *K. P. Lakshmana Rao*, for the Appellants.

Messrs. *B. Sitarama Rao* and *K. Y. Adiga*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 5 and 6 are the appellants. They and the plaintiffs and 2nd defendant and 2nd defendant's son, the 4th defendant, all belong to an Aliyasantana family. The 2nd defendant (mother of the 4th defendant) is the maternal aunt of the plaintiffs and of the defendants Nos. 5 and 6 and she is the senior lady in the *tavazhi* of the 2nd defendant's mother. As such senior lady in the branch of the 2nd defendant's mother, she was the *ejamathi* or manager of the branch. The 2nd defendant was one of four sisters. Of the four sisters, the 2nd defendant is the only one now surviving. One of the other sisters had a daughter Kusmaji and the finding of the lower Courts is that item 1 of Schedule B out of the plaint properties (and that is the only item in dispute in this second appeal) belonged to Kusmaji as her self-acquired property. Kusmaji died issueless. The 2nd defendant, the maternal aunt of Kusmaji, was alleged by the contesting 1st defendant to be the sole owner of this item 1 of Schedule B, and he attached and brought the property to sale as her exclusive property in execution of a decree obtained by him on a mortgage document executed to him by the 2nd defendant. It has been found by the lower Courts that the mortgage-debt contracted by the 2nd defendant and the mortgage-decree obtained against the 2nd defendant by the 1st defendant are not binding on the plaintiffs and on the defendants Nos. 4 to 6, of whose branch the 2nd defendant is the manager.

The Subordinate Judge dismissed the plaintiffs' suit as regards this item 1 of Schedule B on the ground that the 2nd defendant, as the maternal aunt of the deceased owner Kusmaji, was the sole heir to Kusmaji's self-acquired properties and that the plaintiffs and the defendants Nos. 4, 5 and 6 (Kusmaji's mother's nephews and nieces) being one degree more remote than the 2nd defendant were excluded by the 2nd defendant. The Subordinate Judge deals with this question in paragraph 18 of his judgment and seems to assume without any discussion that when a female member of an Aliyasantana family dies, her heir is her nearest relative (or the nearest relatives standing in an equal distance of her by blood relationship) in the female line, and not the nearest branch of the family in the line to which she belonged including all the members of that branch, without regard to the question which of the members of that branch stand nearest in blood to the deceased intestate. The District Judge on appeal in a very short and rather unsatisfactory judgment says thus:—"As I understand the Aliyasantana Law, the nearest relations succeed first, then the *tavazhi*,

and last the *tarwad*." [I shall avoid the use of the words '*tavazhi*' and '*tarwad*' though the word *tarwad* is used in *Antamma* v. *Kaveri* (1), as they are Malayalam words which are used in respect of persons governed by the Malabar Marumakattayam Law whereas the parties to this suit are followers of the Aliyasantana Law. I shall employ the words "branch" and "family" to denote what correspond to "*tavazhi*" and "*tarwad*".]

In *Antamma* v. *Kaveri* (1) Turner, C. J., and Muthusawmi Aiyar, J., held that according to the custom obtaining in South Canara, the self-acquisition of a member of the family governed by the Aliyasantana Law devolves upon his death, not upon all the members of the larger *family* to which he belonged, but upon the members of his own *branch* in the larger family. Among the members of his own branch themselves, no distinction is made between persons nearer in blood to, or remoter in blood from, the deceased acquirer. I have looked into the original records of that case and the only question argued or considered was whether the members of the deceased's branch alone were his heirs (taking as a class) or whether the members of the larger family (including members of other branches also) took as a class. It was never suggested that an individual heir or individual heirs standing in the same degree of blood relationship to the deceased was or were the heirs. I think this case of *Antamma* v. *Kaveri* (1) is clear authority for the proposition that all the members of the nearest non-extinct branch are the heirs of the self-acquirer. In the present case Kusmaji's own line and her mother's line are extinct and her heirs must be found among the descendants of Kusmaji's grandmother, who all take as a class belonging to that nearest branch. Hence the 2nd defendant, though nearer in blood relationship to Kusmaji, must take only as belonging to Kusmaji's grandmother's branch and she then takes the inheritance with all the other members of that branch. The view of the lower Courts that the heirship goes to the nearest individual relation or relations by blood and not to all the members of the nearest branch rests on no authority. Mr. Sitarama Rao ingeniously contended that in the Full Bench case, *Krishnan Nair* v. *Damodaran Nair* (2), the question whether the nearer blood relations standing in the same degree to the deceased do not exclude the remoter relations was left an open question. I was one of the Judges who, with Sundara Aiyar, J., made the reference to the Full Bench in that case. The question, we referred, was whether the self-acquisitions of a female member of a Marumakattayam *tarward* would, on her death, lapse to the *tarward* of which she died a member or whether they would descend to her nearest heirs or her *tavazhi*. The language of the referring order was, if I recollect aright, the language of Sundara Aiyar, J. But I am reasonably clear that we had in contemplation only two alternatives, namely, inheritance by all the members of the larger *tarwad* or inheritance by all the members of the smaller *tavazhi* and not a third alternative, namely, inheritance by those members only of the smaller *tavazhi* who were nearest in blood relationship to the deceased. Sankaran Nair, J., however, at page 53 says: "The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the *tavazhi*, may raise another question." He, however, did not deem it necessary to decide that question and his answer to the reference is: "That the self-acquisitions of a female do not lapse to her *tarwad* but they descend to her *tavazhi*: if she has issue, the *tavazhi* is composed of that issue; if she has no issue, her mother and her descendants form her *tavazhi*." Sundara Aiyar, J., and Benson, J., did not understand the referring order as raising any third question and Sundara Aiyar, J., uses the expression "nearest heirs" and "*tavazhi*" indiscriminately to mean the same thing. The decrees of the lower Courts, therefore, so far as item 1 of B Schedule is concerned, must be reversed and the case remanded to the lower Court for a fresh decision in Appeal No. 429 of 1912 on the other questions arising in the case with reference to the above property.

Costs will abide.

NAPIER, J.—I agree. The decision in *Antamma* v. *Kaveri* (1) has remained un-

(1) 7 M. 575.

(2) 17 Ind. Cas. 769; 38 M. 48; 13 M. L. T. 166; 24 M. L. J. 240.

challenged for 30 years as representing the custom of the District of South Canara and I think that it would be most mischievous to re-open this question and institute a fresh enquiry as to custom after the lapse of such a period.

*Appeal allowed; Case remanded.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 250 OF 1911.

June 25, 1914.

*Present*:—Mr. Justice Fletcher and Mr. Justice Richardson.

GURBUKSH PROSHAD TEWARI—
DEFENDANT—APPELLANT

*versus*

KALI PROSAD NARAIN SINGH—
PLAINTIFF—RESPONDENT.

*Bengal Estates Partition Act (V of 1897), ss. 88, 119—Partition proceedings—Suit to set aside partition in Civil Court, maintainability of.*

Where in a partition proceeding in a Revenue Court no dispute or doubt was found to exist as to whether any land formed a portion of the parent estate and no order was made by the Collector directing the partition to proceed under section 88 (*b*) of the Estates Partition Act, a party suing in a Civil Court for declaration of title to and possession of land, alleging that by reason of fraud practised by one of the defendants land belonging exclusively to him had been partitioned as joint land, is not a person aggrieved by an order made under section 88 and is not entitled to maintain the suit. [p. 169, col. 1; p. 169, col. 1.]

Per *Fletcher, J.*—A party to a partition proceeding in a Revenue Court, having known about his rights from the time the partition papers were submitted to the Collector under section 58 and notices inviting objections issued and never having put them forward in the partition proceedings, ought not to be subsequently permitted to raise them so as to upset the partition proceedings to which he was a party. [p. 169, col. 2.]

Whatever rights a party may have, he is not entitled to keep the lands allotted to him on the footing that the lands sued for formed a portion of the estate under partition and bring an action to recover possession of the lands or a portion thereof awarded to the other party. [p. 169, col. 1.]

Appeal against the decree of the Subordinate Judge of Saran, dated the 29th March 1911.

Babu *Umakali Mukerjee* and Moulvi *Muhammad Mustafa Khan*, for the Appellant.

Dr. *Dwarka Nath Mitter* and Babus *Rajendra Prosad* and *Sib Chandra Palit*, for the Respondent.

### JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 1 from the judgment of the learned Subordinate Judge of the second Court at Saran.

The suit was brought for declaration of title to, and possession of, certain lands.

It appears that many years ago the Mahal Guthui was divided into three separate estates, but some lands remained joint between the three separate estates. The *tauzi* numbers of the three estates are now 1925, 1926 and 1927.

The plaintiffs claim to be the owners of *tauzi* No. 1926 and of 8 annas in *tauzi* No. 1925. The defendant No. 1 is the owner of a 5-annas 4-pies share out of 8 annas of *tauzi* No. 1925 and the defendants Nos. 2—5 are the owners of the remaining share in the 8 annas of *tauzi* No. 1925. The other defendants are the owners of *tauzi* No. 1927.

In January 1902 the defendant No. 1 applied under the provisions of the Estates Partition Act, 1897 (Act V of 1897 B. C.), for partition of his share in *tauzi* No. 1925. On the 30th of September 1902, the plaintiff No. 4 filed a petition of objection before the Collector on the ground that all the owners of *tauzi* Nos. 1926 and 1927 who held land in common with the owners of *tauzi* No. 1925 had not been made parties. But as the defendant No. 1 raised no objection to their being made parties, they were added by order of the Collector in the year 1903. Accordingly on the 25th of August 1903, the Collector issued the notices under section 29 of the Act declaring the estate to be under partition. On the 29th of September 1907, the following order appears on the order-sheet of the Collector: "The papers, *viz.*, *khasra raibandi* and map prepared on the basis of survey records have already been adopted for the purposes of partition under section 50. Checking *moharrir* has reported that there are common lands in the estate. Fix September 3rd for the division of common lands under section 84." The order-sheet shows that the owners of all the three estates presented petitions to the Collector as to the method in which they desired the

common lands to be divided between the estate under partition and the other two estates. On the 2nd of October 1907, the common lands were divided in the presence of the appellants for partition and some of the owners of *tauzi* Nos. 1925 and 1926. Notice was directed to issue on the absentee proprietors.

The owners of all three estates then filed objections as to the proposed method of partition. The petitions having been rejected by the Deputy Collector the plaintiffs preferred an appeal to the Collector against the rejection of their petition, alleging that the lands of the different estates between which the common lands were held were so scattered and interspersed with one another that the partition of the common lands could not proceed. The Collector dismissed the appeal on the 1st of November 1907. The plaintiffs then appealed to the Commissioner of Revenue who confirmed the order of the Collector, and next to the Board of Revenue who also dismissed their appeal. On the 25th of May 1908, the order-sheet shows that notices were directed to issue under section 86 inviting objections, if any, by the 16th of June 1908, to the proposed partition of the common lands. No objections being received the division of the common lands was approved by the Collector under section 86 on the 30th of October 1908.

On the 19th of November 1908, the divided common land was directed to be included in the papers of the parent estate. Then the Deputy Collector proceeded under section 57 with the partition of the parent estate including the divided common land. On the 15th of July 1909, the papers were submitted to the Collector under section 58 and notices inviting objections were issued. On the 11th of August 1909, the plaintiffs Nos. 4 and 5 presented a petition to the Collector objecting chiefly to the proposed division of the parent estate. The only piece of land that they alleged was not in *tauzi* No. 1925 is plot No. 895 which they allege is in *tauzi* No. 1926. This plot No. 895 is not mentioned in the schedule to the plaint in this suit, so presumably the plaintiffs have no grievance in relation thereto. In reference to these objections on the 11th of September 1909 subject to some slight modifications, the partition was confirmed by the Collector.

The Commissioner of Revenue on the 19th of May 1910, rejected the objections put forward by the plaintiff No. 4 and on appeal to the Board of Revenue, the appeal of the plaintiff No. 4 was dismissed. The partition was finally completed on the 26th of September 1910, that is, about 8-3/4 years after the proceedings commenced. The plaintiffs filed this suit on the 26th of April 1910, and although according to the evidence of the plaintiff No. 4 the plaintiffs became aware of the fraud that they say had been practised on them as early as the 15th of July 1909, they did not in the course of the partition proceedings set up this case and it was only after the partition papers had been submitted to the Commissioner for approval that they instituted the present suit.

The result is, as we are informed by the Vakil for the defendant No. 1, that he has been deprived of a substantial portion of the property allotted to him in the partition and the plaintiffs have been permitted to keep all the property allotted to them and to recover the property mentioned in the schedules in the plaint. But the plaintiffs got the property allotted to them in the partition on the footing that the lands now sued for formed a portion of the estate under partition and if they had not been so treated. the allotment to the plaintiffs in the partition would have been much smaller.

The partition proceedings were based upon the Record of Rights made under the provisions of the Bengal Tenancy Act as provided by the Estates Partition Act.

The plaintiffs' case is that the defendant No. 1 represented them at the survey and fraudulently represented what lands were in the different *tauzis* for his own benefit. The documentary evidence shows that the plaintiffs took some part in the settlement proceedings and I doubt this story about the defendant No. 1 representing the plaintiffs at the survey. The foundation of the plaintiffs' case is the *thak* maps made at the Revenue Survey in 1854. But I can see no reason to think that the *thak* maps are more reliable than the Record of Rights. True it is that some few tenants have

given evidence that the plaintiffs are in possession. The evidence on the defendants' side is that the plaintiffs are colluding with the tenants. It would not, I think, be safe to rely on this evidence of possession alone. Section 119 of the Estates Partition Act enacts that no order made under sections 20 and 30, Chapters V, VII, VIII and IX (excepting section 81), Chapter X, section 107 or section 117 shall be liable to be contested or set aside by suit in any Court: Provided, *inter alia*, that any person who is aggrieved by an order made under section 88 may bring a suit in a Court of competent jurisdiction to modify or set aside such order.

There may be some doubt as to what the precise meaning of this section is. The decisions of this Court are that the orders made by the Revenue Authorities are only conclusive so far as they relate to the Government revenue and the details of the partition. This seems to me to be a somewhat narrow view to take of the wording of the section. The learned Subordinate Judge has held that the present suit comes within the proviso of a suit by a person who is aggrieved by an order made under section 88. But there never was any order of the Collector under section 88. No dispute or doubt was found to exist as to whether any land formed a portion of the parent estate and no order was made by the Collector directing the partition to proceed under section 88 (*b*). That being so, the plaintiffs are not persons aggrieved by an order made under section 88 and cannot sue to set aside or modify an order that never was made. The provisions of section 89 as to compensation only apply to cases where the Collector has made an order under section 88 (*b*).

The result I have arrived at is that whatever rights the plaintiffs may have, they are not entitled to keep the lands allotted to them on the footing that the lands now sued for formed a portion of the estate under partition and bring an action to recover possession of the lands or a portion thereof awarded to the defendants. The result of allowing such a suit might be to work grave injustice to the defendants or some of them. It was stated before us that the effect of the decree of the lower Court, although it had not affected the defendants (other than the defendant No. 1) very much, had deprived the defendant No. 1 of a substantial portion of the lands allotted him by the partition by the Collector. I am also inclined to hold that the plaintiffs, having according to their own story known about their rights since the 15th of July 1909 and never having put them forward in the partition proceedings, ought not now to be permitted to raise them so as to upset the partition proceedings to which they were parties. I am, therefore, unable to agree with the result arrived at by the learned Judge in the Court below.

The present appeal must, therefore, be allowed and the suit dismissed. The plaintiffs must pay to the defendant No. 1 his costs both in this Court and in the Court below.

RICHARDSON, J.—I agree. In the proceedings under the Estates Partition Act the plaintiffs never took the objection that more land had been allotted to the estate under partition than that estate was entitled to. That allotment was made under section 84 and confirmed by the Collector under section 86. Objections were made to the mode in which the common lands were divided, but not to the quantity allotted to the estate under partition. These objections were disposed of before the allotment was confirmed under section 86 and the order confirming the allotment was subsequently and separately made. The plaintiffs had another opportunity at that stage to object to the quantity of land allotted to the estate under partition. Notice was issued inviting objections before the order of confirmation was made, and the order was not made until the notices were returned after being fully served. When the allotment was confirmed the partition of the whole was made under section 57. The next step was to submit the partition so made for the sanction of the Collector under section 58. The plaintiffs then had another opportunity to raise the questions raised in this suit. According to their own case they knew then of the fraud said to have been practised upon them in the settlement proceedings. But they did not avail themselves of that

opportunity. The petition which they filed, dated the 11th August 1909, gives no hint of the case made in this suit. The Collector made some small alterations suggested by that petition and subject to those alterations he approved the partition. It is clear that throughout these proceedings no question was raised under section 88 and no order was passed under that section. Turning then to section 119, the plaintiffs cannot well claim to be persons "aggrieved by an order made under section 88." They have no right of suit, therefore, on that ground. It is suggested that they have a right of suit under proviso (*i*). But they are not persons "claiming a greater interest in lands which were held in common tenancy between two or more estates" than has been allotted to them by an order under section 84 or section 86. There is no dispute as to their interest in the allotted lands. They are the owners of estate No. 1926 and of eight annas of estate No. 1925. The dispute is as to what particular lands were held in common tenancy, not as to the plaintiffs' interest in those lands when once the lands were determined. In view of the course taken by the plaintiffs in the partition proceedings and of the provisions of section 119, I agree that the plaintiffs cannot now raise the question what lands were held in common tenancy.

Apart from that question it seems to me more than doubtful whether the plaintiffs ought to succeed on the merits. I do not accept the allegation that fraud was practised upon them by the defendant No. 1 in connection with the preparation of the Record of Rights. The proceedings taken for that purpose lasted from 1895 till the 23rd January 1899, when the Record of Rights was finally published. I agree that the evidence adduced by the plaintiffs in the suit is not sufficient to rebut the presumption of correctness which attaches to that record under section 103B of the Tenancy Act.

I concur in the order which has been proposed.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 34 OF 1913.

March 29, 1915.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

*Musammat* RUKMINI KOERI—DEFENDANT—APPELLANT

*versus*

NILMANI BANDYOPADHYAYA—PLAINTIFF—RESPONDENT.

*Transfer of Property Act (IV of* 1882*)*, s. 59—*Mortgage executed by* pardanashin *lady—Attestation, when valid.*

A mortgage-deed was executed by a *pardanashin* lady. It was attested by two witnesses, one of whom was her husband who actually saw the signature being made, the other one was present in the same room with the lady just outside a screen and he knew her voice and heard her say "yes" when the document was explained to her:

*Held*, that under the circumstances the mortgage-deed was duly attested in accordance with law. [p. 171, col. 1.]

*Semble.*—The criterion in such cases is the presence of the witnesses at the time of the execution. [p. 171, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, 24-Parganas, dated the 12th August 1912.

Mr. *Caspersz* and Babus *Haribhusan Mukerjee*, *Ambica Pada Choudhury* and *Rai Guru Saran Persad*, for the Appellant.

Babus *Jogesh Chandra Roy*, *Brojo Lal Chakravarti* and *Sitaram Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit on a mortgage-bond executed by a *pardanashin* lady. The signature on the document is admitted, but the lady says it was not explained to her. That it was explained to her, is proved by her husband whom we have examined and also by the witnesses for the plaintiff. The receipt of the consideration is also proved. The objection mainly pressed by learned Counsel on her behalf is that the document has not been duly attested in accordance with law. He relies on the recent decision of the Privy Council in the case of *Shamu Patter* v. *Abdul Kadir* (1) which confirms the decision of the Madras High Court *Shamu Patter* v. *Abdul Kadir* (2). The learned Judges

(1) 16 Ind. Cas. 250; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 35; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596; 39 I. A. 218; 16 C. W. N. 1009 (P. C.).

(2) 31 M. 215; 3 M. L. T. 300; 18 M. L. J. 219.

of the Madras High Court held that a mortgage-deed is attested by witnesses within the meaning of section 59 of the Transfer of Property Act, only when such attesting witnesses are actually present at the time of the execution and that the provisions of the section are not complied with when the witnesses are not present at the execution but attest on subsequent acknowledgment. The same view had been taken by this Court in several cases arising under section 59 of the Transfer of Property Act: see *Girindra Nath* v. *Bejoy Gopal* (3) and *Abdul Karim* v. *Salimun* (4). The decision of the Privy Council, therefore, does not make any departure from the Calcutta view of the case. The criterion is the presence of the witnesses at the time of the execution. In this case the husband actually saw the signature being made and the husband is one of the attesting witnesses. The witness Surendra says he was present just outside the screen in the same room with the lady and he knew her voice and heard her say *hun* (yes) when the document was explained to her. We think this presence of Surendra in the same room with the executant and at the time of the execution which is admitted and proved, taken with the presence of Kuldip Sahai who saw her put her signature, is sufficient to meet the requirements of the law. This is the view that was taken in the case of *Harmongal Narain Singh* v. *Ganaur Singh* (5), *Isri Prosad* v. *Rai Gunga Prosad Singh Bahadur* (6) and *Sarurjigar Begam* v. *Baroda Kant Mitter* (7) and we do not think that the Privy Council has laid down a different law.

We are sorry to say that the conduct of Babu Kuldip Sahai who is an enrolled Mukhtear of this Court in this matter is not beyond reproach and he cut a rather sorry figure in the witness-box. As he has said, however, that he has practically retired from practice we do not think it necessary to press this matter further.

(3) 3 C. W. N. 84; 26 C. 246.
(4) 27 C. 190.
(5) 3 Ind. Cas. 309; 13 C. W. N. 40.
(6) 3 Ind. Cas. 311; 14 C. W. N. 165.
(7) 5 Ind. Cas. 539; 11 C. L. J. 563; 37 C. 526; 14 C. W. N. 974.

In the result we dismiss the appeal with costs.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 151 OF 1914.
December 16, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

GANESHI LAL AND OTHERS—DEFENDANTS APPELLANTS

*versus*

JAGAN NATH AND ANOTHER—PLAINTIFFS —RESPONDENTS.

*Mortgage—Suit by a co-mortgagee—Decree—Sale—Purchase by decree-holder—Other mortgagees, right of—Purchase-money—Equity.*

One of the several mortgagees brought a suit on the basis of the mortgage making the other mortgagees *pro forma* defendants and obtained a decree in his own name. Subsequently the property was put to sale in execution of the decree and was purchased by the decree-holder alone:

*Held*, that the equitable right of the other mortgagees attached to the purchase-money and not to the property purchased. [p. 172, col. 2.]

First appeal from the decision of the Subordinate Judge of Meerut, dated the 10th February 1914.

Dr. *S. N. Sen*, for the Appellants.

Mr. *D. C. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed a declaration of their title to a 3/5ths share in certain property and joint possession over the same together with mesne profits. The Court below has granted the plaintiffs a decree subject to the paying of certain costs. The facts so far as they are material for the purposes of our judgment are practically admitted by both sides. There was a mortgage dated the 10th of April 1885. It was made in favour of five brothers, one of whom was Behari Lal. A suit was instituted upon foot of this mortgage in 1891 and a decree was obtained for Rs. 19,000 odd. The law as to the liability of heirs not made parties to mortgage suits was at that time not very clear. The result was that a suit was brought by some of the heirs of the original mortgagors to have 68 shares out of 144 shares exempted from the sale under the mortgage-decree on the ground that

they had not been made parties to the suit. This suit was successful and 68 shares were exempted from sale. Sometime afterwards in 1904 Behari Lal alone brought a suit, against the heirs who had been successful in exempting the 68 shares, for a declaration that those shares were liable to be sold for the balance still remaining due on foot of the mortgage and for the sale of those 68 shares. Behari Lal made the other brothers and their descendants *pro forma* defendants to this suit, alleging that they had declined to join with him. It is necessary here to mention that in the year 1889, that is to say, long prior to the suit, Behari and his brothers had separated. Some of the *pro forma* defendants made an application to be brought from the array of defendants to the array of plaintiffs; but instead of pressing the application they failed to put in appearance and the application was refused for default. Behari's suit was successful. He had remitted portion of the money that was still due on foot of the mortgage upon the ground that the property was not worth the whole amount. The consequence was that Behari got a decree in his own name for the sale of the property to realise Rs. 15,000 and costs. Behari then made an application to the Court for leave to bid which was granted. Some of the *pro forma* defendants made an application to the sale officer (not to the Judge as they should have done) that Behari should pay the amount of the purchase-money in cash and not be allowed to set off the decree; or that if he did set off the decree, the sale should be concluded in the name of Behari Lal and themselves and that Behari Lal and they should be declared the purchasers. This application was refused on the 15th of May 1905, the sale officer holding that Behari Lal was the sole owner of the decree. The property was put up to sale and purchased by Behari Lal for Rs. 10,000. He was allowed to set off the decree *pro tanto*. The sale certificate to Behari is dated the 5th of July 1905. The present suit was instituted on the 11th of October 1912, that is to say more than seven years afterwards and subsequent to the death of Behari Lal.

The Court below seems to have considered that the plaintiffs were entitled to possession of the property sued for in proportion to their shares in the original mortgage. It is contended on behalf of the appellants that having regard to the provisions of section 66 of the Code of Civil Procedure, the present suit is not maintainable. That section provides that "No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims". In our opinion this section has no application to the present case. If the plaintiffs are in a position to show that they are entitled to this property, they are entitled to recover the same notwithstanding the provisions of section 66. It is not alleged by the plaintiffs that Behari Lal was *benamidar* for them. It seems to us that the plaintiffs' claim, if any, is founded upon equity. It is absolutely clear that Behari Lal was not purchasing on behalf of the plaintiffs or their representatives. On the contrary he was purchasing the property for himself in spite of their protests. It must also be carefully borne in mind that Behari Lal was in no sense the managing member of a joint Hindu family. We have already pointed out that this family had separated in the year 1889. Had the plaintiffs or their representatives pressed their application to be brought on to the array of parties on the plaintiffs' side they would probably have been successful. The Court would probably have granted their application, subject to fair conditions as to their responsibility for the costs incurred by Behari Lal. They did not, however, press this application. Later on when a decree was being made, in all probability had they asked the Court to frame the decree so as to safeguard their interests, it would have done so on equitable terms. Even afterwards had the application that Behari Lal should be ordered to pay the purchase-money into Court, been made to the Judge instead of to the sale officer, the plaintiffs' interests might have been considered.

If the plaintiffs' claim is based, as we think it is, upon equitable ground, we have to see what that equity was. It seems to us that the plaintiffs' equity (if any) attached to the purchase-money which the purchaser of the property, whoever he was, would pay. In the events which happened it was that the Rs. 10,000 for which the property was

purchased by Behari should be treated as cash, that out of that Rs. 10,000 the plaintiff who had borne all the expenses and risk of the litigation should in the first place receive not only the costs which were allowed him against the other side, but also such costs as were reasonably and properly expended in carrying on the litigation. In the next place, Behari would have been entitled to his share of the Rs. 10,000 (after deducting the costs) in proportion to his share in the mortgage and the present plaintiffs would have been entitled to the balance in like proportion. Assuming that the plaintiffs or the persons they now represent had this equity, the proper time to enforce and seek it was whilst the suit was pending or possibly even afterwards by an independent suit. It is admitted, however, that all their rights in the Rs. 10,000 which was realised by the sale of the property is now barred by time and unless they can follow the property and get a decree for a specific share, they have no remedy. If we look on the property purchased as representing the decree and even if we assume that the plaintiffs had some equitable claim in respect of the decree, Behari's interest was much larger than that of the plaintiffs. He was entitled to all the costs he had incurred as well as his share of the mortgage debt.

We have, however, already pointed out that the plaintiffs' equity (if any) attached to the purchase-money and not to the property purchased. The fact that the plaintiffs did not enforce their rights at the proper time in a proper manner is no just ground why they should now get possession of the property.

We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in all Courts including in this Court fees on the higher scale.

*Appeal allowed.*

## MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 302 OF 1913.

October 29, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

PONNUSAMY PILLAI—PLAINTIFF—APPELLANT

*versus*

THYAGARAJA PILLAI AND OTHERS—DEFENDANTS NOS. 1 TO 20—RESPONDENTS.

*Mortgage—Payment of mortgage debt to one of several co-mortgagees—Debt, whether discharged—Contract Act (IX of 1872), s. 45.*

Payment of a mortgage-debt to one of several co-mortgagees operates as a discharge of the entire mortgage-debt. [p. 174, col. 1.]

*Mannava Annapurnamma* v. *Uppala Akkayya*, 19 Ind. Css. 12; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333; 36 M. 544, followed.

*Steeds* v. *Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378, *Powell* v. *Brodhurst*, (1901) 2 Ch. D. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501; *Ramaswamy* v. *Muniandy Servai*, 5 Ind. Cas. 343; 7 M. L. T. 253; 20 M. L. J. 709; (1910) M. W. N. 550, referred to.

Appeal against so much of the decree, as is against the plaintiff, of the Court of the Subordinate Judge of Negapatam, in Original Suit No 49 of 1913, dated the 17th April 1913.

Mr. *S. Muttiah Mudaliar*, for the Appellant.

Mr. *M. Venkatarama Aiyar*, for Mr. *V. Viswanatha Sastri* and Messrs. *V. Narasimha Aiyangar* and *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

COUTTS-TROTTER, J.—This action was brought on a mortgage-bond and the defence was that there was a valid discharge, by payment of the entire sum due, to the co-mortgagees of the plaintiff. The plaintiff contends that it was not a good discharge so far as he was concerned, but could only operate on so much of the debt as is beneficially due to his co-mortgagees. He relies on the decision of *Steeds* v. *Steeds* (1) and on the observations in the judgment of Mr. Justice Farwell, as he then was, in the case of *Powell* v. *Brodhurst* (2). If matters stood there, in the face of these authorities that argument would carry very great weight. But unfortunately, in 1912, a similar question arose in the Madras High Court in *Mannava*

(1) 22 Q. B. D. 537; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.

(2) (1901) 2 Ch. D. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501.

MAHABIR PRASAD v. MUHAMMAD MASHIYATULLAH.

*Annapurnamma* v. *Uppala Akkayya* (3), a case of payment to one of several payees of a negotiable instrument. That case was referred to a Full Beuch, and the Full Bench in *Mannava Annapurnamma* v. *Uppala Akkayya* (3) consisting of White, C. J., Sankaran Nair and Sadasiva Aiyar, JJ., by a majority, held that payment to one of several payees was a good discharge, White, C. J., dissenting. It is sought to distinguish that decision on the ground that the analogy is not complete between payees of negotiable instruments and co-mortgagees. That is really quite unarguable. It was the decision in *Ramaswamy* v. *Muniandi Servai* (4) that called for the reference. That was a decision in a case of co-mortgagees. The referring Judges in *Mannava Annapurnamma* v. *Uppala Akkayya* (2), expressed their inability to see any distinction, and the learned Chief Justice based his dissent on the very case of *Ramaswamy* v. *Muniandy Servai* (4). We, in this Court, are bound by the decision of the Full Bench, whatever our own views on the subject may be. Speaking for myself, I desire to say no more than this, that I think it is desirable that on some future occasion the whole matter should be reconsidered by the Privy Council, especially in view of the very careful judgment of the High Court of Calcutta in *Husainara Begum* v. *Rahmannessa Begum* (5), which is contrary to the decision of the Madras Full Bench. In this Court, the matter must be regarded as concluded.

The next point taken is that on the construction of the sale-deed, Exhibit III, there was not a payment of the whole debt to the co-mortgagee, the 20th defendant, as a payment to the mortgagees but it merely amounted to placing money in his hands as the agent of the debtor, with a mandate to hand a portion of it over to the plaintiff. To my mind, the words used are incapable of that construction. The material passage runs thus:—

"As I have given to you and settled Ponnusami Pillai's portion in the above-mentioned hypothecation bond, you yourself shall pay to Ponnusamy Pillai his portion in the sale-deed and settle." That seems to me to mean: "I have settled with you finally and conclusively for the whole debt and you must make your own arrangements with your co-mortgagees among yourselves." Therefore, this ground fails also.

The plaintiff is entitled to one relief which the lower Court refused him—I do not know why. There is an admitted sum of Rs. 1,152-12-0 and interest at 8 per cent. from the 12th of August 1907. There must be, in respect of that debt, a decree against the 1st and 2nd defendants personally and there must be the ordinary order for sale of the hypothecated properties in satisfaction of that amount, unless discharged. This order for sale will include the properties purported to be given by the 20th defendant to his sister, the 16th defendant. Otherwise, the appeal is dismissed with costs.

SRINIVASA AIYANGAR, J.—I entirely agree.

*Appeal dismissed.*

(3) 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 333.

(4) 5 Ind. Cas. 343; 20 M. L. J. 709; 7 M. L. T. 253; (1910) M. W. N. 550.

(5) 8 Ind. Cas. 837; 38 C. 342; 13 C. L. J. 3.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1224 OF 1914.

November 27, 1915.

*Present*:—Justice Sir P. C. Banerjee, KT., and Mr. Justice Walsh.

MAHABIR PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MUHAMMAD MASHIYATULLAH—DEFENDANT—RESPONDENT.

*Mortgage—Redemption—Integrity of mortgage—Misdescription and mutual mistake—Oral evidence, admissibility of—Evidence Act I of 1872), s. 94.*

One *H* mortgaged on the 27th of March 1864, a 9½-*biswa* share in Paniyala along with shares in two other villages. On the 3rd of April 1864, he mortgaged five more *biswas* of the same village along with other property. On the 6th of February 1873, he executed a mortgage for Rs. 15,000 and out of the consideration for that mortgage he declared that Rs. 3,500 was to be a further charge on the property comprised in the first mortgage. In the description of property thus charged Halla Nagla was mentioned instead of Paniyala. The plaintiff acquired the rights of the mortgagor in Paniyala and sued for redemption. The defendants-mortgagees had purchased a portion of the mortgaged properties:

MAHABIR PRASAD *v.* MUHAMMAD MASIYATULLAH.

*Held*, that this was a case of misdescription and mutual mistake and that, therefore, section 94 of the Evidence Act did not preclude the mortgagee from showing that Paniyala was intended to be included in the mortgage of 1873. [p. 175, col. 2; p. 176, col. 1.]

*Held*, further, that as the integrity of the mortgages had been severed the plaintiff could redeem Paniyala by payment of the proportionate liability of that village under the three mortgages. [p. 176, col. 1.]

Second appeal from a decree of the Additional Judge of Moradabad.

Mr. *M. L. Agarwala* with him Mr. *J. Nehru* for Mr. *Motilal Nehru*), for the Appellants.

Mr. *B. E. O'Conor* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage. The property sought to be redeemed is a share in the village Paniyala, which along with other property was mortgaged by one Haidar Baksh who was the owner of it. He executed three mortgages, in one of which, dated the 27th of March 1864, a $9\frac{1}{2}$-*biswa* share in Paniyala was mortgaged along with shares in two other villages. On the 3rd of April 1864, he mortgaged five more *biswas* of the same village along with other property. On the 6th of February 1873, he executed a mortgage for Rs. 15,000 and out of the consideration for that mortgage he declared that Rs. 3,500 was to be a further charge on the property comprised in the mortgage of the 27th of March 1864. In the description of the property on which a further charge was thus placed, were mentioned $9\frac{1}{2}$-*biswas* shares in each of the villages of Anuda, Hasan Mahdud, and Halla Nagla; so that instead of mentioning Paniyala under the mortgage of 27th March 1864 which together with the other two villages was mortgaged, mention was made of Halla Nagla. The rights of the mortgagor in Paniyala have been sold by auction in execution of money-decrees, and have been purchased by the plaintiff to the suit out of which this appeal arises and by the plaintiff to the suit in the connected Appeal No. 1225 of 1914. Portions of the mortgaged property have also been purchased by the defendants Nos. 1 and 2, who now represent the mortgagees. The integrity of the mortgages has thus been severed and the plaintiffs are entitled to redeem on payment of the proportionate liability of the property purchased by them for the mortgages which exist on it. The plaintiffs' contention was that the village Paniyala was only liable under the two mortgages of the 27th of March 1864 and the 3rd of April 1864. The defendants-mortgagees, however, urged that there was a further charge of Rs. 3,500 on that village under the mortgage of the 6th of February 1873. The lower Appellate Court, in view of the provisions of section 94 of the Evidence Act, was of opinion that the defendants were not entitled to show that Paniyala was one of the villages on which a further charge of Rs. 3,500 was created, inasmuch as in the mortgage-deed of the 6th of February 1873 mention was made of Halla Nagla and not of Paniyala. It is clear from the terms of that document that the intention undoubtedly was to create a further charge on the property comprised in what was called the second mortgage, namely, that of the 27th of March 1864. In that mortgage Paniyala was clearly included and not Halla Nagla. It also appears from the mortgage-deed of the 6th of February 1873 that where the mortgagor included in that mortgage property not included in the earlier mortgages, he distinctly said so. There is, therefore, no room for doubt that the intention was to create a further charge on Paniyala and not on Halla Nagla. Section 94 of the Evidence Act provides that "when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts." We are of opinion that the language used in the mortgage of the 6th of February 1873 is not plain and unambiguous, as we have already pointed out. In the opening part of that document mention was made of the mortgage of the 27th of March 1864 which created a charge on Paniyala. The document of 1873 clearly purports to place a further burden of Rs. 3,500 on the property comprised in the earlier mortgage of 1864, but apparently the scribe of the document made a mistake in mentioning Halla Nagla as one of the properties included in the earlier mortgage of 1864 instead of Paniyala. This was clearly a misdescription and the case is, in our opinion, one of misdescription

and mutual mistake. This being so, section 94 of the Evidence Act does not preclude the appellant from showing what was intended to be included in the mortgage of 1873. In our judgment the plaintiffs can redeem Paniyala by payment of the proportionate liability of that village, not only under the mortgages of the 27th of March 1864 and the 3rd of April 1864, but also under the mortgage of the 6th of February 1873 for Rs. 3,500 out of the amount secured by that mortgage. As the amount for which Paniyala is rateably liable under these mortgages has not been ascertained by the Court below, we must refer an issue to that Court to determine what is the amount of the proportionate liability of Paniyala. We accordingly refer the following issue to the Court below under Order XLI, rule 25, of the Code of Civil Procedure:

"What is the amount of the rateable liability of $14\frac{1}{2}$ *biswas* of the village Paniyala under the mortgages of the 27th of March 1864, 3rd of April 1864 and the 6th of February 1873?"

The Court may take additional evidence, if necessary, and in arriving at its conclusion will bear in mind the observations made above.

On receipt of the findings, the ordinary ten days will be allowed for filing objections.

*Issue referred.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 394 OF 1914.

November 22, 1915.

*Present*:—Mr. Justice Phillips.

MEENAKSHI *alias* SIVAKAMI AND OTHERS —DEFENDANTS NOS. 1 TO 4—PETITIONERS

*versus*

KRISHNA ROYAR AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 5 —RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 97—Contract of sale—Dispossession of vendee—Suit to recover purchase-money, maintainability of.*

Where in pursuance of a contract of sale, the vendee was put in possession of the property sold and on being subsequently dispossessed sued to recover damages for the loss sustained:

*Held*, that inasmuch as possession had been given under the contract of sale, the sale was not void *ab initio* and the plaintiff was entitled to recover his purchase-money in a suit under Article 97 of the Limitation Act. [p. 176 col. 2.]

*Srinivasa Raghava Dikshadar* v. *Rangasami Aiyangar*, 31 M. 452; 18 M. L. J. 477; 5 M. L. T. 211 *Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudirpad*, 21 Ind. Cas. 740; 14 M. L. T. 524; 1 L. W. 110; (1913) M. W. N. 1029; *Subbaraya Reddia* v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; 15 M. L. T. 240; 38 M 887; (1914) M. W. N. 376; *Venkatarama Ayyar* v. *Venkata Subramahnian*, 24 M. 27; 10 M. L. J. 217; *Ram Ckandar Singh* v *Tohfah Bharti*, 26 A. 519; A. W N. (1904) 92; 1 A. L. J. 231; *Ammabibi* v. *Udit Narain Misra*, 1 Ind. Cas. 890; 9 C. L. J. 512; 11 Bom. L. R 525; 19 M. L. J. 295; 6 M. L. T. 89 (P. C.); 31 A. 68; 36 I. A. 44, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Temporary Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 231 of 1913.

Mr. *R. Kuppuswami Aiyar*, for the Petitioners.

Mr. *V. Purushothama Aiyar*, for the Respondents.

JUDGMENT.—Certain land was sold by Minakshinathan, 1st defendant's husband, to one Subbayya, 5th defendant's husband, in 1897 and he re-sold to plaintiff's brother in 1898. On 24th September 1910, plaintiff was dispossessed of 62 cents of the land in execution of a decree, and sues to recover Rs. 147-8-11 for the loss sustained. Defendants Nos. 2 to 4 are in possession of part of Minakshinadan's estate under a Will and are said in the plaint to be living with 1st defendant in a joint family manner. The main question argued in this petition is the question of limitation and it is contended for the petitioners that this being a suit on a breach of covenant for title, the starting point for limitation is the date of the sale-deed in 1897, and that, therefore, the suit is barred. For the respondents it is urged that this is a suit for money paid upon an existing consideration which afterwards fails and that the suit is within time as the failure was on 24th September 1910, when the plaintiff was dispossessed. As the vendee was put in possession of the property in 1897 and was in possession till 1910, it cannot be said that the contract was void *ab initio* and although the suit on a breach of covenant for title would be barred, plaintiff has his remedy in a suit under Article 97 of the Limitation Act. Petitioners' Vakil referred to a case recently decided (Second Appeal No. 2783 of 1913) in support of his argument, but in that case it was only held that a breach of covenant for title occurs once

for all on the date of the sale [as held in *Srinivasa Raghava Dikshadar* v. *Rangasami Aiyangar* (1) and *Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad* (2)] and the plaintiff did get a decree for money paid on a consideration which afterwards failed. In *Ramanatha Aiyar* v. *Ozhaloor Pathiriserri Raman Nambudripad* (2) it was held by Miller, J., that when the purchaser, from an usufructuary mortgagee was subsequently dipossessed by the mortgagor, the starting point for limitation in a suit to recover the purchase-money would be the date of the final decree decreeing redemption. In *Subbaraya Reddiar* v. *Rajagopala Reddiar* (3) it was held that a sale cannot be said to have been without consideration and consequently void *ab initio* when possession has been given under the contract of sale, and that the cause of action for return of purchase-money arises on the disturbance of possession [*vide* also *Venkatarama Ayyar* v. *Venkata Subrahmanian*(4); *Ram Chandar Singh* v. *Tohfah Bharti* (5 and *Amma Bibi v. Udit Narain Misra* (6)].

It was then contended that as in this case there had only been a partial failure of consideration the principle would not apply.

can find no authority for such a proposition and am not prepared to accept it, as there is no reason why the words "an existing consideration" in Article 97 should be read as meaning "the whole consideration for the contract". I, therefore, find that the suit is not barred by limitation.

It is further contended that plaintiff's vendor alone is liable and not Minakshinadhan, the original vendor. The latter was, however, liable to his vendee, and under section 55 (2) of the Transfer of Property Act is liable to plaintiff.

Therefore, defendants Nos. 1 to 4 who are now in possession of Minakshinathan's property have rightly been held liable, as there is nothing to rebut the plaint allegation that defendants Nos. 1 to 4 are in enjoyment as a joint family.

The petition is dismissed with costs.

*Petition dismissed.*

(1) 31 M. 452; 18 M. L. J. 477; 5 M. L. T. 211.
(2) 21 Ind. Cas. 740; (1913) M. W. N. 1029; 14 M. L. T. 524; 1 L. W. 110.
(3) 23 Ind. Cas. 570; (1914) M. W. N. 376; 15 M. L. T. 240; 38 M. 887.
(4) 24 M. 27; 0 M. L. J. 217.
(5) 26 A. 519; A. W. N. (1904) 92; 1 A. L. J. 231.
(6) 1 Ind. Cas. 890; 31 A. 68; 9 C. L. J. 512; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89 (P. C.); 36 I. A. 44.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1290 OF 1914.

November 26, 1915.

*Present*:- Justice Sir P. C. Banerji, KT., and Mr. Justice Walsh.

ABID ALI—PLAINTIFF—APPELLANT

*versus*

IMAM ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Contribution—Mortgagor relieving his co-mortgagors of burden, if entitled to contribution—Muhammadan Law—Minor,* de facto *guardian of—Mortgage by such guardian, when binding on minor.*

A mortgagor is entitled to contribution from his co-mortgagors for what he has paid for their benefit either under compulsion of law or as a private transaction, and it is not necessary that he should have been put into possession of the property of his co-mortgagors. [p. 178, col. 1.]

Under the Muhammadan Law if the mother of a minor, who was his *de facto* guardian, makes a mortgage of the minor's property for the benefit of the minor and for necessity, the mortgage is binding on the minor. [p. 178, col. 2.]

Second appeal from the decree of the First Additional Judge of Aligarh.

Mr. *Iqbal Ahmad* (with him Mr. *Gulzari Lal*), for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiff-appellant against the defendants in respect of a mortgage, dated the 11th of April 1908, alleged to have been executed in favour of Dalel Khan and Sikandar Khan by the parties to this suit. The plaintiff discharged the mortgage and he claims to recover from the defendants their rateable share of liability for the mortgage-debt. The defendants denied the execution of the mortgage and the payment of consideration. It was

further contended on behalf of Imam Ali that he was of unsound mind at the date of the mortgage, and that the mortgage, if at all made, had been obtained from him by undue influence. On behalf of Shahamat Ali, who is a minor, it was urged that his mother, who is said to have executed the mortgage as his guardian, was not competent to do so on his behalf, that there was no necessity for the mortgage and that he did not benefit by it. The Court of first instance found in favour of the defendants and dismissed the suit. Upon appeal the learned Judge came to the conclusion that Imam Ali was not of unsound mind at the date of the mortgage, that there was no undue influence and that the execution of the mortgage was proved as well as the payment of consideration. The learned Judge decreed the claim against Imam Ali. As regards the minor defendant he was of opinion that his mother, not being his legal guardian according to Muhammadan Law, was not competent to mortgage his property. He further proceeded to try the question of necessity, and on that point he observed that although it did not seem that there was any ground for assuming that the money was not taken for necessity, it could not be said that the plaintiff had clearly proved the existence of necessity. He accordingly affirmed the decree of the first Court as regards the minor defendant. The plaintiff filed this appeal and objections have been preferred under Order XLI, rule 22, on behalf of Imam Ali. We may deal with these objections first of all. It was urged that as the mortgage was not discharged under compulsion, the plaintiff could not maintain a suit for contribution. We do not agree with this contention. It is clear that if the plaintiff discharged the mortgage he relieved the property of the defendants from a burden which lay on it, and is, therefore, entitled to be compensated for what he paid for the defendants and for their benefit. It was also not necessary, in order to entitle him to contribution, that he should have been put into possession of the property of the defendants. As he relieved the defendants of a burden, whether under compulsion of law or as a private transaction, he is entitled to claim that the defendants, his co-mortgagors, should pay him what he has paid for their benefit.

It is next urged that the lower Court did not come to a clear finding as to Imam Ali's state of mind at the date of the mortgage and as to undue influence. We think that the finding of the learned Judge on the point is as clear as it could be. He was distinctly of opinion that at the date of the mortgage the defendant Imam Ali was not of unsound mind such as incapacitated him from understanding the nature of the transaction. He also clearly found that there was no undue influence. The objections put forward on behalf of the respondent Imam Ali must, therefore, fail.

As for the appeal, the first ground of the learned Judge's decision, namely, that the mother of the defendant had no power to make the mortgage and that the mortgage could not be binding whether it was for necessity and for the benefit of the minor or not, cannot be supported in view of the decision of this Court in *Majidan* v. *Ram Narain* (1), which followed the ruling in *Hasan Ali* v. *Mehdi Husain* (2). According to these rulings, if the mother of the minor defendant, who was his *de facto* guardian, made the mortgage for the benefit of the minor and for necessity, the mortgage would be binding on the minor. The learned Judge's finding on the question of necessity is not very clear and is open to doubt. It is, therefore, necessary to obtain from the Court below a clear and distinct finding on the issue whether the debt in question was incurred by the mother of Shahamat Ali, minor, for valid necessity and for his benefit. We refer this issue to the Court below under Order XLI, rule 25, of the Code of Civil Procedure. The Court will decide the issue upon the evidence already on the record. On receipt of its finding the usual ten days will be allowed for filing objections.

WALSH, J.—I want to say a word or two about this case out of respect to the learned Judge of the lower Court. It is quite clear that he followed the dictum which has been cited from the argument

(1) 26 A. 22; A. W. N. (1903) 183.
(2) 1 A. 533.

in the Privy Council, and did not recognise that the decisions of this Court, which were quoted to him, were binding upon him. Now it is quite true that in spite of the decision to which he came upon the point of law, he would still have to dispose of the issue as to necessity, and if he had done so in any shape or form, however unsatisfactory on the face of it, I should have to accept it. To my mind it is perfectly clear that he came to no decision at all. I look at the decisions to which he did come. In clear unambiguous language he held that the execution of the deed was proved. In clear and unambiguous language he held that the two issues of unsound mind and undue influence failed. In clear and unambiguous language he held that the mother had no power to mortgage. I, therefore, find that out of five decisions to which he is alleged to have come he used clear and unambiguous language in four. In the fifth he used language which under no circumstances can be called either clear or unambiguous. Mr. O'Conor sought to justify or rather to satisfy us that it was a finding of fact on two grounds. The *first*, as I understand him, is that it was a slipshod judgment, *secondly*, that there had already been a finding by the Subordinate Judge. To my mind both these points rather confirm the view which I took on a study of the language used by the District Judge. If it had been a slipshod judgment, one might possibly infer that he intended to come to some decision. But to my mind it is a very clear and well-expressed judgment from the beginning to the end, and my view, therefore, is strengthened that he did not intend to come to any decision on this point. *Secondly*, the fact that he had a decision before him of the Subordinate Judge on this point rather strengthens my view that the tendency of his mind was not to agree with the Subordinate Judge. He could have said on the merits as to necessity, that the Subordinate Judge had found that there was no necessity and that he agreed with him. So far from saying that, he dwelt upon the strength of the argument in favour of necessity, and he went on to say, "it does not seem that there is any ground for assuming that the money was not taken for necessity though it cannot be said that plaintiff has clearly proved this". Under these circumstances it is impossible for me to come to the conclusion that the District Judge intended to find that there was no necessity.

*Issue referred.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 9 TO 14 OF 1913.

November 5, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr Justice Napier.

KANDUM VENKATASWAMY—PLAINTIFF—APPELLANT IN ALL

*versus*

IN S. A. NO. 9 OF 1913

BALIGADU AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. NO. 10 OF 1913

BOYA CHINNA RAMIGADU AND OTHERS

DEFENDANTS—RESPONDENTS.

IN S. A. NO. 11 OF 1913

DUDGALA SUBBANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

IN S. A. NO. 12 OF 1913

GURRALA RAMMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS

IN S. A. NO. 13 OF 1913

THIKKALINGADU—DEFENDANT—RESPONDENT.

IN S. A. NO. 14 OF 1913

ANKADU (DIED) AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Partition—Partial partition, whether allowed—Property left out of account as worthless, whether remains joint—Presumption in case of partition—Burden of proving the contrary—Mortgage suit, whether can be instituted for part only of mortgage-money.*

In a suit for partition between a father and his son, a certain mortgage-bond was left out of account as worthless. Subsequently the father brought a suit on the mortgae-bond and it was pleaded that the plaintiff and his son were not divided in respect of the properties covered by the mortgage-bond and that the son was, therefore, a necessary party:

*Held*, per *Napier, J.*—(1) that, all the properties of the family not having been included in the partition

suit, only partial partition had taken place and that, therefore, the property covered by the mortgage-bond remained joint family property; [p. 183, col. 2.]

(2) that the son was a necessary party under section 67 of the Transfer of Property Act, 1882, being a co-owner of the property in suit, and that the suit was, therefore, bad for non-joinder of parties. [p. 184, col. 1.]

*Parsotam Saran* v. *Mulu*, 9 A. 68; A. W. N. (1886) 298 followed.

Per *Sadasiva Aiyar, J.*—(1) that a complete partition having taken place between the father and the son, the latter was not a necessary party to the suit on the mortgage-bond; [p. 182, col. 1.]

(2) that where there was a partition, the presumption was that it was a complete one and that it embraced the whole family property and that if property was afterwards found in the exclusive possession of one member of the family and it was alleged that such property was still undivided and divisible, the proof of such an allegation rested upon the party making it. [p. 181, col. 1.]

*Narayan Babaji* v. *Nana Manohar* 7 B. H. C. R. A. C. J. 153, followed.

A co-parcener who wishes to get a partition of family properties has only a single cause of action in respect of all the joint properties and hence a suit for partial partition cannot lie. [p. 181, col. 2.]

Second appeals against the decrees of the Court of the Subordinate Judge of Kurnool, in Appeal Suits Nos. 200, 202, 204, 205, 210 and 208 of 1911, preferred against those of the Court of the District Munsif of Kurnool, in Original Suits Nos. 98, 108, 99, 97, 103 and 100 of 1911, respectively.

Mr. *K. Ramanath Shenai*, for the Appellant.

Mr. *P. Chenchiah*, for Mr. *T. Prakasam*, and Dr. *Swaminathan*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I had the great advantage of a perusal of the judgment just now pronounced by my learned brother before I began to write the following opinion. The material question for decision in these connected cases is whether in the moneys claimable under the mortgage documents sued on, the plaintiff's divided son possesses any interest notwithstanding the decree in the partition suit, Original Suit No. 7 of 1901 on the file of the District Court of Kurnool, brought by the plaintiff's son against the plaintiff. The decree, Exhibit B, in that suit, Original Suit No. 7 of 1901, contains the schedule of properties, the partition of which was prayed for in that suit. Item 35 of that schedule B is "Decrees, accounts, documents, *vagaira*" and Rs. 1,000 is given as the value of these incorporeal personalties. *Vagaira* means "things of a similar character to those mentioned just previously." It is quite clear from the judgment, Exhibit A, and the decree, Exhibit B, that the suit brought by the plaintiff's son was a suit for partition of *all the properties* then belonging jointly to himself and to his father (the plaintiff) and it was never intended to reserve any property for future partition. The 1st issue in the judgment, Exhibit A, is "what is the net value of the defendant's property?" and the judgment decided that the value of the half share in B schedule property was Rs. 1,210 and gave a decree for that sum against the plaintiff in favour of plaintiff's son. The lower Appellate Court does not deny (see paragraph 3 of its judgment) that item 35 of schedule B in the decree in the suit of 1901 did include all the bond debts due to the plaintiff and plaintiff's son. But as I understand the judgments of the lower Courts, they held that because the plaintiff in that suit (that is, the present plaintiff's son through his next friend) and the defendant in that suit (that is, the present plaintiff) both treated the bonds as worthless, the value of the plaintiff's son's half share of the family moveables was claimed in that plaint and awarded by the decree excluding the amounts of the present bond debts. The plaint bond-debts were not partitioned and remained the joint or common property of the plaintiff and his son. The plaintiff says in his evidence that he has paid up the amount due to his son under the decree. I am unable to accept the view of the lower Courts on this point. Plaintiff's son's next friend did not claim any money for his share of the amounts which may be recovered under these bonds, because he believed that nothing could be recovered on these bonds. He treated them as of no value and consented to the Court allowing nothing to him specifically for half the value of these bonds. The Court (see Exhibit A) was not, in fact, asked to give more than Rs. 1,210 (including Rs. 1,000 of which for the decrees, accounts, documents, and bond debts), and the Court did award that sum. As said in Mayne, paragraph 493: "Every suit for partition should embrace all the joint family property" if all the property lies within the same jurisdiction, "unless some portion of it is at the time incapable of partition, as for instance from being in the possession of a

mortgagee or is from its nature impartible, or is held jointly with strangers to the family, who have no interest in the family partition and therefore cannot be made parties to the joint family suit for partition." "Where there has been a partition at all, the presumption is that it was a complete one, and that it embraced the whole family property." It follows that after such a partition, none of the parties to it holds any of the properties (till then held jointly) along with any other party, unless the partition agreement or the partition award or decree itself provides for such joint holding or unless there has been accident, mistake or fraud in the non-inclusion of some of the property at the division. The usual concluding portion of a partition-deed is "hereafter there shall be only connection by blood between us but no connection as co-sharers in any of the properties till now belonging to us in common." If property is afterwards found in the exclusive possession of one member of the family and it is alleged that such property is still undivided and divisible, the proof of such an allegation rests upon the party making it. [*Narayan Babaji* v. *Nana Manohar* (1).] Except on the ground of accident, mistake or fraud, therefore, there cannot be a second partition. "It cannot be successfully disputed" unless in exceptional cases "that at the time of" "a partition" "all the assets are determined and divided." "All accounts should be presumed to have been taken with a view to ascertain the properties" to be divided, and the cash to be paid to the plaintiff's son in full satisfaction of his claim in respect of his half share must be taken to have been arrived at after such a complete account. In Appeal Suit No. 47 of 1913 very recently decided by the First Bench, Seshagiri Aiyar, J., says: "Mr. Mitra in his Tagore Lectures, dealing with this special question, quotes from the *Smrithis* and commentaries to show that partial partition was unknown to Hindu Law." "As regards decided cases Sir Richard Garth in *Radha Churn Dass* v. *Kripa Sindhu Dass* (2) says: 'It seems indeed very doubtful whether by the Hindu Law any partial partition of the family property can take place except by arrangement.' In *Vaidyanath Aiyar* v. *Aiyasamy Aiyar* (3), it was clearly laid down that when once a partition was made, the presumption is that it effected a complete severance of interest." I am clear that a co-parcener who wishes to get a partition of family properties has only a single cause of action in respect of all the joint properties and hence it is that a suit for partial partition has been consistently held not to lie.

Order II, rules 1 and 2, of the new Civil Procedure Code, corresponding to sections 42 and 43 of the old Civil Procedure Code are as follows:—

"1. Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them."

"2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

"(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

"(3) A person entitled to more than one *relief* in respect of the same cause of action may sue for all or any of *such reliefs*; but if he omits, except with the leave of the Court, to sue for *all* such *reliefs*, he shall not afterwards sue for any *relief* so omitted."

Section 11 of the Civil Procedure Code (corresponding to old section 13) in explanations 4 and 5 says on the question of *res judicata*:—

Explanation 4:—"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Explanation 5:—"Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused."

(1) 7 B. H. C. R. A. C. J. 153.
(2) 5 C. 474, 4 C. L. R, 428.
(3) 1 Ind. Cas. 408; 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49.

KANDUM VENKATASAWMY v. BALIGADU.

Now if the plaintiff's son represented by his next friend is taken to have omitted to sue in respect of these bonds (having according to the plaintiff's evidence, which is accepted by the lower Appellate Court, known of the existence of these bonds), he has no right to sue again under Order II, rule 2, clause 2, claiming any share in them now. If he did not make the matter of these bonds a ground of attack in the former suit against his father, he *ought* to have done so and explanation 4 to section 11 makes his right to a share in the value of these bonds *res judicata*. If he did claim a relief as regards these bonds and if it was not expressly granted by the decree, it should be deemed to have been refused under explanation 5 to section 11 and in that view also the matter is *res judicata*. If he did claim the relief and if, on account of that relief and of the relief as regards his share in the other moveable properties, a consolidated sum of Rs. 1,210 was awarded to him, then also he lost all further rights in these bonds and the matter is again *res judicata*.

On all these grounds, I hold that the suit brought by the plaintiff alone without the plaintiff's son was not bad for non-joinder of parties and I would, reversing the decisions of the lower Courts, remand the suit to the Court of first instance for a fresh decision according to law. As my learned brother differs, the second appeals will stand dismissed (and with costs to the respondents who appear) under section 98 of the Civil Procedure Code.

NAPIER, J.—Original Suit No. 98 of 1911 was one of the six suits brought by one Kandum Venkataswmy on a mortgage executed by the paternal grandfather of defendants Nos. 1 to 7 in favour of the plaintiff's deceased father. It was pleaded in defence that the plaintiff and his son were not divided in respect of these properties and as such were entitled as co-owners of the suit bond and that, therefore, the son was a necessary party. This contention was upheld by the District Munsif and on appeal by the Subordinate Judge, and the suit has been accordingly dismissed.

The most important question that has been argued is whether the suit bonds are the joint property of the plaintiff and his minor son, or whether they have fallen to the plaintiff as his share in the partition suit brought by his minor son against him in Original Suit No. 7 of 1901. The lower Appellate Court has held that the bonds were not taken into account in the partition and that, therefore, the plaintiff and his son are co-owners. It is argued here that there had been a final partition of all the family assets which is conclusive in the absence of accident, mistake, fraud, none of which can be put forward in this case. It is not quite easy to ascertain exactly what was done with reference to these bonds at the time of partition. One thing, however, is clear, namely, that they were regarded as waste paper in the light of the law as it was at that time, they being time-barred. The finding of the lower Appellate Court is against the plea of the plaintiff that his son sued for his share in these bonds and that he paid off to his son the value of his half share thereof. This being a finding of fact is binding on me, and I, therefore, do not examine the evidence as to what occurred at the time of the partition. We are pressed with the argument that, as this was the minor's suit, and as the Commissioner purported to divide everything that he believed to be of any value, and the plaintiff got a decree for a certain amount as his share, everything that remained belonged to the father. This contention seems to me to go too far; for it amounts to this—that in a suit for partition the result will always depend on the question, who was the plaintiff in the suit. On principle, I cannot accept this contention. Partition by suit is only one form of partition; and I fail to see why the right of the plaintiff which arises, not out of a wrong, but out of natural rights should be determined by what might be called a mere matter of arrangement. It is quite conceivable that brothers, for instance, might agree to have their property partitioned in a friendly suit, preferring that method to private partition. One brother, in such a case, would be selected as the plaintiff; and in that case I see no reason, on principle, why any property which had escaped partition should belong to the defendant. The second answer is that the proposition goes too far, in that it is admittedly not correct where property has been left out of the partition on certain

grounds above referred to. The law as to partition by a suit is summed up by Mr. Mayne in paragraph 493 as follows:—

"There may be a partition and distribution which is intended to be final, but some part of the family property may have been overlooked, or fraudulently kept out of sight. In such a case, when the property is discovered, it will be the subject of a fresh distribution." It has not been contended before us that this statement of the law is incorrect; and it necessarily follows that the theory that what is not given to the plaintiff must belong to the defendant, is not sustainable.

Another argument put forward was that these bonds, having been left in the possession of the father defendant, must be deemed to be his property. I asked in vain for an answer to the question, what would have happened if the bonds had been taken away, at the request of the father, by his son as waste paper or if the Commissioner, appointed by the Court to divide, had, by accident retained the bonds, also treating them as waste paper. I cannot, therefore, attach any weight to this argument.

It is then suggested that the effect of the partition was to operate as an assignment by the plaintiff of all that was not allotted to him. No authority was quoted for this proposition and, in my opinion, partition by mutual arrangement operates no higher than a release by each party of his rights in the property allotted to the other party.

It was then argued that if a small value had been put on these bonds, and a sum representing half their value had been allowed to the plaintiff by the Commissioner, he could not have claimed a share. I reserve my opinion on this point, but I see no analogy between such a position and that found by the lower Appellate Court, namely, that these bonds were not taken into account. The true proposition is, I think, stated in two cases decided by the High Court of Calcutta. In *Jogendra Nath Rai* v. *Baladeo Das* (4) the following language is used: "Although the entire property must be included in the partition, yet, if by mistake or by consent of the co-owners, acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not grant a division of the remainder at the instance of one or more of the co-owners." This view was more broadly stated in a suit of this class, *Bhowani Prosad Shaha* v. *Juggernath Shaha* (5), and is founded on circumstances entitling a party to re-open settled accounts: "The parties will not be concluded by the presumption of final settlement as to matters which were not contemplated by them or which were not in fact included in the settlements, though they existed at that time. The presumption is destroyed when the details of the settlement show that the matter in controversy was not included".

Although the language in *Jogendra Nath Rai* v. *Baladeo Das* (4) may not cover the present case, this latter proposition is certainly wide enough and I do not think that the Judges intended that passage in the earlier case to be exhaustive, especially in view of the fact that Mr. Justice Mookerjee was a party to both judgments. At all events, I prefer the broader proposition; and assuming that a case like this does not come within the word 'mistake', I am prepared to add, to the exceptional cases stated by Mr. Mayne, the case where property, being deemed to be worthless, has not been taken into account, though its existence was well known to all the parties to the partition suit. In this view, I must hold that the case is one of partial partition and that the property remains joint family property.

Certain other arguments were put forward by Mr. Shenai which can be briefly disposed of. I do not think that, when once the parties have become divided in interest, the father can sue on behalf of his son; nor do I think it arguable that this suit can be treated as one for partition, it being impossible to find a joint cause of action in a suit on a mortgage and a partition suit. Such a suit would violate the provisions of Order II of the Civil Procedure Code.

Lastly, it was also contended that the father could bring this suit and ask for his

(4) 35 C. 961 at p. 968; 12 C. W. N. 127; 6 C. L. J. 735.

(5) 3 Ind. Cas. 241; 13 C. W. N. 309; 9 C. L. J. 133.

half share. This, however, is clearly forbidden by section 67 of the Transfer of Property Act, which forbids a person interested in a part only of the mortgage-money from instituting a suit relating only to a corresponding part of the mortgaged property, except where there has been a severance with the consent of the mortgagor. *Vide* also *Parsotam Saran* v. *Mulu* (6). In my view, therefore, the suit was rightly dismissed for want of parties.

This appeal is, therefore, dismissed with costs as provided in the judgment of my learned brother.

*Appeal dismissed.*

(6) 9 A. 68; A. W. N. (1886) 298.

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 198 OF 1914.

December 7, 1915.

*Present:*—Justice Sir P. C. Banerji, KT., and Mr. Justice Walsh.

RAM NARAIN - DEFENDANT—APPELLANT

*versus*

JAGANNATH PRASAD—PLAINTIFF - RESPONDENT.

*U. P. Land Revenue Act (III of 1901) s. 112—Partition proceedings—Objection taken by plaintiff on ground of previous private partition—Question of proprietary title—Revenue Court, jurisdiction of, to refer question to Civil Court for trial.*

An objection, in a partition proceeding carried on in a Revenue Court, to the effect that the village has already been privately partitioned and that a definite portion of it has been allotted to the objector's share and that that portion cannot be partitioned again, raises a question of proprietary title, and the Revenue Court is competent under the provisions of section 112 of the Land Revenue Act to refer the parties to a Civil Court. [p. 184, col. 2.]

First appeal from a decree of the Subordinate Judge, Banda.

Mr. *Girdharilal Agarwala*, for the Appellant.

Mr. *Jogindra Nath Mukerji*, for the Respondent.

JUDGMENT.—The plaintiff Jagan Nath is the son of one Sheo Dayal, who had a brother named Mata Din. The defendants are the sons and grandsons of Mata Din. The appellant Ram Narain applied to the Revenue Court for a partition of his 1/10th share in the village. Upon notice being issued to the recorded co-sharers, the plaintiff Jagan Nath raised an objection to the effect that the village had already been privately partitioned, that a definite portion of it had been allotted to his share, and that that portion could not be partitioned again. He thus raised a question of proprietary title and the Revenue Court was competent, under the provisions of section 112 of the Land Revenue Act, either to try the question itself or to refer the parties to the Civil Court. It elected to adopt the latter course, and directed the plaintiff to bring a suit in the Civil Court to have a question of title raised by him determined. Thereupon the plaintiff brought the suit out of which this appeal has arisen, and the prayer in his plaint is that it may be declared that the plaintiff is, by virtue of the mutual partition, separately the owner in possession of an eight-annas share in *mauza* Gagauli according to the partition *chittis*, together with all the rights and interests in the cultivated and uncultivated lands, "fruit-bearing and timber trees and groves containing mango, *mahua* and other trees, which should not again be divided." The Court below has made a decree in his favour, holding that a partition was effected in 1880, but that it was only what is known, as an imperfect partition.

In this appeal the first contention raised is that the Revenue Court was not competent to refer the parties to the Civil Court and that the latter Court had no jurisdiction to entertain the suit. We are of opinion that this contention has no force. As stated above, a question of proprietary title was raised and the Revenue Court was fully competent to refer the parties lto the Civil Court. As to the merits of the case, the evidence is overwhelming in favour of the finding of the learned Subordinate Judge. Partition *chittis* were prepared and the lands were divided not as an arrangement for the distribution of profits, but as a division of the lands in the village. The oral evidence is supported by the *dastur dehi* which is printed on page 2 of the appellant's book. In our opinion the appeal is wholly

without force. We accordingly dismiss it with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2993, 3003, 3004 AND 3005 OF 1913.

December 10, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

IN No. 2993

*Hon'ble Maharaja* MANINDRA CHANDRA NANDI BAHADUR—PLAINTIFF—APPELLANT

*versus*

*Srimati* DURGA SUNDARI DASYA—DEFENDANT—RESPONDENT.

*Landlord and tenant—Landlord receiving reduced rent, whether precluded from getting rent stipulated for in lease*—Hajat—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 29, *contravention of—Agreement to pay full rent reserved in* kabuliat *on expiry of its term, during which large portion of rent to be kept in* hajat, *effect of—Evidence that rent was never realised at rate stipulated for in lease, value of—Instalments for payment of rent numerous, whether contrary to usage—Agreement to accept reduced rent, consideration for—Evidence that stipulated instalments were never enforced, value of—Bengal Rent Act* (*X of* 1859), *s.* 21.

The mere fact that a landlord accepted rent at a lower rate than that stipulated for in the *kabuliat* for some time, does not bind him to accept rent at that rate in future. [p. 188, col. 1]

*Durga Prosad Singh* v. *Rajendra Narain Bagchi*, 4 Ind. Cas. 713; 10 C. L. J. 570; 37 C. 293; *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 Ind. Cas. 750; 18 C. W. N. 66; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42 (P. C.); 41 C. 493; *Baijnath Prosad Sahu* v. *Raghunath Rai*, 14 Ind. Cas. 817; 16 C. W. N. 496, followed.

The question, whether an agreement by an occupancy *raiyat* to pay the full rent stipulated for in a *kabuliat* on the expiry of its term, where during the term a large portion of that rent was to be kept in suspense (*hajat*), contravenes the provisions of section 29 of the Bengal Tenancy Act, does not arise in a case in which the term of the *kabuliat* expired before the passing of the Act. [p. 188, col. 1.]

Any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation. [p. 188, col. 2.]

An agreement is nonetheless oral because it is to be inferred from the conduct of the parties. [p. 188 col 2.]

*Lakhatullah Sheikh* v. *Bishambhar Roy*, 6 Ind. Cas. 577; 12 C. L. J. 646, referred to.

Where leases are not registered oral evidence is admissible to prove any variation of the terms. [p. 188, col. 2.]

*Quære.*—Whether an agreement made by a landlord, on the expiry of the term of a *kabuliat*, to accept rent at a lower rate than that reserved in the *kabuliat* is unenforceable for want of consideration? [p. 189, col. 1.]

The fact of payment and acceptance of rent at a reduced rate ever since the expiry of a lease (which reserved a higher rent) may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver. [p. 189, col. 1.]

The question of usage (as to the payment of rent in numerous instalments) arises only where there is no written agreement between the landlord and tenant under section 21 of Act X of 1859. [p. 189, col. 2.]

Appeal against the decree of the District Judge, Rangpur, dated the 25th June 1913, reversing that of the Munsif, 1st Court at Kurigram, dated the 5th July 1912.

FACTS material to the report are stated in the judgment.

Sir *Rash Behary Ghose* (with Babus *Hemendra Nath Sen* and *Sarat Kumar Mitter*), for the Appellant.—The learned Judge has held that the original contract as contained in the *kabuliats* was varied by a new implied contract. No such case was made out by the defendant in her written statement. The only case made was that the stipulation to pay the full rent reserved in the *kabuliats* was never intended to be acted upon and was never acted upon. The Judge uses the word waiver, an expression which is much used but is hardly understood in its legal significance. The case of waiver or variation of the terms of a contract must be specifically pleaded, otherwise such a plea ought not to be entertained. The landlord, as a matter of indulgence or favour to the tenant, did not enforce the full rent stipulated in the *kabuliats* for some years, but that could not preclude the landlord from enforcing the contract entered into by the tenant. No parol evidence is admissible to vary the terms of the *kabuliats*, some of which are

registered. *Vide* section 92 of the Evidence Act. Evidence from the conduct of the parties is no more than oral evidence. When one wants to vary the terms of a registered instrument he must do so by means of another instrument, but there is no such instrument, set up or proved. Even if it be held that such an agreement was made by the plaintiff to accept reduced rent, it is void for want of consideration. It is not proved nor even suggested that the tenant would have given up possession, if the plaintiff had not agreed to accept reduced rent. It might be argued by the other side that the *kabuliats* were taken with a view to evade the provisions of section 29 of the Bengal Tenancy Act. But the tenant here was not an occupancy *raiyat*, he was a tenure-holder; even if he was an occupancy *raiyat*, the terms of the *kabuliats* expired long before the passing of the Bengal Tenancy Act and the tenant is holding over. So the question as to the contravention of section 29 of the Act by means of these *kabuliats* does not arise at all. When the agreement to pay the higher rent stipulated in the *kabuliats* came into operation, the Bengal Tenancy Act was not in existence, so the agreement was not contrary to the provisions of any law at the time it became operative. The tenant is holding over on the original terms of the lease.

The lower Court has held that the stipulation to pay the rent in 11 instalments is contrary to usage. But when this stipulation was made, Act X of 1859 was in force and under section 21 of the Act the question of usage cannot arise if there is a written agreement between the landlord and the tenant. He referred to *Rutty Kant Bose* v. *Gungadhur Biswas* (1), *Pearee Mohun Mookerjee* v. *Brojo Mohun Bose* (2), *Sheikh Dilbur* v. *Issur Chunder Roy* (3), *North Eastern Railway Company* v. *Lord Hastings* (4), *Morgan* v. *Rainsford* (5), *Fitzerald* v. *Lord Partarlington* (6), *Satish Chandra Basu* v. *Kamini Mohan Gosvami* (7), *Lakhatullah Sheikh* v. *Bishambhar Roy* (8), *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (9), *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (10), *Baijnath Prosad Sahu* v. *Raghunath Rai* (11), *Romesh Chandra Biswas* v. *Ghulam Nabi Fakir* (12), *Sarat Chandra Sinha* v. *Nritya Gopal Biswas* (13), *Johoory Lall* v. *Bullab Lall* (14) and distinguished the case of *Beni Madhub Gorani* v. *Lalmoti Dassi* (15).

Babu *D. N. Baychi*, for the Respondent.—These cases are not cases of variation of an existing or subsisting lease, but of waiver of the original terms after the expiry of the lease and of entering into a new implied contract as found by the learned Judge. This implied contract he has inferred from the conduct of the parties in paying and accepting rent at a reduced rate for years together. When tenants hold over they do so on the terms of the lease that has expired. That proposition of the learned Doctor is not disputed; but this is subject to the qualification that it only holds good until the contrary is shown or proved. The payment and acceptance of rent for nearly half a century is evidence to prove that the parties by their conduct entered into a new contract after the expiry of the terms of the original *kabuliats*.

The finding of the learned District Judge amounts to holding that the stipulation for higher rent after the expiry of the terms of the *kabuliats* was waived or that such stipulation was never intended to be acted upon. This is a finding of fact arrived at after consideration of the evidence on the record and the conduct of the parties. It might be wrong or right, but still it is conclusive in second appeal. The numerous cases cited by the other side lay down well-known propositions which are not disputed, *viz.*, that tenants holding over continue to hold on the

(1) Marshall's Report 40.
(2) 22 W. R. 428.
(3) 21 W. R. 36.
(4) (1900) App. Cas. 260 at p. 268; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.
(5) (1858) 8 Irish Eq 299.
(6) (1835) 1 Jones 431 (Irish).
(7) 7 Ind. Cas. 721.
(8) 6 Ind. Cas. 577; 12 C. L. J. 646.
(9) 4 Ind. Cas. 713; 10 C. L. J. 570; 37 C. 293.
(10) 21 Ind. Cas. 750; 41 C. 493; 18 C. W. N. 66; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42 (P. C.)
(11) 14 Ind. Cas. 817; 16 C. W. N. 496.
(12) 29 Ind. Cas. 807; 19 C. W. N. 867.
(13) 8 Ind. Cas. 47; 13 C. L. J. 284.
(14) 5 C. 102; 4 C. L. R. 349.
(15) 6 C. W. N. 242.

terms of the expired leases and that oral evidence is not admissible to vary the terms of a registered instrument. But here the registered leases expired long ago and the tenant held over after the expiry and paid reduced rent, and the landlord accepted the rent for a number of years. So no question of variation of a registered lease does arise. The registered lease which is said to have been varied expired long ago and the tenant does not hold under that lease. The cases cited in support of the appellant's contention do not help him at all. The only cases which are applicable to the circumstances of this case are those reported as *Beni Madhub Gorani* v. *Lalmoti Dassi* (15) and *Mukunda Chandra Sarma* v. *Arpan Ali* (16) and the unreported case (Second Appeal No. 113 of 1909) decided by Mr. Justice Coxe on the 29th March 1911. The learned Vakil on the other side contended that even if there was an agreement to accept reduced rent on the part of the landlord, that agreement is void for want of consideration. This would be so, if the agreement were made during the continuance of the term of the lease reserving higher rent. But here the agreement was made after the expiry of the original leases—the tenants agreed to hold over in consideration of the landlord agreeing to accept reduced rent. The lower Appellate Court has held on evidence that there was such an agreement and this finding concludes the appeals. As regards the contention that no case of a new implied contract was made in the written statement, my answer is that in the written statement there are set out sufficient materials for making such a case.

JUDGMENT.—Three questions are involved in these four appeals. The *first* is whether the defendant-respondent is bound to pay the full rent reserved in the *kabuliats* executed by her predecessor-in-title in favour of the *zemindar* now represented by the plaintiff-appellant; *secondly*, whether the defendant is bound to pay rent by 11 instalments as stipulated in the *kabuliats*; and *thirdly*, whether apart from any stipulation in the *kabuliats* the defendant's rent is liable to enhancement up to the limit of the customary rate if she is found to be a tenure-holder.

(16) 2 C. W. N. 47.

The *kabuliats* in Second Appeals Nos. 2993 and 3005 were for the term of one year each and were unregistered, and the *kabuliats* in Nos. 3003 and 3004 were for five years each and were registered, the first two were executed in the year 1275 B. S. and the last two in the year 1280 B. S.

It appears that before the *kabuliats* of 1275 were executed, the *zemindar* applied to the Collector for measurement of the lands of the tenants under section 9 of the Bengal Act VI of 1862. The lands were measured and certain rents were assessed upon the lands found on such measurement. The *zemindar* then brought suits for *kabuliats* at the rents so assessed against some of the tenants. Some of the suits were decreed *ex parte*, and at least one suit appears to have been decreed after contest. The Court of first instance finds that the other tenants finding it useless to fight with the *zemindar* executed *kabuliats* in her favour and the *kabuliats* in the present cases were executed under those circumstances. It was stated in the *kabuliats* that the lands had been measured and rent assessed according to the uniform rate prevalent from time immemorial in the *pargana* and the *taluk*. The *kabuliats* were only for short terms and it was agreed that a large portion of the rent so assessed was to be kept in suspense (*hajat*) and the balance payable as the rent for the term. It was stipulated, however, that no objection was to be taken to payment of the full rent after the expiry of the term, when the amount of *hajat* would be added to the *jama*.

The *zemindar* after the expiry of the terms of the *kabuliats* did not realise the full rent but continued to receive rent at the reduced rate all along.

The plaintiff based his claim for rent at the full rate on the ground that it was stipulated for in the *kabuliat* as also upon the ground that it was the rate prevalent in the *pargana*.

The defendants denied the *kabuliat* and pleaded that even if the *kabuliat* was *bona fide*, it was never acted upon or intended to be acted upon, and that they

were not liable to pay rent at the full rate or according to the *kists* as claimed.

The Court of first instance held that the defendant was a tenure-holder, that the *kabuliats* were genuine and *bona fide*, that the reduced rent was accepted after the expiry of the term as a matter of favour, that the defendant had failed to show that the stipulation in the *kabuliats* was not intended to be acted upon or had been waived and it was not the defendant's case that there was any subsequent settlement of the rent, and in the result held that the defendant was bound to pay the full rent according to the instalments mentioned in the *kabuliats*.

On appeal the decision was reversed by the District Judge, who was of opinion that the acceptance of rent at the reduced rate for so many years put an end to the agreement to pay rent at the full rate and that the plaintiff, by his conduct in accepting rent at the reduced rate after the expiry of the terms, entered into a new implied contract varying the rent reserved in the *kabuliats*.

The plaintiff has appealed to this Court and has raised the questions set forth above.

With regard to the *first* question, it is to be observed that the mere fact that the landlord accepted rent at a reduced rate than that stipulated for in the *kabuliat* for some time, does not bind the lessor to accept rent at that rate in future, as the reduced rent might have been accepted as a matter of indulgence which might be put an end to at any time. See *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (9), on appeal *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (10), *Baijnath Prasad Sahu* v. *Raghunath Rai* (11). As the terms of the *kabuliats* in these cases expired before the Bengal Tenancy Act, the question whether the agreement contravened the provisions of section 29 of the Bengal Tenancy Act does not arise in these cases, assuming that the defendant is an occupancy *raiyat*. It is contended, however, on behalf of the respondent that the acceptance of rent for a very long time may be evidence from which a new contract may be inferred, and the learned District Judge has come to the conclusion, from the acceptance of rent at the reduced rate for a very long time, that there was a new implied contract between the parties, varying the rent reserved by the *kabuliats*.

But under section 92 (4th proviso) of the Evidence Act, any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation. The learned District Judge relies upon the conduct of the parties, but an agreement, as pointed out by Jenkins, C. J., in *Lakhatullah Sheikh* v. *Bishambhar Roy* (8), is none the less oral because it is to be inferred from the conduct of the parties. No such evidence is admissible in the two Second Appeals Nos. 3003 and 3004, in which the leases were registered.

In the other two cases (Second Appeals Nos. 2993 and 3005) the leases were not registered and under section 92 of the Evidence Act, oral evidence is admissible to prove a subsequent oral agreement.

It is contended, however, on behalf of the appellant that no subsequent agreement to accept rent at the reduced rate was set up by the defendant, nor could it have been set up having regard to the defence taken by her, and that even if any such case had been made, the agreement could not be enforced being without consideration. It is pointed out that the defendant did not allege that the tenants would have given up the lands had not the landlord agreed to the reduction of the rent, which might have formed consideration for the agreement, or any other consideration. Reliance is placed upon the case of *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (9), where the learned Judges held that the agreement for reduction of rent was unenforceable as being without consideration, and upon the decision of the Judicial Committee in the same case, where their Lordships agreed with the view taken by this Court on the point. [See *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (10).] It was contended, on the other hand, by the learned Pleader for the respondent that as the agreement set up in this case was after the expiry of the terms of the original *kabuliats*, there was sufficient consideration for the agreement and the present

cases were, therefore, distinguishable. It is unnecessary, however, to consider this question, as the defendant never set up any case of subsequent agreement varying the rent reserved in the original *kabuliat*. The defendant denied the *kabuliat* and in the alternative pleaded that the *kabuliat* was never intended to be acted upon, and was never acted upon. We are accordingly of opinion that the learned Judge is wrong in disposing of the case on the ground that there was a subsequent agreement varying the terms of the original *kabuliat*.

The defendant, however, as stated above, pleaded that the stipulation in the *kabuliat* to pay the full rent was never intended to be acted upon, and was never acted upon. It was open to the defendant to take such a plea. In the case of *Bani Madhab Gorani* v. *Lalmoti Dassi* (15) Maclean, C. J., and Macpherson, J., held that evidence that since the execution of the *kabuliat* the tenant paid rent at a lower rate than that stated in the *kabuliat*, is admissible to show that the intention of the parties was that the *kabuliat* from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease. We agree with the above view, and we think that the fact of payment and acceptance of rent at the reduced rate ever since the expiry of the lease may be adduced as evidence to show that the parties never intended that the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver.

The Court of first instance held that it was not intended that the stipulation to pay rent at the full rate should be inoperative or that there had been any waiver of the stipulation. The learned District Judge has not come to a finding on the point. It is true the defendant did not distinctly plead waiver in her written statement, but she relied on the fact that the stipulation was never acted upon and the question was gone into by the Court of first instance. We think, therefore, that the case should go back to the lower Appellate Court for a decision upon the said questions: *viz.*, whether the stipulation in the *kabuliat* as to the payment of the full rent after the expiry of the lease was intended to be acted upon or in the alternative whether there was a waiver of the stipulation after the expiry of that lease.

As regards the *second* point, *viz.*, whether the defendant is bound to pay rent in 11 instalments as stipulated in the *kabuliat*, we think that the learned District Judge is wrong in deciding the question against the plaintiff on the ground that there is no custom of paying rent in so many *kists* in the *pargana*. The question of usage can arise only where there is no written agreement between the parties, under section 21 of Act X of 1859. It is contended on behalf of the appellant that the fact that the landlord has not claimed rent according to the instalments for a certain period, does not preclude him from ever afterwards claiming rent according to the instalments stipulated for in the *kabuliat*. Here again we think the question may arise whether having regard to the fact that rent has never been realised according to the instalments as agreed upon in the *kabuliat*, the stipulation was intended to be acted upon. We are accordingly of opinion that this question also should be considered by the Court of Appeal below.

The *last* point raises the question whether apart from the *kabuliat*, the plaintiff is not entitled to the rent claimed on the ground that it is the customary rate. The learned District Judge has not considered the question, on the ground that there was no express prayer in so many distinct terms for assessment of fair and equitable rates of rent and that the Court of first instance dealt only with the plaintiff's claim on the basis of the *kabuliat*.

The plaintiff, however, as pointed out above, based his claim upon the *kabuliat*, as also upon the ground that the rent claimed was the rate prevalent in the *pargana*, and there was an express prayer that a decree might be passed for any amount that might be fixed by the Court. The second issue is sufficiently wide to cover the question, but the Court of first instance did not go into the question apparently because the claim of the plaintiff

based upon the *kabuliat* was found in his favour. That Court found that the defendant was a tenure-holder, and it is contended on behalf of the plaintiff that if she is a tenure-holder, her rent may be enhanced up to the customary rate under section 7 of the Bengal Tenancy Act. Having regard to the fact that this alternative claim was made in the plaint, we think that the parties should not be driven to a fresh suit, and that the Court of Appeal below should decide the question whether the defendant is a tenure-holder, and if so whether the plaintiff is entitled to the rent claimed on the ground that it is the customary rate, and if it is not the customary rate, what is the customary or fair and equitable rate to which the plaintiff is entitled. The Court below will, of course, decide these questions only if it decides that the plaintiff is not entitled to the full rent claimed on the basis of the *kabuliat*. Both parties will be entitled to adduce further evidence on the point.

The result is that the decrees of the lower Appellate Court are set aside, and the cases sent back to that Court for disposal according to the directions given above. Costs to abide the result.

*Decrees set aside; Cases remanded.*

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MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 115 OF 1914.

November 15, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

T. ERRIKULAPPA CHETTY—COUNTER-PETITIONER—APPELLANT

*versus*

THE OFFICIAL ASSIGNEE OF MADRAS—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5 (1) (b)—Attachment before judgment—Security for production of property—Attaching creditor, whether acquires charge on money deposited—Insolvency of defendant—Claims of Official Assignee.*

Per *Wallis, C. J.*—Order XXXVIII, rule 5 (1) (*b*), of the Civil Procedure Code does not give a plaintiff a charge on the money furnished by a defendant as security for producing and placing his property at the disposal of a Court whenever required. [p. 191, col. 1.]

Attachment of the property in default of such security being given does not confer title on the attaching creditor. [p. 191, col. 1.]

Per *Seshagiri Aiyar, J.*—The object of rule 5 (1) (*b*) of Order XXXVIII of the Civil Procedure Code is to give a control to the Court over the property and not to give a preferential right to the plaintiff who moves the Court over others who have claims against the debtor. [p. 191, col. 2; p. 192, col. 1.]

In order that a creditor should obtain a special charge upon some specifict par of the property under the writ of attachment, he must obtain some order giving him special right to or charge on a specific part of the property. [p. 192, col. 1.]

*Pollard, In re, Pollard, Ex parte* (1903) 2 K. B. 41; 72 L. J. K. B. 509; 88 L. T. 652; 51 W. R. 483; 10 Manson, 152, cited.

The plaintiff took out summons for attachment before judgment of certain properties belonging to the defendant who deposited a certain sum of money into Court as security in order to prevent the attachment. The defendant subsequently became insolvent and then the plaintiff claimed to withdraw the money:

*Held*, that, as the money was merely paid [as security for the production of the property and to render attachment unnecessary, the plaintiff did not acquire a charge on it and could not claim it in preference to the Official Assignee in whom the entire property of the defendant vested on his becoming an insolvent. [p. 191, col. 1; p. 192, col. 1.]

Appeal from the order of Mr. Justice Bakewell, dated the 9th November 1914, in the Insolvency Jurisdiction of this Court, in Insolvency Petition No. 214 of 1913.

Mr. *T. R. Venkatarama Sastri* (with him Mr. *P. Venkataramana Rao*), for the Appellant.

Mr. *D. Chamier* (with him Mr. *P. Kandasami*), for the Respondents.

JUDGMENT.

WALLIS, C. J.—In this case the appellant took out a summons, Exhibit A, for attachment of certain properties before judgment under Order XXXVIII, rule 5, of the Code of Civil Procedure, and by the terms of the warrant to the Sheriff, Exhibit B, the appellant was called upon either to furnish security for Rs. 4,150 5 or such other sum as may be found sufficient to satisfy the decree which may be passed against him or to show cause why he should not furnish security, and it was further ordered that the goods at his house should be attached until further notice. On this the bailiff returned

that the defendant had paid Rs. 4,150-5 and that amount had been paid to the Registrar. The defendant subsequently became insolvent and Bakewell, J., has held that the appellant is not entitled to the rights of a secured creditor in respect of this sum as against the Official Assignee, in whom the defendant's estate has vested on insolvency. The order was applied for and made under Order XXXVIII, rule 5, of the Code of Civil Procedure, and the money paid by the defendant must be taken to have been ordered and levied as security to do what is specified in the rule, *viz.*, "to produce and place at the disposal of the Court, when required, the said property, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree" reproducing the language of section 484 of the old Code. It is plain that under the terms of the rule, the defendant is only ordered to give security to produce and place at the disposal of the Court when required the "said property", which, with reference to the earlier part of the rule, must mean his property within the jurisdiction of the Court, or its value, or such portion thereof as may be sufficient to satisfy the decree. There is nothing in the language of the rule to give the plaintiff a charge on the money furnished as security for this purpose, and as, in default of the security being given, the property is ordered to be attached and it is well settled that such attachment before and after judgment does not confer title on the attaching creditor, it would, as pointed out by Mr. Chamier, be most anomalous that the plaintiff should acquire a charge on money which is merely paid as security for the production of the said property and to render attachment unnecessary. In my opinion this contention was rightly overruled. The defendant subsequently on 25th November 1912, obtained an order, Exhibit C, permitting him to draw the money so paid into Court by him on giving security for that amount, but before the security was given the case came on for settlement of issues, when in view of the admission in paragraph 5 of the defendant's written statement it was ordered that Rs. 2,000 be retained in Court pending the decision of the suit. If, as already held, the appellant had no charge on the money paid into Court, there is, in my opinion, nothing in the order to give him one. I think, therefore, the learned Judge was right and the appeal must be dismissed with costs on the original side scale.

SESHAGIRI AIYAR, J.—I entirely agree. The main contention of Mr. Venkatarama Sastriar was that if the defendant furnished security by paying money into Court in obedience to an order issued under Order XXXVIII, rule 5, of the Code of Civil Procedure, that money must be regarded as having been paid to the credit of the suit. The learned Vakil conceded that if on failure to furnish security, the defendant's properties were attached, the attachment will not create a charge in favour of the plaintiff. I am unable to see any distinction in principle between the two classes of cases. As pointed out by Mr. Chamier, the acceptance of the contention of the appellant would involve the position that a larger right was conferred by the Legislature on a plaintiff who was fortunate enough to secure his object at the first stage than was given to the person who was obliged to have recourse to the process of attaching the defendant's properties. There is no justification for this differentiation on principle. But it was argued that the language of the rule points to such a distinction. The operative clause directs the defendant "to produce and place at the disposal of the Court when required the said property or the value of the same". The security mentioned in the earlier clause is to be given to ensure this production in Court. The adjectival clause "as may be sufficient to satisfy the decree", is intended to limit the quantum of the property to be produced, the object being that the defendant should not be deprived of more of his property than is required to satisfy the final decree. The essence of the provision is to see that the defendant does not render the property unavailable to the creditor when and if a decree is obtained. The provision is penal in its nature. It is to be enforced against the defendant only to prevent him from screening the property for his creditors. No doubt the attaching plaintiff would benefit by such an order; but the object of the law is not to secure his rights alone. I am, therefore, of opinion that the aim of the rule is to give a control to the Court over the property

and not to give a preferential right to the plaintiff who moves the Court over others who have claims against the debtor.

The learned Vakil for the appellant drew attention to the language of section 483 of the Act of 1882. I do not think that, even under the old Code, it was permissible for the attaching creditor to claim preference by virtue of his having obtained an order for security. Section 484 makes that clear. There are no decided cases on the old sections or on the corresponding Order in the new Code. The case in *Sorabji Coovarji* v. *Kala Raghunath* (1) is the nearest approach to a decision in favour of the appellant. In that case the attachment was after decree and a sale was ordered. On that date, the judgment-debtor satisfied the decree by paying money into Court. It was held that the applications for rateable distribution by the other decree-holders were infructuous, as the attachment ceased to exist by payment into Court. Speaking for myself, I am not sure whether the position taken by the learned Judges in the Bombay case is correct. However that may be, I am not prepared to extend the ruling to cases where the law directs that the security shall be at the disposal of the Court. The decision in *Pollard, In re, Pollard, Ex parte* (2), enunciates the true principle applicable to such cases. The sequestration under which the money was brought into Court in that case corresponds to the attachment under our law. Lord Justice Romer says: "In order that the creditor should obtain a special charge upon some specific part of the property seized under the writ, he must go further, and must obtain some order giving him a special right to or charge on a specific part of the property. To my mind these propositions are now free from doubt. Therefore, in an ordinary case like the present, the fact that the sequestrators had sequestrated money owing to the debtor by a banker would not give the creditor any right to say that the money was his property or that he had any special charge thereon." These observations apply *mutatis mutandis* to the present case. The first contention must, therefore, be overruled.

It was next argued that the appellant obtained priority by reason of the order of the 29th January, which directed "that Rs. 2,000 be retained in Court pending the suit in view of the admission in paragraph 5 of the written statement." This is not an order in favour of the appellant or for payment to the credit of his suit. It was intended to enable the debtor to take away a portion of the money on certain conditions. The reservation of the Lords Justices in the case already cited would not apply to such an order. I agree in the order proposed by the learned Chief Justice.

*Appeal dismissed.*

(1) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R 1193.
(2) (1903) 2 K. B. 41; 72 L. J. K. B. 509; 88 L. T. 652; 51 W. R. 483, 10 Manson, 152.

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ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 47 of 1914.
December 20, 1915.
*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.
MUHAMMAD QASIM AND OTHERS—DEFENDANTS—APPELLANTS
*versus*
*Sri Mahant* SHEO LING SWAMI JANGAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Construction of document — Sale — Mortgage — Surrounding circumstances.*

The mere fact of the conditions on which a mortgage can be redeemed being onerous is not sufficient to justify a Court in coming to the conclusion that the transaction which purports to be a mortgage is a sale. A Court has to look to the surrounding circumstances as well. [p. 193, col. 2.]

First appeal from the decision of the District Judge of Benares, dated the 28th August 1913.

The Hon'ble Dr. *Sunder Lal* (with him the Hon'ble Mr. *Moti Lal*), for the Appellants.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for recovery of Rs. 5,000 and interest thereon as *haqqi-chaharum* in respect of a transaction entered into between the defendants Nos. 1 to 3 on the one part and the defendants Nos. 4 to 7 on the other. On the 5th of February 1910, the defendants Nos. 1 to 3 executed in favour of the other defendants a deed of usufructuary mortgage for Rs. 20,000 in respect of a house. The plaintiff who is the

landlord of the site of the house, states that the transaction was in reality a sale and not a mortgage and that he is entitled to $\frac{1}{4}$th of the amount of consideration, according to the terms of a *kabuliat* executed by the person who originally took the site for building purposes and also according to custom. The Court below has found against the plaintiff on the question of custom but it has held that the transaction was a sale. According to the terms of the *kabuliat* on which the plaintiff relies, *zar-i-chaharum* is payable in the case of a sale or mortgage by way of a conditional sale. If the transaction now in question is not a sale, *zar-i-chaharum* is not payable under the terms of the *kabuliat*, inasmuch as it is not a mortgage by way of conditional sale. We have, therefore, to see whether the transaction though it purported to be a usufructuary mortgage was in reality a sale. As has already been said, it is on the face of it a usufructuary mortgage. The learned Judge considered that as the terms upon which redemption can take place are onerous and as the transferors stated in their written statement that a transaction was in reality a sale, it must be regarded as a sale. The learned Judge has also relied upon the evidence of Murgiya Pillay, one of the executants of the document. In our opinion the mere fact of the conditions on which the mortgage can be redeemed being onerous, would not be sufficient to justify the Court in coming to the conclusion that the transaction which purported to be a mortgage was a sale. We have to look to the surrounding circumstances also, but what are the circumstances in this case? So far as we can see the executants of the document were heavily in debt and it is probable that they were prepared to mortgage their property with a right of redeeming it at the end of thirty years. We are not prepared to accept the statement of Murgiya Pillay that he intended to sell the house and that he was not aware that the document to which he affixed his signature was a mortgage, in face of the endorsement of the Sub-Registrar that the terms of the document were explained to the executants and they professed to have understood them. If the statement of Murgiya Pillay is true the document had not his assent and, therefore, by virtue of this document there was no sale in respect of which the plaintiff could claim *zar-i-chaharum*. There is no evidence from which we can infer that it was intended at the very outset of the transaction to be a sale in the guise of a mortgage-deed. The oral evidence adduced by the plaintiff proves the contrary. It seems to us to be quite probable that in order to evade payment of *zar-i-chaharum* to the plaintiff the parties to the transaction agreed that a mortgage should be effected instead of a sale, as in that case no *zari-chaharum* would have to be paid.

Under these circumstances we are unable to agree with the Court below that the transaction was a sale. We allow the appeal, set aside the decree of the Court below and dismiss the claim of the plaintiff with costs, including in this Court fees on the higher scale.

*Appeal allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 496 OF 1914.

December 16, 1915.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Chapman.

TULSI RAUT—APPLICANT—APPELLANT

*versus*

*Sheikh* NABI BUX AND OTHERS—AUCTION-PURCHASERS AND DECREE-HOLDER—RESPONDENTS.

*Execution—Auction sale set aside—Auction-purchasers, several—Some appealing against order setting aside sale, effect of, as regards auction-purchasers not appealing.*

When on an appeal preferred by one of the auction-purchasers at an execution sale, an Appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even against the other auction-purchasers who did not appeal. [p. 194, cols. 1 & 2.]

Appeal against the order of the District Judge, Mozafferpur, dated the 31st July 1914, reversing that of the Munsif, Sitamari, dated the 23rd April 1914.

Dr. *Dwarkanath Mitter*, for the Appellant.

Babu *Harihar Prosad Singh*, for the Respondent.

*In re* RISAL SINGH *v.* BALWANT SINGH.

JUDGMENT.—This is an appeal against the order of the District Judge of Mozafferpur, dated the 31st July 1914, setting aside an order of the Munsif, dated the 23rd April 1914.

An application was made to the Munsif under Order XXI, rule 90, Civil Procedure Code, and section 47 of the Code, on the allegation that the *ex parte* decree in the execution of which the land was sold was obtained fraudulently and that the land was sold fraudulently, which the decree-holder purchased himself in the name of his servant and relation Nabi Bux. The first Court held in favour of the applicant and set aside the sale on the grounds, *first*, that the decree on the strength of which the sale had taken place having been obtained fraudulently and having been set aside, all further proceedings after the decree were null and void; *secondly*, that there was fraud in the publication of the necessary notice of the sale which had caused inadequacy of price; and *thirdly* that the real purchaser was the decree-holder himself and that he purchased *benami* for himself in the name of Nabi Bux. The purchaser thereupon appealed to the District Judge, who has set aside the order of the Munsif. The order of the District Judge is now the subject of appeal.

On behalf of the appellant, many grounds were taken in the memorandum of appeal; but the learned Pleader appearing for him has confined himself only to two grounds mentioned therein, namely, to grounds Nos. 4 and 5. Ground No. 4 has no substance in it. There is a distinct finding of the lower Appellate Court to the effect that the auction-purchaser and the decree-holder have not identical interest and that the auction-purchaser was an innocent purchaser. He says: "the reasons for holding that he is the real purchaser and the auction-purchaser a *benamidar* are insufficient and the auction-purchaser positively denies that this is so."

The 5th ground is that there are three auction-purchasers. Two of them did not appeal to the District Judge. It is, therefore, contended that the sale, so far as these two men are concerned, should be set aside. We do not think that this can be done. It is really one sale in execution of the decree and the property was knocked down to three individuals. It is impossible to make a division in the sale with regard to a portion of the property and to allow the sale to stand with regard to the other portion.

For these reasons we dismiss the appeal with costs, two gold *mohurs*.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.

**FULL BENCH.**

CIVIL MISCELLANEOUS APPLICATION No. 355 OF 1915.

December 21, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Walsh.

*In re* RISAL SINGH AND OTHERS—PETITIONERS

*versus*

BALWANT SINGH AND OTHERS—OPPOSITE PARTY.

*Allahabad High Court Rules, Ch. XVI, r.* 22—*Payment of fee—Affidavit—Payment by cheque of third person, if sufficient—Civil Procedure Code (Act V of* 1908*), ss.* 151, 152—*Appeal to Privy Council—Decree, if amended.*

An affidavit to authenticate the payment of fees to a Pleader under rule 22, Chapter XVI, of the High Court's Rules was filed by an agent of the party and it was stated that the payment was made by means of a cheque of a third person:

*Held*, that this was a sufficient compliance with the rules, inasmuch as the natural inference to be drawn from the words of the affidavit was that the agent who made the affidavit got the cheque and brought it to the Pleader. [p. 195, col. 1.]

A High Court cannot amend a decree which is the subject-matter of an appeal to the Privy Council. [p. 195, col. 1.]

Application for amendment of decree.

Mr. *Howard*, for the Petitioner.

JUDGMENT.—In this application the applicant seeks in effect that the decree of this Court should now be amended by disallowing a certain sum for costs, on the ground that the payment of the fee was not authenticated in the manner provided by rule 22, Chapter XVI, of the High Court's Rules. It is alleged that it was necessary that there should be an affidavit made by "the party" or his agent, whichever of them made the payment, and that such an affidavit is absent. There is an affidavit on the file in which the agent of the party states that the

payment was made and how it was made. In this affidavit it is stated that the payment was made by means of a cheque of Dr. Suresh Chander Banerji. The natural inference to be drawn from the words of the affidavit is that the agent who made the affidavit got the cheque and brought it to the Pleader. This, it seems to us, is a sufficient compliance with the rule. There is, however, a further objection to the present application, namely, that the application is made after the decree has been signed and sealed. In effect we are asked to amend a decree which is now the subject-matter of an appeal to the Privy Council. We think that the application is without force and should be rejected. We order accordingly.

*Application rejected.*

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 438 OF 1912.

August 4, 1915.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Holmwood.

BAL MAKUND RUIYA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MATI LAL BURMAN AND OTHERS—DEFENDANTS--RESPONDENTS.

*Mortgage—Simple mortgage—Mortgagor, if can create tenancies—Possessory suit by purchaser under mortgage-decree—Lease, effect on—Lease-holder, whether can be obliged to redeem.*

A simple mortgage does not, as a matter of conveyancing, arrest the mortgagor's power of leasing in the ordinary course of management. Therefore, so long as nothing takes place which impairs the value or impedes the operation of the mortgage, the mortgagor is quite within his powers in creating a temporary lease. [p. 197, cols . 1 & 2.]

*Banee Pershad* v. *Reet Bhunjun Singh*, 10 W. R. 325, followed.

In a suit for possession by a purchaser under a mortgage-decree against a lease-holder in possession who was not a party to the mortgage suit, it appeared that the leases under which the defendant held the lands in suit were created for 50 years and the plaintiff bought with notice of the leases and the person under whom he claimed had recognized the leases in the most unequivocal manner, and it was not shown that the mortgage was impaired in value or impeded in operation by the leases:

*Held*, that the leases could not be treated by the plaintiff as inoperative and the lessee was under no obligation to redeem. [p. 198, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 6th of September 1912.

Mr. *B. C. Mitter*, Dr. *Sarat Chandra Basak* and Babu *Bepin Chandra Bose*, for the Appellants.

Sir *Rash Behari Ghose*, Dr. *Dwarka Nath Mitter* and Babu *Baranashibasi Mookerjee*, for Defendant No. 1.

Babus *Braja Lal Chakravarty* and *Mohini Mohan Chatterjee*, for Defendant No. 2.

Babus *Manmath Nath Mukherjee* and *Satindra Nath Mukherjee*, for Defendant No. 15.

JUDGMENT.

JENKINS, C. J.—The contest of this appeal is as to the respective rights of a purchaser under a mortgage-decree and a lease-holder in possession who was not a party to the mortgage suit. The plaintiff in this suit is the purchaser and the contesting defendant is the lease-holder. The plaintiff prays for possession or in the alternative that the lease-holder be directed to redeem.

The other defendants are the mortgagors and former claimants under mortgages or their representatives. The two mortgagors are Debendra Narayan, who is represented by defendant No. 3, and his brother Upendra Narain defendant No. 4. These brothers were the sons of Joy Narain Saha, a Hindu governed by the Bengal School of Law who died before the mortgages to which I will next refer. On his death each of these brothers became entitled to $\frac{1}{4}$th share in the family property, their uncle, with whom we have no concern, being entitled to the other moiety.

On the 3rd of May 1894, Debendra mortgaged his $\frac{1}{4}$th of the property in suit to the defendant Srimati Iswari Debi and Srimati Bhuban Mohini Debi, the mother of defendants Nos. 7 and 8, to secure Rs. 400 with interest at 2 per cent. per mensem with monthly rests.

On the 10th of January 1896, Upendra mortgaged his $\frac{1}{4}$th share in the property to

Panchanan Prosad Kundu, who is now represented by defendants Nos. 10 and 11, to secure Rs. 1,900 with interest.

On the 13th June 1898, Debendra and Upendra mortgaged the property in suit to Upendra Nath Mukherjee, father of defendant No. 2, to secure Rs. 5,000 with interest.

On the 3rd of October 1898, the two brothers again mortgaged the property to Upendra Nath Mookerjee to secure Rs. 15,000 with interest.

These are the mortgages with which we are concerned in this suit and I now pass on to describe what was done with them.

On the 26th of May 1900, a suit, No. 41 of that year, was brought on Debendra's first mortgage, and on the 8th of July 1901, a decree for sale was passed. The $\frac{1}{4}$th share of the property in suit was bought at the Court sale by Indra Narayan Pal, defendant No. 9.

In 1904 Suit No. 57 of that year was instituted by Upendra Nath Mukherjee on his two mortgages and he joined as defendants Debendra and Upendra and their mother, the two ladies who were mortgagees under Deben's 1st mortgage, Indra Narain Pal, the mortgagee under Upendra's 1st mortgage, and P. N. Mallik to whom this last mortgage had been transferred on the 22nd October 1900.

In 1905 Suit No. 55 of that year was instituted by P. N. Mallik on Upendra's 1st mortgage and the defendants to that suit were Upendra, Debendra and their mother, the Kundus who had transferred to P. N. Mallik the mortgage then in suit, Upendra Nath Mukherjee, the predecessor of the present contesting defendant, and others who need not be particularised.

On the 30th June 1905, a decree was passed in Suit No. 57 of 1904 brought by Upendra Nath Mukherjee and thereby a sale of the mortgaged properties was directed free from all incumbrances, and it was ordered that Indra Narain Pal should get payment first out of $\frac{1}{4}$th of the sale-proceeds of the sum of Rs. , 78 2 6, due on account of the mortgage-bond dated the 3rd May 1894, with interest at the rate of the bond up to the 12th August 1901 and certain other sums making a total of Rs. 2,305-7-0. Similarly Rs. 7,670 odd was directed to be paid in respect of the mortgage of January 10th, 1896. There then followed a power to redeem.

On the 23rd May 1906, a decree in the suit was passed directing a sale subject to the *mokarari maurasi* right and the *pattas* there described. And it was noted that Upendra Nath Mukherjee had obtained a decree in Suit No. 57 of 1904.

On the 17th June 1907, the property in suit was put up to sale in Suit No. 7 of 1906 and was bought by the plaintiff Balmakunda Ruiya at Rs. 30,000. A deposit of Rs. 7,500 was paid and after the balance had been paid, the sale was confirmed.

Difficulties as to possession followed with the usual sequel of criminal proceeding and ultimately on February 23rd, 1911, this suit was instituted. The suit was heard by the Subordinate Judge, 2nd Court, of Hooghly.

By way of defence the lessee, the contesting defendant, relied on certain leases which, according to them, either vested in him a title paramount or had become binding on the plaintiffs by recognition or otherwise. The lessee also claimed that the suit was barred against him by limitation, and advanced other defences.

The result of the trial was that the Sub-Judge decided in effect as to the bulk of the property that the lessee would only resist the plaintiffs' claim for possession by redeeming the property on the terms stated in the Court's decree.

According to those terms the lessee had to pay Rs. 2,172-14-0 in redemption of the 1st mortgage and Rs. 6,720-11-2$\frac{1}{2}$ in redemption of the 2nd mortgage, but the plaintiffs' claim for interest after the confirmation of the sale under the decree in Suit No. 57 of 1904 was dismissed.

Neither party was satisfied with this decree and so the plaintiffs have appealed and the defendant has filed cross-objections. To appreciate the points at issue, it is necessary to observe the dates of the leases on which the defendant lessee relies. Some purport to have been transferred and the rest have been granted direct to the lessee's predecessor. Those said to have been transferred may be eliminated from

discussion, for the contesting parties have come to the following arrangement regarding them: "It is agreed between Mr. B. C. Mitter on behalf of the appellants and Sir Rash Behari Ghosh on behalf of the respondent that the tenancies to which the *kabalas* of 14th March 1888 and 9th November 1903 relate came into existence prior to the mortgage of 3rd May 1894 and that no notice to determine the same has been given, but this Court is not to affirm but to leave open whether those leases are *maurasi mokarari* or not, so that if necessary that point may be determined in subsequent litigation." As a result of this the decision of the Subordinate Judge dismissing the suit in relation to the property comprised in these tenancies is to be confirmed on this ground, but on this ground alone. The direct leases are dated the 27th of October 1894 and the 17th of January 1895 and two, the 22nd of November 1897. Thus it will be seen that all are subsequent to the 1st mortgage and the last two are subsequent to the 2nd mortgage. But no cross-objection has been preferred as to these last two, so that the only contest is as to whether the 1st two prevail over the plaintiff's right to possession. These leases are each for 50 years with an option of renewal for ten years and it has not been, nor could it be, maintained that the leases did not at least entitle the lessee to redeem. But the lessee maintains that he is entitled to retain possession without redeeming the plaintiffs.

The relative positions of a mortgagee and of a tenant under a tenancy created by the mortgagor after a legal mortgage are well settled in England, but it would be a mistake to apply these English rules to the relations resulting from an Indian simple mortgage. The rule of *Keech* v. *Hall* (1), the leading English case, is one of conveyancing but under a simple mortgage, the mortgagor does not part with possession, and the right of a mortgagee is merely to cause the mortgaged property to be sold for the payment of his debt,

And so we find that a simple mortgage does not as a matter of conveyancing arrest the mortgagor's power of leasing in the ordinary course of management. Thus in *Banee Pershad* v. *Reet Bhunjun Singh* (2), it was decided, and the propriety of the decision has never been questioned, that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers. This aspect of the case was not developed as fully as it might have been at the trial. It has not been shown that the first mortgage was impaired in value or impeded in operation by the first two leases. There is no evidence as to what class of lease is ordinarily granted in the case of properties such as that in suit, and the only restriction on leasing mentioned in the mortgage is against the granting of a *kayemi maurasi*. The impugned leases do not come within that description.

We learn from the Commissioner's report that "the disputed land is situated in the town of Salkia adjoining the Bandaghat and appertains to a very thickly populated and important commercial quarter of the town, lying as it does exactly on the river Hooghly... Over the disputed land and that on the north of it there exist the jute press and godowns of the defendant." And so the lease involved building operations. At the same time the first mortgage was only for Rs. 400, and the view of the Subordinate Judge was that it could not be said that the mortgage security even of the 1st and 2nd mortgages became insufficient by the execution of these leases. Nor can it be urged that the plaintiffs have been taken by surprise, for the lower Court has held that the purchaser bought with notice of the leases, and no attempt has been made to impugn the correctness of this finding.

Moreover no complaint was made by the 1st mortgagees or by Indra Narain who purchased under their decree.

On the contrary, Indra Narain under whom the plaintiffs claim so far as they rest on the first mortgage, recognised and adopted the leases in the most unequivocal manner, for he brought a suit expressly on them and obtained a decree.

(1) (1778) 1 Dougl. 21; 1 Sm. L. C. 511; 99 E. R. 17.

(2) 10 W. R. 325.

TIRUVENGADA KONAN *v.* VENKATACHALA KONAN.

This suit was instituted in the Court of the Munsif at Howrah in 1907 and thereby rent was claimed and recovered on the registered *kabuliats* of the 27th October 1894 and the 17th January 895. And before this rent was also paid to the Receiver appointed in Suit No. 57 of 1904, the suit in which the plaintiffs' purchase was made. In view of these facts I do not think the two leases of the 27th October 1894 and the 17th January 1895 can be treated by the plaintiff as inoperative, and I hold that the lessee is under no obligation to redeem. Mr. B. C. Mitter at one time thought that the lessee had made an admission as to boundaries favourable to him, but in this he was manifestly mistaken.

The result then is that the decree of the Sub-Judge will stand as to the plots comprised in the mortgage of the 16th January 1896, for as to these no appeal has been preferred, but it will be subject to a modification to which the plaintiffs assent, as by an oversight the decree has been so expressed as to give rise to possible error. The decree as drawn directs that "the plaintiffs will be entitled to get a decree for foreclosure against defendant No. 1 with respect to the land covered by the third and fourth leases, dated the 22nd November 1897 and the 22nd November 1897 respectively. This must be altered by substituting the words "covered by the mortgage of the 16th of January 1896." In view of the statement made on behalf of the lessee that he does not propose to redeem the mortgage of the 16th January 1896, it becomes unnecessary to consider whether the Subordinate Judge erred in disallowing interest up to the date of the suit. There will be a statement to that effect embodied in the decree.

The result then is that the plaintiffs' claim is dismissed as to the plots comprised in the tenancies to which the *kabalas* of 14th March 1888 and 9th November 1903 relate, that is to say, to plots measuring 3 *cottas* and 7 *cottas* 6 *chittaks* and in this connection there will be embodied in the decree the terms to which the parties have agreed.

The plaintiffs' claim will also be dismissed as to the plots comprised in the leases dated the 27th October 1894 and 17th January 1895 and measuring 7 *cottas* and 2 *bighas* and 8 *cottas* respectively.

The rest of the Subordinate Judge's decree will stand with the variation which I have indicated. The appellants must pay the defendant No. 1 half his costs of this appeal and two gold *mohurs* as hearing fee to each of the defendants Nos. 2 and 15.

HOLMWOOD, J.—I agree.

*Decree modified.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1932 OF 1914.

November 22, 1915.

*Present*: Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

TIRUVENGADA KONAN—PLAINTIFF—APPELLANT

*versus*

VENKATACHALA KONAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Lease—Trespasser—Adverse possession—Reversioner, whether can sue for declaration of title—Cause of action—Decree for "formal" possession—Civil Procedure Code (Act V of 1908), O. XXI, r. 36.*

Where during the currency of a lease the defendants took possession of the suit lands not only adversely to the tenant, but also claiming adversely to the reversionary rights of the plaintiff landlord:

*Held*, (1) that inasmuch as the plaintiff's right of reversion was affected by such adverse occupation, he had a cause of action against the trespassers even during the currency of the lease; [p. 199, col. 2.]

(2) that he was entitled to a decree declaring his title to the lands and giving him "formal" possession thereof by the proclamation of his reversionary right. [p. 199, col. 2.]

*Somai Ammal* v. *Vellayya Sethurangam*, 26 Ind. Cas. 347; 29 M. L. J. 233; 16 M. L. T. 532; (1915) M. W. N. 12; 1 L. W. 1047, referred to.

*Sita Ram* v. *Ram Lal*, 8 A. 449 (F. B.); A. W. N. (1896) 162, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 455 of 1913, preferred against that of the Court of the District Munsif of Tiruturaipundi, in Original Suit No. 68 of 1912.

FACTS.—Plaintiff was a landlord; defendants Nos. 1 and 2 were trespassers. Defendant No. 3 was a lessee holding under a lease for three years from plaintiff. During the currency of the lease, the defendants Nos. 1 and 2 got into possession of the land in collusion with defendant No. 3 and denied the title

of the plaintiff and asserted that he was only a *benamidar* for the real owner. The District Munsif held that the title of the plaintiff was proved and that he had a cause of action to sue before the expiry of the lease, and decreed the claim. On appeal, the Subordinate Judge held that though plaintiff had title he could not sue for possession during the currency of the tenancy, and dismissed the suit. The present appeal is against that decree.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—Mr. Justice Hannay and myself held in *Somai Ammal* v. *Vellayya Sethurangam* (1) that where a landlord (*A*) is under an obligation to put his tenant (*B*) into *khas* possession of the leased land, he (*A*) is entitled to succeed in a suit in ejectment brought against a trespasser even if the suit was brought during the term of *B*'s tenancy.

In this case, however, the plaintiff had put his tenant (the 3rd defendant) into possession and hence had discharged his obligation as landlord to let the 3rd defendant into actual possession. But the plaintiff has a reversion in the plaint lands and he might be said to have been dispossessed of that reversion, when the defendants Nos. 1 and 2 took possession of the lands not only adversely to the tenant (the 3rd defendant), but claiming adversely to the plaintiff's reversion.

In such a case, *Sita Ram* v. *Ram Lal* (2) decides that the landlord can be put in possession of his reversion by the passing of a decree against the trespassers in the form indicated in section 264 of the old Civil Procedure Code corresponding to Order XXI, rule 36, of the new Civil Procedure Code. I do not think it is necessary to adopt the rather too broad view indicated in certain passages of the judgment of Sundara, Aiyar, J., in the case of *Ambalavana Chetty* v. *Singaravelu Odayar* (3) that the landlord even in such a case is entitled to *khas* possession from the trespassers. [The case *Sita Ram* v. *Ram Lal* (2) is not referred to by Sundara Aiyar J. in his judgment.] Mr. Venkatarama Sastriar for the contesting respondents (defendants Nos. 1 and 2) argues that the landlord is entitled only to a declaratory decree and that a decree granting possession of the reversion in the form indicated in Order XXI, rule 36, Civil Procedure Code, is nothing more than a decree declaratory of the title of the plaintiff to his reversion, which decree he argues should not be given to him at this stage. I think that though the distinction between a decree declaring the landlord's right to his reversion and a decree giving him *possession of his reversionary right* in the lands might be fine [see *Ghulam Hussain* v. *Muhammad Hussain* (4), where existence of the distinction seems to be ignored], the said distinction is a real one. For it may be argued that a mere declaratory decree against a trespasser will not prevent the limitation period from running on, whereas a decree for possession of the reversion, properly executed, will nullify the effect of the adverse possession of that reversionary right by the trespasser during that period (at least) which elapsed before the possession of the reversion was so obtained in execution.

I think that on the facts found in this case, the plaintiff's suit should not have been dismissed wholly, though he sued for *khas* possession which he was not entitled to get during the period of the 3rd defendant's lease.

Relying on *Eissesuri Dabeea* v. *Baroda Kanta Roy Chowdry* (5) and *Sita Ram* v. *Ram Lal* (2), I would give a decree declaring the plaintiff's title to the lands as against the defendants Nos. 1 and 2 and giving him what is called "formal" possession of the land by the proclamation of his reversionary right (namely, the right to obtain *khas* possession of the lands at the end of the term and to be obtaining rents from the 3rd defendant during the term of the lease). The claim for mesne profits will be disallowed.

The parties will bear their respective costs throughout.

NAPIER, J.—I agree.

*Appeal allowed; Suit decreed.*

(1) 26 Ind. Cas. 347; 29 M. L. J. 233; 16 M. L. T. 532; (1915) M. W. N. 12; 1 L. W. 1047.
(2) 18 A. 440 (F. B.); A. W. N. (1896) 162.
(3) 15 Ind. Cas. 146; (1912) M. W. N. 669.
(4) 2 Ind. Cas. 209; 31 A. 271; 6 A. L. J. 177.
(5) 10 C. 1076.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1472 OF 1914.

December 22, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

CHANDRADAYA SEN—DEFENDANT No. 2 —APPELLANT

*versus*

BHAGABAN CHANDRA SEN AND OTHERS PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 —RESPONDENTS.

*Contract Act (IX of* 1872), *s.* 69 *"Person bound to pay," meaning of—"Person interested in payment," meaning of—Rent, a first charge—Purchaser of tenure, liability of, to pay arrears of rent accruing before purchase—Contribution, suit for.*

One who is not personally liable to pay but to whose land liability is attached, is a person "bound by law to pay" within the meaning of section 69 of the Contract Act. [p. 201, col. 1.]

A person whose land would have been sold had he not made a payment, is "interested in the payment of money" within the meaning of section 69 of the Contract Act. [p. 201, col. 2.]

*Mothooranath Chuttopadhya* v. *Kristo Kumar*, 4 C. 369, followed.

Rent is, by operation of law, the first charge on a tenure and the person who purchases the same at an execution-sale must, in the absence of anything to denote the contrary, be taken to purchase it charged with the rent due at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due. [p. 201, col. 2.]

*Moharance Dasya* v. *Harendra Lal Roy Chowdry*, 1 C. W. N. 458, applied

*Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose*, 6 C. W. N 794 and *Manindra Chandra Nandy* v. *Jamahir Kumari*, 9 C. W. N. 670; 32 C. 643, followed.

*Sreemutty Jogemaya Dassi* v. *Girindra Nath Mukherjee* 4 C. W. N. 590, and *Gobindo Chunder Chuckerbutty* v. *Basant Kumar Chuckerbutty*, 3 C. W. N. 384, referred to and explained.

The plaintiff and the defendant No. 1 were co-sharers of a *taluk*. The share of the defendant No. 1 was purchased by the defendant No. 2 in execution of a mortgage-decree. Prior to the purchase of the defendant No. 2, the landlord had obtained a decree for arrears of rent, and after the purchase by the defendant No. 2, put up the *taluk* to sale in execution of the rent decree. The plaintiff deposited the entire amount due to the landlord and saved the *taluk*. He then brought a suit for contribution against defendants Nos. 1 and 2:

*Held*, that the plaintiff was entitled to a decree for contribution against the defendant No. 2, and the defendant No. 2 could not raise the question of the liability of the defendant No. 1 for plaintiff's claim when the plaintiff did not insist upon his claim against the defendant No. 1. [p. 202, cols. 1 & 2.]

Appeal against the decree of the Additional District Judge, Tipperah, dated the 28th February 1914, confirming that of the Munsif, Kasba, dated the 18th January 1913.

Babus *Sarat Chandra Roy Chowdhury* and *Sasadhar Roy*, for the Appellant.

Babus *Birindra Chandra Das* and *Upendra Kumar Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for contribution.

A preliminary objection has been taken to the hearing of the appeal on the ground that the suit is of a nature cognizable by the Court of Small Causes, and does not come within Article 41 of the Second Schedule of that Act. It is pointed out that the plaintiff's case was that he was a tenant under the defendant No. 1, and he sued to recover from the defendants the whole amount paid by him to save the property a portion of which was held by him as a tenant under the defendant No. 1; in other words, he denied any common liability with the defendants which is the foundation of a suit for contribution. That no doubt was the plaintiff's case, but there was an alternative case, *viz.*, that if the plaintiff was held liable to contribute then a decree for proportionate amounts might be passed against the defendants.

The Court of first instance held that the plaintiff was a co-sharer and liable to contribute and on that footing gave a modified decree to the plaintiff. The plaintiff did not appeal against that decree. Under the circumstances we are of opinion that the suit is one for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer, and is exempted from the cognizance of Small Cause Courts under Article 41 of the Second Schedule of Act IX of 1887. The preliminary objection is accordingly overruled.

As regards the merits of the case, it must be held upon the findings arrived at that the plaintiff and the defendant No. 1 were co-sharers of a *taluk*. The share of the defendant No. 1 in the *taluk* was purchased by the defendant No. 2 in execution of a mortgage-decree in 1908. Prior to the purchase of the defendant No. 2 the landlord of the *taluk* had obtained a decree for arrears of rent of the *taluk* and after the purchase by defendant No. 2 put up the *taluk* to sale in execution of the rent-decree, when the plaintiff deposited the entire amount due to the landlord and saved

the *taluk*. He then brought the present suit for contribution. The Court of first instance passed a decree against the defendant No. 2 and the other co-sharers and that decree was confirmed on appeal.

The defendant No. 2 has appealed to this Court and it is contended on his behalf that as the rent-decree obtained by the landlord was for a period prior to the date of his purchase, he was not a person "*bound by law to pay*" (any share of the rent) within the meaning of section 69 of the Contract Act. It is true he was not personally liable for the rent for the period prior to his purchase, but the *taluk*, a share of which was purchased by him, was liable to be sold in execution of the decree. In *Mothooranath Chatopadhya* v. *Kristo Kumar Ghose* (1), it was contended that the section applied only to cases where there was a personal liability for the debt, and did not apply whereas in the present case the liability attached to the land only. Markby, J., in overruling the contention said as follows:—"Now, I think it is rightly argued that taking that section by itself, it is possible to say that that section only applies to cases where the person who is there called 'the other' was personally liable for the debt, but it is clear from the illustration that that is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government; but the liability to pay revenue due to Government is not a personal liability of the *zemindar*, but a liability which is imposed upon the *zemindar's* land. It is, therefore, clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

We agree with the view taken in the above case, and hold that the defendant No. 2 is a person who is "bound by law to pay" within the meaning of section 69 of the Contract Act.

The learned Pleader for the appellant sought to distinguish the case upon the ground that there was no personal liability of either of the parties to the case, and that the plaintiff in the present case personally as well as his share of the *taluk* was liable for the rent, and the defendant No. 2 was not personally liable but only his share of the *taluk*. If, however, a person is "bound by law to pay" by reason of the liability attaching to the land, the defendant No. 2 comes within the purview of the section although his liability is not a double liability like that of the plaintiff. Besides in the present case the landlord did not proceed against the tenants personally.

It was further contended that the plaintiff was not "a person interested in the payment of money" but was himself bound by law to pay and that as such he cannot come under the section. But the plaintiff in the case cited above was also "bound by law to pay" by reason of the liability attaching to the land and that did not prevent him from coming under the section. The learned Judges held that he was "interested in the payment" of the money because if he had not paid it his land would have been sold, as in the present case. The first contention of the appellant is accordingly overruled.

It is next contended that as between the defendant No. 1 and the defendant No. 2, the former ought to have been made liable for the plaintiff's claim as the decree for rent was for a period prior to the date of the purchase by the defendant No. 2 in execution of his mortgage decree, during which the defendant No. 1 was in possession, and that the Courts below are wrong in making a decree against the defendant No. 2. But as pointed out in the case of *Srimati Moharanee Dasya* v. *Harendra Lal Roy Chowdry* (2), rent is, by operation of law, the first charge on a tenure and the person who purchases the same at an execution-sale must, in the absence of anything to denote the contrary be taken to purchase it charged with the rent which is due in respect of it at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase.

The case has been followed in *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (3)

(1) 4 C. 369.

(2) 1 C. W. N. 458.

(3) 6 C. W. N. 794.

and *Manindra Chandra Nandy* v. *Jamahir Kumari* (4).

We have been referred to the cases of *Sreemutty Jogemaya Dassi* v. *Girinder Nath Mukherjee* (5) and *Gobindo Chunder Chukerbutty* v. *Basant Kumar Chukerbutty* (6). But all that was laid down in the first case was that a purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent. In the second case the appellant, an unrecorded co-sharer of a tenure, was held liable to contribute to the rent paid by a recorded co-sharer to save the tenure, although the share of the former had been sold away and purchased by another at the date of the sale in execution of the rent decree. Reliance is placed upon a passage in the judgment in that case which runs as follows:—"It may be that the purchaser of... the share could not have come down upon the appellant for any rent which had become due before the purchase, but the question here is not between the appellant and the purchaser, but between the plaintiff and those who were the co-owners with him of the *taluk* during the period for which the rent became due."

In the present case, however, the plaintiff does not insist upon his claim against the defendant No. 1, and it is the defendant No. 2 who raises the question of the liability of the defendant No. 1. It is found that the defendant No. 2 purchased the share of the defendant No. 1 at a low price, which in the opinion of the Court below indicated that he purchased the share subject to the liability to contribute. No equitable consideration, therefore, arises in favour of the defendant No. 2.

It is unnecessary to consider whether the defendant No. 1 could be held liable on the basis of the contract (of mortgage) as between him and the defendant No. 2, because the latter never set up such a case. The case of the defendant No. 2 simply was that the debt was a personal liability of the defendant No. 1 and he was bound to pay it, by reason of his having been in possession and in enjoyment of the profits of the share during the period for which the rent was due.

The defendant No. 2 is liable only to the extent of the share purchased by him. But no question was raised in the Courts below that the amount decreed against him exceeds the value of the share purchased by him.

We are of opinion that the decree appealed from should be confirmed and this appeal is accordingly dismissed with costs, one set of Pleader's fees will be divided between the plaintiff and defendant No. 1, respondents.

*Appeal dismissed.*

(4) 32 C. 643; 9 C. W. N. 670.
(5) 4 C. W. N. 590.
(6) 3 C. W. N. 384.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECTION 115 APPLICATION NO. 130 OF 1915.

November 5, 1915

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

*Sardar* NIHAL SINGH AND OTHERS—PLAINTIFFS—APPLICANTS

*versus*

*Raja* RAGHURAJ BAHADUR SINGH—DEFENDANT—RESPONDENT.

*Specific Relief Act (I of 1877), s. 9—Dispossession of tenant if dispossession of landlord—Suit for possession, maintainability of—Attornment by tenants to stranger, effect of—Landlord, if dispossessed without dispossession of tenants.*

The dispossession of a tenant by a trespasser is the dispossession of his landlord, and entitles the landlord to a relief under section 9, Specific Relief Act. [p. 204, col. 2.]

A mere attornment by a tenant in actual possession to another person coupled with a refusal to pay rent to the proprietor does not amount to the dispossession of the proprietor under section 9 of the Specific Relief Act. [p. 200, col. 2.]

*Semble*:—A proprietor may be dispossessed without dispossession of his tenants, but in such a case something more than an attornment to a third party is necessary, *e.g.*, by the forcible removal of a proprietor's rent-collectors by a third party and the introduction of his own collecting agency into the estate. [p. 204, col. 2.]

*Natabar Parue* v. *Kubir Parue*, 18 C. 80; *Bhundal Panda* v. *Pandol Pos Patil*, 12 B. 221; *Krishna* v. *Akbanda*, 13 M. 54; *Fadu Jhala* v. *Gour Mohan Jhala*, 19 C. 544; *Fazlur Rahmen* v. *Krishna Prasad*, 29 C. 614; *Jagannatha Chary* v. *Rama Rayer*, 28 M. 238; *Rathnasabapathi Pillai* v. *Ramasami Aiyar*, 5 Ind. Cas. 630; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. T. 301; 33 M. 452; *Innasi Pillai* v. *Sivagnana Desikar* 5 M. L. J. 95; *Thakur Abbas Ali Khan* v. *Muhammad Khan*, Select Case No. 243, referred to.

NIHAL SINGH *v.* RAGHURAJ BAHADUR SINGH.

*Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbttuy*, 14 C. 649, followed.

Application against an order of the Additional District Judge, Lucknow, dated the 23rd August 1915.

Messrs. *Mohammad Nasim*, *Bisheshar Nath* and *Hyder Husain*, for the Applicant.

Thakur *Raghunath Singh*, for the Respondent.

ORDER.—The circumstances in which this application came to be made are as follows: —

Raja Raghuraj Bahadur Singh, *taluqdar* of Harha, in the Bara Banki District, made over by a deed of trust the management of his *taluqdari* property to certain trustees. In the month of October 1914, the *taluqdar* endeavoured to resume the management of his estate. The trustees, alleging that they had been forcibly dispossessed from the management without their consent, instituted a suit against the Raja for possession of the estate under the provisions of section 9 of the Specific Relief Act. This suit was originally filed in the Court of the Subordinate Judge of Bara Banki, whence it was transferred to the Court of the Additional District Judge, Lucknow. The learned Additional District Judge dismissed the suit on the ground that the plaintiffs were not entitled to the relief which they sought, as they had not been deprived of actual physical possession of the estate. The validity of that dismissal is contested in revision.

There have been many judicial decisions as to the scope and the limitation of section 9 of the Specific Relief Act and Courts have not been unanimous in their interpretation of the provisions of that section. According to its wording it is necessary for a person, in order to succeed in a suit brought in accordance with its provisions, to establish that he has been dispossessed of immoveable property without his consent otherwise than in due course of law, and the differences of opinion amongst the Courts which have decided the question have usually been differences of opinion as to the nature of the dispossession and the nature of the property from which it has been made. The Courts in India have been unanimous on one point. All agree that such a suit can lie where there has been an effective dispossession. When a proprietor of landed property has placed tenants in possession of that property and those tenants have been dispossessed by a trespasser, all agree that the dispossession of the tenants is in effect the dispossession of the proprietor and that a proprietor whose tenants have been so dispossessed, has a right to recover possession under the provisions of this section. But in cases in which such tenants have not been dispossessed, there is a difference of opinion upon the point whether collection of rent from tenants by a person other than the proprietor constitutes a dispossession of the proprietor which entitles him to bring a suit under the provisions of the section.

In the case of *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty* (1), a Bench of the Calcutta High Court decided in 1887 that the mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of the section. Ghose, J., pointed out at page 652 that it was open to the proprietor in such circumstances to bring an action against the tenants for the recovery of the rent, and thus, as he was still in a position to recover his rent, it would appear to follow that he had not been dispossessed. In 1890 a Bench of the Calcutta High Court decided in the case of *Natabar Parue* v. *Kubir Parue* (2) that a suit for the possession of a right to fish in a sheet of water, the bed of which belonged to another, did not come within the provisions of the section. In this case there was apparently an actual physical dispossession, but the Bench decided that the right to fish in such a piece of water could not be considered immoveable property. It did not discuss whether the provisions of the General Clauses Act which include benefits arising out of land as immoveable property, should have application in the circumstances of the case. Previously in 1887 a Bench of the Bombay High Court had held in *Bhundal Panda* v *Pandol Pos Patil* (3) that a somewhat similar right of fishery was immoveable property, and in 1889 a Bench of the Madras High Court in *Krishna* v. *Akilanda* (4) had

(1) 14 C. 649.
(2) 18 C. 80.
(3) 12 B. 221.
(4) 13 M. 54.

decided that a right of ferry was immoveable property within the meaning of section 9 of the Specific Relief Act. These two latter decisions conflict with the Calcutta decision already quoted. The same question arising in a subsequent case was referred to a Full Bench of the Calcutta High Court in *Fadu Jhala* v. *Gour Mohun Jhala* (5) in 1892. Three of the Judges composing that Full Bench found that a suit for the possession of a right to fish in a piece of water, the bed of which did not belong to the plaintiff, did not come within the provisions of section 9 of the Specific Relief Act. The remaining two Judges came to a contrary opinion. The view taken by the majority of the Full Bench in this case was upheld in 1902 in the case of *Fazlur Rahman* v. *Krishna Prasad* (6), in which a Bench decided that the rights to collect tolls, rents, and the like in a market are not immoveable property within the meaning of section 9 of the Specific Relief Act. It has been noted that the view taken by the Calcutta High Court is not the view which has been taken by the Madras High Court. In subsequent decisions of the Madras High Court it has been found that a right to collect rent is immoveable property and that an action can be brought under section 9 of the Specific Relief Act for possession of that right. This was the decision of a Bench of the Court in 1904 in *Jagannatha Charry* v. *Rama Rayer* (7). It is to be noted, however, that in that case the right of the landlord to bring such a suit was clear, as he had not only been deprived of his right to collect rent but his tenant had also been dispossessed. In a still more recent case of the Madras High Court, *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (8), decided in 1910, the decision in *Jagannatha Charry* v. *Rama Rayer* (7) was approved and it was stated generally that possession by receipt of rents may be disturbed and the person dispossessed may bring a suit for possession under that section within six months of such dispossession. This was a decision of a Bench. It has been brought to our notice that in a single Judge case of the Madras High Court in *Innasi Pillai* v. *Sivagnana Desikar* (9), Mr. Justice Muthusami Aiyar in 1894 carried the view somewhat further. This concludes the authorities of the High Courts upon the point. The only authority in this Court is that contained in *Thakur Abbas Ali Khan* v. *Muhammad Khan* (10) in which Mr. H. F. Evans, J. C., approved in 1893 the doctrine laid down in *Tarini Mohun Mozumdar* v. *Ganga Prasad Chuckerbutty* (1).

The conclusion at which we arrive is as follows :—We accept absolutely the proposition that, where a proprietor has leased his land to tenants and those tenants have been evicted by a trespasser, the dispossession of the tenants is the dispossession of the landlord and entitles him to relief under the provisions of section 9 of the Specific Relief Act, and we accept the proposition advanced by the Calcutta High Court that, where tenants in actual possession of the land have not been evicted although they have, while remaining tenants of the proprietor, attorned in favour of another person and refused to pay rent to the proprietor, there has been no dispossession of the proprietor. It is possible, however, for a state of things to arise where a proprietor can be dispossessed without dispossession of the tenants, although in such a case something more than an attornment to a third party would be necessary. To take, for example, a case in which a landlord maintains (as is frequently the case in Oudh) rent-collectors on the estate. The forcible removal of those rent-collectors by a third party and the introduction by such a party of his own collecting agency into the estate would constitute, in our opinion a dispossession of the proprietor although the tenants themselves were not dispossessed. There might be dispossession by various other methods upon which it is not necessary for us to enlarge. We think it advisable to state these opinions, as the point for our decision is one of considerable importance to landed proprietors in Oudh, but we do not consider it advisable to specify more exactly the methods by which such a dispossession could take place in cases in which the tenants were not evicted.

Having thus stated our decision upon the general question, we proceed to examine the

(5) 19 C. 544.
(6) 29 C. 614.
(7) 28 M. 238.
(8) 5 Ind. Cas. 630; (1910) M. W. N. 112; 7 M. L. T. 311 20 M. L. J. 391; 33 M. 452.
(9) 5 M. L. J. 95.
(10) Select Case No. 243.

facts of this particular case. We cannot find that in this case there was any real dispossession of the trustees. What appears to have happened is that the *taluqdar* arrived at a village, where the trustees had placed the office from which they managed the estate, and requested them to discontinue their management. They do not appear to have discontinued their management entirely or to have acceded to his request. They left the village under protest and the greater portion of the management appears at the time to have passed out of their hands. There is considerable reason, however, to suppose that they have since regained their original powers. We have been told in the course of argument that they have succeeded in obtaining mutation of names in their favour from the Revenue Authorities, and we are given to understand that if that order of mutation remains unaltered, they will not be dissatisfied with the infructuous nature of these proceedings. As we take the view that there has been no actual dispossession, it follows that the learned Additional District Judge was right in dismissing the suit.

We, therefore, dismiss this application. The applicants will pay their own costs and those of the opposite party.

*Application dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1024 OF 1914.

December 22, 1915.

*Present*:—Mr. Justice Holmwood and Mr. Justice Mullick.

*Prince* GOLAM MUHAMMAD—DEFENDANT No. 1—APPELLANT

*versus*

AKHOY KUMAR LAHA AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

*Muhammadan Law*—Wakf—*House property, lease of*—*Sanction of* Kazi, *necessity of*—*Earnest money paid for lease of* wakf *house property, recovery of, if* mutwalli *does not give good title*—Factum valet, *doctrine of*—*Money advanced as partial guarantee for performance of contract, if can be recovered.*

A person who with full knowledge enters into a bargain for the lease of a *wakf* house property with a *mutwalli*, is equitably entitled to insist upon the *mutwalli* doing all that is necessary to give him a good title. [p. 206, col. 1.]

A sanction of a *Kazi* is necessary to validate a lease of *wakf* house property for more than a year. [p. 206, col. 1.]

*Semble*:—When such a lease has been made improperly and many years afterwards it is impugned before a Court, the lease may be held valid on the doctrine of *factum valet* and on the principle that a Court should not disturb the arrangement made in the ordinary course of management of an estate for the benefit of the beneficiaries. [p. 206, col. 1.]

*Nemai Chand Adhya* v. *Mir Golam Hossein*, 3 Ind. Cas. 353; 11 C. L. J. 317; 14 C. W. N. 535; 37 C. 179, referred to.

A *mutwalli*, to whom money is advanced by a person as earnest money for getting a lease of the *wakf* property, cannot seek to retain the money unless he is willing to give a good title by going to a *Kazi* and getting sanction for the transfer. [p. 206, col. 2.]

A party to a contract advancing money to the other party by way of a partial guarantee for performance cannot recover the money if there has been default on his part and no default on the part of the other. [p. 206, col. 2.]

Appeal against the decree of the Additional District Judge, 24-Parganas, dated the 24th of January 1914, modifying that of the Subordinate Judge of 24-Parganas, dated the 25th March 1913.

Mr. *B. K. Chakerbutty* and Babu *Harendra Kishore Sarbadhicary*, for the Appellant.

Babus *Dwarka Nath Chakerbutty*, *Hemendra Nath Sen* and *Santosh Kumar Bose*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff to recover a sum of money paid to the defendant No. 1 for granting a certain lease which the defendant agreed to execute in favour of the plaintiff and the *pro forma* defendant in respect of certain premises known as 46, 46-1 to 46-12, Bentinck Street, in the town of Calcutta. The premises in question were part of an estate which was *wakf* property and the defendant No. 1 is the *mutwalli* of that property. In view of the contentions that have been raised before us, it is necessary to state that the plaintiff had been a tenant of this *mutwalli* for many many years and, therefore, presumably must have known that the property was *wakf* property. The *salami* was fixed at 20 thousand rupees, but the plaintiff states that two thousand rupees was paid as earnest money for the execution of the *bima-patra*, which

is called an agreement of sale in the plaint, and the same expression "earnest money" occurs in the agreement which is upon the record. A further two thousand rupees was to be paid within a week, and these two items of guarantee so to speak were also to be taken as part of the *salami* of 20 thousand rupees, so that we must hold that this four thousand rupees was not only a mere part of the consideration for the lease but was specifically the guarantee for the performance of the contract on the part of the plaintiff. Under such circumstances the defendant could not seek to recover this sum unless there was some default on the part of the lessor in refusing to carry out the contract to the extent to which he is capable of carrying it out.

It is clear that the plaintiff, although he entered into the bargain with full knowledge that defendant No. 1 was a *mutwalli*, is equitably entitled to insist upon defendant No. 1 doing all that is necessary and that he is capable of doing to give him a good title. He has refused to take this lease because the Muhammadan Law, according to his contention, necessitates the leave of the *Kazi* when a building, which Baillie describes as a mansion, which later authorities describe as houses, is leased by the *mutwalli* for a longer term than one year. The learned Subordinate Judge found that the balance of authority seems to be in favour of the view that sanction of the Court was necessary to validate a lease of *wakf* house property for more than a year. He does not state where he gets the contrary opinion. We can find no contrary authority at all. It does not appear to be a question of balance of authority, but a question of all the authorities which seem to lay down that sanction of the *Kazi* is necessary for such a lease. No doubt when such a lease has been made improperly and many years afterwards it is impugned before the Court, this Court has held in *Nemai Chand Adhya* v. *Mir Golam Hossein* (1) that *factum valet*, and that it would not disturb the arrangement which was made in the ordinary course of management of an estate for the benefit of the beneficiaries. But that does not in any way debar the plaintiff from seeking at the outset of the negotiation to obtain the best title which the transferor is now capable of giving him, and there is no doubt that the transferor is capable of giving him a good title and that his title cannot be considered to have passed without this action of going to the *Kazi* and getting sanction of the transfer. They who seek equity must do equity, and we are of opinion that defendant No. 1 cannot seek to retain this money unless he is willing to do this very simple act, which he is bound to do under section 8 of the Transfer of Property Act.

It has been contended before us that this is not the point on which the case was decided in the lower Court, and that the Judge raised some new issues. We do not see that there is any force in these contentions. In both the lower Courts the question of Muhammadan Law was distinctly raised. The Court of first instance found in favour of the plaintiff on that point. The Court of appeal below says that it is immaterial and decides the appeal on other grounds. The respondent is undoubtedly entitled to uphold the judgment and decree of the lower Appellate Court on grounds of Muhammadan Law which have been fully discussed and upon which the decree can be supported and it is in no way necessary to bring a counter-case. There is, moreover, no new question raised. It is not necessary to go into the question of fact whether the plaintiff entered into the bargain with his eyes open and, therefore, cannot ask the defendant to do anything more than was specifically set forth in the bargain. The matter is purely one of law and the plaintiff can ask that the defendant should do, as we have pointed out, anything that is necessary under section 8 of the Transfer of Property Act.

We do not agree with the learned Judge that whether there was any default on the part of the plaintiff or the defendant is immaterial. His view was that if the lease was not carried out the defendant was bound to refund the money, because it was simply a part of the consideration and not a guarantee for performance. We have already said that we think it was a partial guarantee for performance and that if there had been any default on the part of the plaintiff and no default on the part of the defendant, the

(1) 3 Ind. Cas. 353; 37 C. 179; 11 C. L. J. 317; 14 C. W. N. 535.

plaintiff could not recover the money. But there has been this obvious and serious default on the part of the defendant, and the plaintiff is, therefore, entitled to recover the money.

The result is that the judgment and decree of the learned Additional District Judge is affirmed and the appeal dismissed with costs, though for different reasons than those given by the learned Judge.

*Appeal dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1089 TO 1091 OF 1914.

November 2, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

THE SECRETARY OF STATE FOR INDIA, REPRESENTED BY THE COLLECTOR, KISTNA — DEFENDANT—APPELLANT IN ALL

*versus*

IN S. A. No. 1089 OF 1914

KOMARAGIRI JANARDHANA RAO—PLAINTIFF—RESPONDENT

IN S. A. No. 1090 OF 1914

CHAMARTHI VENKATA HANUMANTHA RAO—PLAINTIFF—RESPONDENT

IN S. A. No. 1091 OF 1914

NANDURI BHIMARAJU—PLAINTIFF—RESPONDENT.

*Madras Proprietary Estates Village Service Act (II of 1894), ss 4, 15—"Proprietor", meaning of—General powers of management given to Receiver, effect of—Receiver, whether can appoint* karnams.

The powers of a Receiver appointed by a Civil Court under Order XL, rule 1, of the Civil Procedure Code are entirely conditioned by the terms of his appointment, subject to any subsequent modification by the Court under which he holds the appointment. [p. 207, col. 2; p. 208, col 1.]

Where an appointment order confers on a Receiver general powers of management authorising him to do such acts as may be necessary for the efficient administration of the property subject to the control of the Court, he has all the powers of a proprietor within the meaning of section 4 of Act II of 1894 and is entitled to nominate persons to *karnamships* under section 15 of the Act. [p. 208, col. 1.]

Second appeals against the decrees of the Court of the Temporary Subordinate Judge of Ellore, in Appeal Suits Nos. 226, 241 and 243 of 1912 (transferred for disposal from Sub Court, Ellore), preferred against the decrees of the Court of the Principal District Munsif of Tanuku, in Original Suits Nos. 309 to 311 of 1911.

FACTS.—The Receiver of the Nidadavole Estate appointed plaintiffs as *karnams* to certain villages situate within the *zemindar's* estate and submitted his nominations under section 15 of Act II of 1894 (Madras Proprietary Estates Village Service Act). The Collector vetoed their nominations holding that it was the Subordinate Court of Ellore, within whose jurisdiction the villages were situate and to whose control the Receiver was subject, that should make the appointments and not the Receiver. The present suits were by the appointed *karnams* to declare the order of the Collector illegal. The District Munsif held that he had no jurisdiction. On appeal the Subordinate Judge gave decrees for the plaintiffs. The present appeals are by the Government against the said decrees of the Subordinate Judge.

The Government Pleader, for the Appellant.

Mr. *P. Nagabhushanam*, for Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—These suits arise out of certain appointments to *karnamships* made by the Court Receiver of Nidadavole Estate and reported to the Revenue Divisional Officer under section 15 of Act II of 1894. (*Vide* Exhibits P., Q. and R, dated March 9th 1910.) These appointments have to be made by the "proprietor" of the estate. The term "proprietor" is defined in section 4 of the Act, and includes any person who is in lawful management of the Estates otherwise than as agent or servant of the proprietor or as mortgagee or lessee.

The *first* question for determination is whether the Receiver of the Nidadavole Estate comes within this definition. Both the lower Courts have answered this question in the affirmative and in our opinion rightly, subject to certain remarks which we shall come to presently.

The powers of a Receiver appointed by a Civil Court under Order XL, rule 1 of the Civil Procedure Code (as in the present

case) are entirely conditioned by the terms of his appointment, subject to any subsequent modification by the Court under which he holds the appointment. Clause (*d*) of the rule gives the Court complete discretion as to the powers to be conferred on the Receiver, and the Court may limit his powers in any way it thinks fit. But where the powers conferred amount to general powers of management, the effect of section 4 of Act II of 1894 would appear to be to attach to the Receiver the special powers conferred on a proprietor by the Act, and subject to any restrictions arising out of the terms of his appointment, there can, we think, be no question that he should be regarded as a proprietor within the meaning of the Act.

The appointment order in the present case, Exhibit B, certainly seems to confer general powers of management: and we see no reason why the powers of a proprietor under the Act should not be held to be included in paragraph 4 thereof, which authorises the Receiver to do such other acts as may be necessary for the efficient administration of the property subject to the control of the Court. We see nothing in Exhibit C, the memo. of standing orders for the Receiver's guidance, which should be taken to affect these particular powers. In our opinion the term "establishment" in this connection does not include village officers.

There is, however, an important limitation on the power conferred by paragraph 4 contained in the words "subject to the control of this Court." The Court referred to was the District Court of Godaveri, in the jurisdiction of which the Nidadavole *zamindari* originally lay, and which appointed the Receiver. But all the powers of control exercised by that Court passed to the Sub-Judge of Ellore, to whose territorial jurisdiction the *zamindari* was subsequently transferred. As to what the control signified, it would, in our opinion, be unreasonable to hold that it was intended that no act of the Receiver should be valid without prior sanction or even subsequent approval of the Court: but on the other hand, it clearly includes the power of supervision and a limiting and directing the action of the Receiver in any direction. It is in this sense that the order of the Sub-Judge, Exhibit IX, becomes of vital importance in the present case.

Before this order was passed, we see no reason to doubt that the Receiver was in the position of a proprietor under Act II of 1894 and competent to act as such. It has now to be considered how far his position was modified by that order.

It was passed by the Sub-Judge on March 4th, 1910 (5 days before the appointment of the plaintiffs in these suits) on the petition presented by certain claimants to the Nidadavole Estate, objecting to the action of the Receiver in two directions:

(1) in submitting registers (apparently wrongly called nomination rolls) of village officers under section 5 of Act II of 1894, (2) in consenting to the localisations of certain *mamul* wet lands.

The Receiver appeared as 1st respondent and opposed the petitions.

The power of appointment under section 15 of the Act was not directly in question; but it would presumably stand on the same footing as his power of submitting registers under section 5, and the Receiver in fact seems to have claimed the full powers of a proprietor under the Act.

The Sub-Judge's order is not altogether easy to understand, and paragraph 9 is incomprehensible. But he seems to have interpreted Exhibits B and C as implying that every action of the Receiver (except in the way of granting casual leave) should receive the assent of the Court: and he declares that the Receiver's action in the two instances brought to notice was null and void for want of the previous sanction of the Court.

The correctness of the interpretation of Exhibits B and C is a minor matter. We should certainly not interpret them in that way ourselves, and the difficulties in the way of management under such restrictions are obvious, especially if, as seems to be intended, assent means prior assent. But it is for the Court to say how it will exercise the power of control reserved to it by the appointment order, and it was the duty of the Receiver to obey. It was in this view, that a Bench of this Court, of which one of us was a member, rejected a revision petition

presented by the Receiver against this order (*vide* Exhibit X).

What then was the effect of the order, Exhibit IX, on the Receiver's position as "a proprietor" under the Act? It seems to us that he still remained as he had been before, "a person in lawful management of the Estate": and, therefore, classed as a "proprietor." The purport of the order has already been indicated. It does not contain a prohibition in terms of all unauthorized actions: and even if it be taken that the opinion expressed was meant to be binding on the Receiver, it merely amounts to this. The Receiver was simply saddled with the duty of obtaining the assent of the Court to his every action, a very difficult but not absolutely impossible position.

We are now in a position to consider the legality of the Collector's order, Exhibit VIII, dated 20th June 1910, which it is sought to set aside as illegal. This order holds in effect that the Sub-Judge and not the Receiver is entitled to exercise the powers of a "proprietor" under Act II of 1894, and it directs that in future notices for nominations under the Act should be issued to the Sub-Court only, thus treating the Court as a "proprietor." There are many objections to such a course, as pointed out by the Subordinate Judge, and it seems to us that the Court cannot be deemed to be the "person in lawful management", for it only exercises control over the estate by the appointment of a Receiver and until such appointment is unable to exercise any powers of management (Order XL of the Civil Procedure Code). The order also cancels an order of the Head Assistant Collector accepting nominations to the same 3 *karnamships* by certain claimants to the estate. With this position we have no concern.

The order in so far as it affects the position of the Receiver is entirely illegal, and the decree of the Subordinate Court setting it aside appears to be justified and should be confirmed.

The decisions of both the lower Courts on the 6th issue appear to be correct.

We dismiss these three appeals and memoranda of objections with costs.

*Appeals dismissed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 452 OF 1913.

July 13, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

DHAMSA BAKHSH SINGH—PLAINTIFF—APPELLANT

*versus*

JAGMOHAN SINGH DEFENDANT—RESPONDENT.

*Will, interpretation of—Construction of document—Court, duty of—Hindu widow, Will by, legality of—Reversioner, affirmation by, when validates Will by Hindu widow.*

A Court is bound to give effect to every word of a Will without change or rejection, provided effect can be given to it not inconsistent with the general intent of the whole Will taken together, but if that cannot be done, the general intent has to be pursued, though it may involve the rejection or transposition of a particular superfluous or misplaced word. [p. 210, col. 2.]

Where a Will, after reciting the property of which the testator was the owner, declared that the legatee should be in possession and occupation of the former's entire property, "moveable and immoveable aforementioned, which is or may hereafter be in my possession":

*Held*, that the Will covered the property in which the testator had a reversionary interest on the date of the bequest and which he afterwards inherited, although in his life-time he did not take any steps to acquire its possession. [p. 211, col. 1.]

A Will by a Hindu widow is absolutely void, and no affirmation by a reversioner, unless it amounts to a renunciation by him of his reversionary interest, can validate it. [p. 211, col. 2.]

*Vishvanath Sadashiv* v. *Narayan Ballal*, 5 Bom. L. R. 314 and *Gadadhar Bhat* v. *Chandrabhagabai*, 17 B. 690, referred to.

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 20th June 1913, upholding the order of the Additional Munsif, Sultanpur, dated the 4th April 1913.

Pandit *Brij Narain Chakbast*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The dispute in this case relates to certain property, which originally belonged to two brothers named Gajadhar Singh and Sripal Singh. Gajadhar Singh died in 1871, leaving a widow *Musammat* Phulmani. The Courts below found that Gajadhar Singh and Sripal Singh lived separately. The half share of Gajadhar Singh, therefore, devolved on his widow Phulmani. Her name was not, however, entered in the revenue papers. Acknowledging *Musammat* Phulmani to be

the owner of half the property, Sripal Singh executed a deed formally declaring *Musammat* Phulmani to be the owner of that half with full power of alienation. He bequeathed the remainder in favour of the same lady, giving her an absolute and transferable right. He died in September 1905. *Musammat* Phulmani died in July 1909. She bequeathed her entire property to a relation of hers named Dhamsa Bakhsh Singh. *Musammat* Phulmani had a life-interest in the estate of her husband, and the document executed by Sripal Singh, acknowledging her title, could not enlarge her rights. The Courts below, therefore, held that the bequest of *Musammat* Phulmani could only be enforced in regard to the half share which she obtained from Sripal Singh by bequest, and that the remainder, which she had inherited from her husband, should go to Behari Singh, who was the nearest reversioner of her husband alive at the date of her death. Behari Singh died in 1910, bequeathing the property of which he was then in possession and that of which he might obtain possession thereafter to his nephew Jagmohan Singh. The Courts below gave Jagmohan Singh a decree in respect of that half share.

The learned Counsel for Dhamsa Bakhsh Singh has conceded that he is unable to impugn the finding of the Courts below in regard to the separation between Gajadhar Singh and Sripal Singh. His contention is that the bequest by Behari Singh in favour of Jagmohan Singh did not cover the property in which Behari Singh had a reversionary interest on the date of the bequest and which he inherited afterwards on the death of *Musammat* Phulmani. The bequest was made in 1900. After reciting the property of which Behari Singh was owner, the testator went on to say: "After my death Jagmohan Singh aforesaid shall be in possession and occupation of my entire *zemindari* property entered in *khewat*, and the property, moveable and immoveable aforementioned, which is or may hereafter be in my possession and Jagmohan Singh shall have, generation after generation and descent after descent, power to make every kind of transfer like myself after my death. If any kinsman or person related to or connected with me out of my co-sharers and heirs claims the property bequeathed, his claim should be considered futile by the officer of the Court for the time being." The suggestion made on behalf of Jagmohan Singh (?) is that the use of the word "aforementioned" confined the bequest to the property previously specified in the deed of gift. But if that interpretation were adopted, the reference to the property which might come into the possession of the testator after the date of the Will becomes out of place. In the preamble the testator refers to the *zemindari* property standing recorded in his name in the *khewat* and to the other property including a house, cattle, ornaments, grain, cash and the like of which he was in possession. It is alleged that the property bequeathed by him or any portion thereof was out of his possession, and the word "aforementioned" (*mazkur-us-sadar*) can only be regarded as qualifying the property specified and not as defining that of which he might obtain possession thereafter. By the Will the testator intended to bequeath his entire property, moveable and immoveable, and the words "*ya ayanda ho*" indicate that he wanted to include what he might acquire thereafter. A Court is bound to give effect to every word of the Will without change or rejection, provided an effect can be given to it not inconsistent with the general intent of the whole Will taken together, but if that cannot be done, the general intent has to be pursued, though it may involve the rejection or transposition of a particular superfluous or misplaced word. "The Will," says Williams, "must be most favourably and benignly expounded to pursue, if possible, the intention of the testator. To effectuate, therefore, the clear intention, as apparent upon the whole Will, clerical errors may be corrected, and words and limitations may be transposed, supplied or rejected. But the rule is, that words in a Will are not to be rejected or supplied, unless there cannot be any rational construction of the words as they stand, or the rejection or insertion is necessary to carry out the manifest intention of the Will" (William's Executors and Administrators, 10th Edition, Vol. I, pages 837, 839). Dealing with this matter, Jarman says, "Where a testator used the words, 'I declare again

that I leave everything I die possessed of to my dearest mother, for her entire and sole use and benefit as stated above,' the words 'as stated above' were held not to limit the subject of the bequest, but to mean that the gift was for the sole use, so that the words were superfluous" (Jarman on Wills, 6th Edition, Volume I, page 690). "The word 'such'," he goes on, "is sometimes used as a referential expression meaning 'as aforesaid,' sometimes to refer to what follows after. It frequently happens that the word 'such' is inaccurately used, and must be either rejected or modified, in order to carry out the intention of the testator. Thus, in *Howgrave* v. *Cartier* (1) there was a limitation to children who attained twenty-one, with a gift over if there should be no 'such' children or they should die before any of them attained twenty-one; the word 'such' was rejected as senseless" (*Ibid.*, page 690). The same principle is embodied in sections 69 and 72 of the Indian Succession Act, which lay down that the meaning of any clause in a Will is to be collected from the entire instrument and that no part of a Will is to be rejected as destitute of meaning, if it is possible to put a reasonable construction upon it. Section 64 of the Act similarly declares that where any word material to the full expression of the meaning has been omitted it may be supplied by the context. The words '*ya ayanda ho*' qualify the words '*jaedad manqula wa ghair manqula*' in the same way as the words '*mazkur-us-sadar jo mere qabze men hai*' which precede. The Will, therefore, covers the entire property, which the testator held at the time of his death.

It is immaterial that he did not in his lifetime take any steps to acquire possession. He was examined in the mutation proceedings instituted by Dhamsa Bakhsh Singh on the death of *Musammat* Phulmani. He did not then set up any rights to the property of Gajadhar Singh. There is nothing, however, to show that he was aware of any bequest made by *Musammat* Phulmani in favour of Dhamsa Bakhsh Singh or that he affirmed it, knowing how it affected his rights. It is possible that Behari Singh may have thought that Sripal Singh was the full owner of the property on the death of Gajadhar Singh and had a right to bequeath it to *Musammat* Phulmani. A Will by a Hindu widow is, moreover, absolutely void [*Vishvanath Sadashiv* v. *Narayan Ballal* (2), and *Gadadhar Bhat* v *Chandrabhagabai* (3)] and no affirmation by a reversioner, unless it amounts to a renunciation by him of his reversionary interest, can validate it.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) G. Cooper 66; 13 R. R. 142; 3 V. & B. 79; 35 E. R. 409.

(2) 5 Bom. L. R. 314.

(3) 17 B. 690.

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## MADRAS HIGH COURT.

CIVIL APPEALS NOS. 328 AND 355 OF 1913.

November 19, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN APPEAL NO. 328 OF 1913

T. SITHARAM CHETTY—PLAINTIFF NO. 2—APPELLANT

*versus*

SIR S. SUBRAMANIA AIYER AND OTHERS—PLAINTIFF NO. 1 AND DEFENDANTS—RESPONDENTS.

IN APPEAL NO. 355 OF 1913

THOTTA V. RAMANUJAM CHETTY AND OTHERS—DEFENDANTS NOS. 1 TO 5—APPELLANTS

*versus*

SIR S. SUBRAMANIA IYER AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 6 TO 14—RESPONDENTS.

*Religious Endowments Act (XX of 1863), ss. 7, 12—Temple Committee, powers of—Civil Court, jurisdiction of, to frame scheme—Interpretation of Statute—Subject, right—Regulation VII of 1817—Civil Procedure Code (Act V of 1908), s. 92.*

A Civil Court, while framing a scheme under section 92 of the Code of Civil Procedure for the management of a temple under the control of a Temple Committee, interposed between the trustees and the Temple Committee a body of persons called the Board of Control to supervise the work of the trustees:

*Held*, that the appointment of the Board of Control was an undue restriction of the powers of the Temple Committee and that the Civil Court had no jurisdiction to do it. [p. 216, col. 1; p. 222, col. 1.]

A Civil Court has jurisdiction to frame a scheme for the management of a temple controlled by a Temple Committee appointed under Act XX of 1863. [p. 216, col. 1; p. 222, col 1.]

Per *Wallis, C. J.*—There is nothing in Act XX of 1863 empowering a Court to frame a scheme for the management of temple affairs. [p. 214, col. 1.]

*Karedla Vijayaraghava Perumalayya Naidu* v. *Vemavarapu Sitaramayya*, 26 M. 361, followed.

SITHARAM CHETTY *v.* SUBRAMANIA AIYER.

It is the intention of the Legislature that the extensive powers conferred on the Board of Revenue under Regulation VII of 1817 should be exercised by a Temple Committee and a Court should be very slow to construe the Religious Endowments Act in such a manner as to impede the due exercise of those powers [p. 214, col. 1.]

*Santhalva* v. *Manjanna Shetty*, 7 Ind. Cas. 754; 8 M. L. T. 213; 34 M. 1; (1910) M. W. N. 608; 20 M. L. J. 814, dissented from.

*Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee*, 12 Ind. Cas. 147; 39 C. 304; *Doe* v. *Godwin*, 1 Dowl. & R. 259; *Anantanarayana Ayyar* v. *Kuttalam Pillai*, 22 M. 481; 9 M. L. J. 203; *Reynell* v. *Lewis*, 3 Railw. Cas. 351; 16 L. J. Ex. 25; 15 M. & W. 517 at p. 526; 10 Jur. 1097; 153 E. R. 954; 71 R. R. 751, referred to.

A Court cannot interfere with the statutory powers conferred upon the members of a Committee so as to deprive them of their statutory functions, although it might frame a scheme conditional on legislative sanction being obtained for it. [p. 215, col. 2.]

*Attorney-General* v. *Governors of the Foundling Hospital*, 2 Ves. (Jur.) 42; 4 Bro. C. C. 65; 3 E. R. 514; *In re Shrewsbury Grammer School*, 1 Mac. & G. 324; 41 E. R. 1290; 1 H. & Tw. 401; 19 L. J. Ch. 287; 14 Jur. 259; 84 R. R. 75, referred to.

Per *Seshagiri Aiyar*, *J.*—Moffusil Courts are Courts both of law and equity and they exercise jurisdiction over religious and charitable institutions in the same way as Courts of Chancery do in England. [p. 218, col. 1.]

*Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai*, 1 I. A. 209 at p. 232; *Attorney-General* v. *Brodie*, 4 M. I. A. 190; 6 Moo. P. C. 12; 11 Jur. 137; 1 Sar. P. C. J. 325; 18 E. R. 671; *Mayor of Lyons* v. *East India Company*, 1 M. I. A 175; 1 Sar. P. C. J. 107; 18 E. R. 66; 1 Moo. P. C. 175; 3 State Tr. (N. S.) 647; 43 E. R. 27; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo*, 13 M.I.A 270; 13 W. R. (P. C.) 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552; *Philips* v. *Bury*, (1788) 2 T. R. 346 at p. 352; 100 E. R. 186; *Green* v. *Rutherforth*, 1 Vesey Senior) 462; 27 E. R. 1144; *Attorney General* v. *Governors of Christ's Hospital*, (1896) 1 Ch. 879 at p. 888; 65 L. J. Ch. 646; 74 L. T. 96; 44 W. R. 379; 60 J. P. 246; *In re Endowed Schools Act*, 1869, *In re Christ's Hospital*, 15 A. C. 172; *Clephane* v. *Lord Provost etc. Edinburgh*, L. R. 1 Scotch Appeals 417; *Attorney-General* v. *Dedham School*, (1857) 23 Beav. 350; 26 L. J. Ch. 497; 3 Jur. (N. S.) 325; 5 W. R. 395; 53 E. R. 138; 113 R. R. 169; *Attorney-General* v. *Dixie*, 13 Vesey (Junior) 519; 33 E. R. 388, referred to.

A Court has the power to administer a charitable or religious trust provided it does not unduly interfere with the visitor or the statutory body. [p. 218, col. 2.]

*Stevens* v. *Chown*, *Stevens* v. *Clark*, (1901) 1 Ch. D. 894, 70 L. J. Ch. 571; 84 L. T. 796; 49 W. R. 460; 65 J. P. 470 followed.

There is a general right possessed by a subject to ask a Court's assistance to set right abuses and to have a scheme framed independent of the Statute. [p. 219, col. 1.]

*Karuppa* v. *Arumuga*, 5 M. 383; *Pandara Sannadhi* v. *Kandasami Tambiran*, 10 M. 375; *Subbayya* v. *Krishna*, 14 M. 186; 1 M. L. J. 95; *Rangasami Naicken* v. *Varadappa Naicken* 17 M. 462 at p. 466; *Srinivasa Chariar* v. *Raghava Chariar*, 23 M. 28; 7 M. L. J. 281; *Radhabai* v. *Chimnaji* bin *Ramji Sali*, 3 B. 27, referred to.

It is not intended in Regulation VII of 1817 to give larger powers to a Temple Committee than those possessed by the Board of Revenue and the Committee should not concern itself with the internal management of the institution. [p. 221, col. 1.]

Section 14 of Act XX of 1863 gives only a general remedy to the public. The right of suit under the Act has been purposely restricted because the general right of the subject under the Code of Civil Procedure was not intended to be interfered with. The remedies are cumulative and not exhaustive. [p. 221, col. 2.]

*Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatanbiar*, 7 M. H. C. R. 117; *Kassyvassy Kristna Patter* v. *Vangala Shangaranat Josser*, S. D. A. of 1858 page 39; *Thiruvengadatha Aiyangar* v. *Ponnappaiyangar*, 25 Ind. Cas. 765; 28 M. L. J. 209; *Bheema Raut* v. *Durga Prosad Singh*, 16 Ind. Cas. 908; 17 C. L. J. 182; 40 C. 323; *Venkatesa Nayudu* v. *Shrivan Shatagopa*, 7 M. H. C. R. 77; *Panduranga* v. *Nagappa*, 12 M. 366; *Sankaramurthi Mudaliar* v. *Chidambara Vadan*, 17 M. 143; *Seshadri Ayyangar* v. *Nataraja Ayyar*, 21 M. 179; *Pattikadan Ummaru* v. *Emperor*, 26 M. 243; 2 Weir. 463; *Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswarlu*, 31 M 111; 3 M. L. T 241; *Ramanathan Chettiar* v. *Saminatha Aiyar*, 14 Ind. Cas 520; 23 M. L. J. 278, 12 M. L. T. 155, referred to.

A Civil Court alone has power to frame a scheme and its jurisdiction is not taken away by the creation of Temple Committees. [p. 222, col. 1 ]

Appeals against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 25 of 1912.

FACTS.– The Dharma Rakshana Sabha, presided over by Sir S. Subramania Aiyar, Retired Judge of the Madras High Court as the 1st plaintiff and Mr. T. Seetharama Chetty of Messrs. Moses and Co., brought a suit in the Sub-Court, Trichinopoly, for a scheme to prevent maladministration in the temple of Sri Rangadhaswami at Srirangam. The Sub-Judge held that the statutory functions of the Temple Committee should not be interfered with, but he appointed a Board of Control to supervise the work of the Trustees, and interposed the Board between the Trustees and the Temple Committee. Against this decree an appeal was filed in the High Court on the following grounds :—

(1) That the Civil Court has no power to appoint a body independent both of the Temple Committee and the Trustees.

(2) That the management of the Srirangam Temple having been at first handed over to a hereditary trustee, section 3 and not section 4 of Act XX of 1863 is applicable.

(3) That the Civil Court has no jurisdic-

tion to frame a scheme under section 92 of the Code of Civil Procedure to administer the affairs of a temple under the control of a Temple Committee under Act XX of 1863.

IN A. S. No. 355 OF 1913

Mr. *S. T. Sreenivasa Gopalachariar*, for the Appellant.

Messrs. *T. V. Venkatarama Aiyar*, *P. R. Ganapathi Aiyar* and *C. Padmanabha Aiyangar*, for the Respondents.

IN A. S. No. 328 OF 1913

Mr. *T. Rangachariar*, for the Appellants.

Messrs. *S. T. Sreenivasa Gopalachariar*, *T. V. Venkatarama Aiyar*, *V. C. Seshachariar*, *P. R. Ganapathi Aiyar*, *K. S. Ramabhadra Aiyar*, *T. Narasimha Aiyangar*, *V. Viswanadha Sastri*, *C. Sreenivasa Murthi Aiyar*, *C. Padamabha Aiyangar*, *N. S. Rangarama Aiyangar* and *C. Rajagopala Aiyangar*, for the Respondents.

These appeals and the memoranda of objections filed by the 4th and 7th Respondents in Appeal No. 328 of 1913 and by the 1st Respondent in Appeal No. 355 of 1913 coming on for hearing on 1st, 4th, 5th, 6th and 7th October 1915 and having stood over for consideration till the 15th October 1915, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—These are appeals from a decree of the Subordinate Judge of Trichinopoly framing a scheme for the management of the temples at Srirangam. The case is one of great importance, because this is admittedly the first time a scheme has been framed under what is now section 92 of the Civil Procedure Code for a temple subject to a Temple Committee under Act XX of 1863. In the lower Court all parties appear to have been willing that a scheme should be framed, but on appeal objection has been taken on behalf of the Committee to the scheme approved by the Court, on the ground that it is not open to the Court to frame a scheme of this sort interfering with the statutory management of the Temple Committee. It will be convenient in the first place to consider the position of the Temple Committee under the Statute, more especially as the Subordinate Judge in approving of the introduction of a new governing body known as the Board of Control has been influenced by the fact that in his view the powers of the Temple Committee are of a very restricted character. Prior to Regulation VII of 1817, the British Government and the Hindu Rulers before them had exercised powers of a visitatorial character over such foundations. See *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (1). Under that Regulation, which was framed for the due appropriation of the rents and produce of lands granted for the support of Hindu temples, etc., certain statutory powers and duties were conferred upon the Board of Revenue. Under section 2 they were charged with a general superintendence of all endowments in land or money granted for the support of Hindu temples. Under sections 3 and 5 a duty was imposed on them of seeing that the endowments are appropriated to the purposes for which they were granted and to the repairs of the buildings, and under section 4 they were empowered to dispose of buildings which could not be repaired. Sections 7 to 10 provide for enquiries and reports to the Board by its local agents. Sections 11 to 14 are important. Under section 11 the local agents are to report to the Board all vacancies in the office of trustees, managers or superintendents, whether these officers are hereditary or have been in the nomination of Government, and in the latter case to recommend fit and proper persons for the approval and confirmation of the Board. On the receipt of the report under section 12, section 13 requires the Board either to appoint the persons so nominated or "to make such other provision for the trust, management or superintendence as may seem to them right and fit with reference to the nature and conditions of the endowment" after obtaining any further information they may require. The Board actively exercised all these powers until the year 1841 or 1842 when, in deference to strong objections which were taken to this course by certain persons in England, the Board were ordered to withdraw as far as possible from the active management of Hindu temples. No alteration, however, was made at the time in their statutory powers and duties under the Regulation and it was not until the passing of Act XX of 1863 that the situation was regularised and the powers exercised by

(1) 1 I. A. 209 at p. 232.

the Board under the Regulation were transferred to Temple Committees constituted under that Act in the case of temples in which the nomination of the trustee, manager or superintendent thereof at the time of the passing of this Act (1863) was vested in or subject to the confirmation of Government. This is the effect of section 3 and sections 7 to 12 of the Act, sections 4 to 6 dealing with cases in which the right of appointment was not vested in Government. Section 13 imposes upon all trustees, managers and superintendents the duty of keeping accounts and empowers and requires the Temple Committees to require the production of such accounts at least once a year. Lastly sections 14 and 18 provide for the institution with the preliminary leave of the Court of suits by persons interested against trustees, managers or superintendents or members of the Temple Committees for any misfeasance, breach of trust or neglect of duty, and empower the Courts to direct specific performance of any act and to award damages, and to remove the trustee, manager, or superintendent. These sections do not empower the Court to frame a scheme for the management of the temple affairs, *Karedla Vijayaraghava Perumalayya Naidu* v. *Vemavarapu Sitaramayya*(2)

It was, in my opinion, clearly the intention of the Legislature that the extensive powers conferred on the Board of Revenue should be exercised thereafter by the Temple Committees and I think the Court should be very slow to construe the Act in such a manner as to impede the due exercise of these powers. I am, therefore, with great respect unable to agree with the decision in *Santhalva* v. *Manjanna Shetty* (3), which was cited as showing the necessity for a scheme and which decides, if I rightly understand it, that the powers of the Committee are suspended by the occurrence of a vacancy among its members. No authority is cited in judgments in support of this view and the decision has been dissented from in *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee* (4) on the authority of an English case, *Doe* v. *Godwin* (5), which is directly in point. This also appears to me not to be in accordance with the principles laid down in *Anantanarayana Ayyar* v. *Kuttalam Pillai* (6) as to the Committee being governed by the rules applicable to corporations. The term "Committee," said Pollock, C. B., in *Reynell* v. *Lewis* (7), 'means an individual or body to which others have delegated a particular duty," and I can see no reason why the remaining members constituting a majority should not be able to act during a vacancy. In the absence of any decisive authority the other way the argument *ab inconvenienti* is, in my opinion, sufficient to show that such must have been the intention of the Legislature.

Further, with reference to the numerous decisions of this Court relating to the powers of the Committee to which Mr. Ganapathy Iyer has called our attention in the course of his exhaustive argument as showing the necessity for a scheme, I cannot help saying with great respect that some of those decisions appear to me to fetter the Committee unduly, and I think that the able judgment of Davies, J., in *Seshadri Ayyangar* v. *Nataraja Ayyar* (8) with which Collins, C. J., agreed in the main and the recent decisions in *Venkatachala Pillai* v. *Taluq Board, Saidapet* (9) and *Thiruvengadatha Aiyangar* v. *Ponnappaiyangar* (10) are more in conformity with the terms of the Act and the intention of the Legislature.

It is necessary to consider one of these decisions more particularly, as the contention has been raised for the 1st plaintiff that the Temple Committee has no power over the Srirangam Devasthanam, because at the coming into force of the Act of 1863, one of the trustees under an arrangement made by the Board of Revenue had become hereditary as held in *Ganapathi Ayyar* v.

(2) 26 M. 361.
(3) 7 Ind. Cas. 754; 34 M. 1; 8 M. L. T. 213; (1910) M. W. N. 608; 20 M. L. J. 814.
(4) 12 Ind. Cas. 147; 39 C. 304.
(5) 1 Dowl. & R. 259.
(6) 22 M. 181; 9 M. L. J. 203.
(7) 15 M. & W. 517 at p. 526; 3 Railw. Cas. 351; 16 L. J. Ex. 25; 10 Jur. 1097; 153 E. R. 954; 71 R. R. 751.
(8) 21 M. 179.
(9) 10 Ind. Cas. 304; 34 M. 375; (1911) 1 M. W. N. 204; 21 M. L. J. 305.
(10) 25 Ind. Cas. 965; 28 M. L. J. 209.

*Sri Vedavyasa Alasinga Bhattar* (11). That one trusteeship is hereditary is no doubt *res judicata* as between the Committee and the hereditary trustee by reason of that decision. Mr. T. V. Venkatrama Aiyar who appeared for the Committee stated that there is evidence to show that the Board never appointed any hereditary trustee and alleged that they had no power to do so in the exercise of the statutory authority under section 13 of the Regulation. This was apparently the opinion of Sir Charles Turner in *Appasami* v. *Nagappa* (12), though the opposite view was taken in *Venkatesa Nayudu* v. *Shriran Shatagopa* (13) and followed in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (11). As to this I will merely observe that *Sheik Davud Saiba* v. *Hussein Saiba* (14) is no authority for the proposition for which it is cited in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (11) and *Santhalva* v. *Manjanna Shetty* (3) that where the Board made one of the trusteeships hereditary, it deprived itself of authority to appoint additional trustees. The immediate question here is whether this Devasthanam is subject to the Temple Committee. It was not questioned in *Seshadri Ayyangar* v. *Nataraja Ayyar* (8) and *Ganapathi Ayyar* v. *Sri Vedayasa Alasinga Bhattar* (11), that it is so subject, and it is admitted by the 1st plaintiff in his plaint in the present case. Further, it is, I think, clear that sections 3 and 4 of the Act of 1863 were introduced to cover all classes of cases, and even assuming that in 1863 one of the trustees was hereditary and the other two were nominated by the Temple Committee, I think the case comes under clause 3 rather than under clause 4. In any other view I should feel bound to consider whether the decision in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (11) can be supported.

This objection being overruled, we have next to consider whether it is competent and desirable that the scheme framed by the Subordinate Judge should be approved with or without modifications. Now as to this I take it the Court cannot interfere with the statutory powers conferred upon the members of the Committee so as to deprive them of their statutory functions [see *Attorney-General* v. *Governors of the Foundling Hospital* (15)], although following the practice of the Court of Chancery it might frame a scheme conditional on legislative sanction being obtained for it, as to which see *In re Shrewsbury Grammar School* (16). The decision in *Attorney-General* v. *Wyggeston's Hospital* (17) which appeared to go further was disapproved in *Attorney-General* v. *Payne* (18). In my opinion, the most helpful authority cited before us was the judgment of Chitty, J., in *Attorney-General* v. *Governors of Christ's Hospital* (19). The learned Judge observed: "I prefer to state my own opinion broadly. I hold that it is beyond the jurisdiction of the Court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the Court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts *cypres*, upset the constitution of the present governing body, or, by transferring their powers and duties of

(11) 29 M. 534; 16 M. L. J. 435; 1 M. L. T. 127.
(12) 7 M. 499 at p. 509.
(13) 7 M. H. C. R. 77.
(14) 17 M. 212; 4 M. L. J. 48.
(15) 2 Ves. (Jun.) 42; 30 E. R. 514; 4 Bro. C. C. 165.
(16) 1 Mac. & G. 324; 41 E. R. 1290; 1 H. & Tw. 491; 19 L. J. Ch. 287; 14 Jur. 259; 84 R. R. 75.
(17) 12 Beav. 113; 50 E. R. 1003; 85 R. R. 40.
(18) (1859) 27 Beav. 168; 54 E. R. 65; 122 R. R. 357.
(19) (1896) 1 Ch. 879 at p. 888; 65 L. J. Ch. 646; 74 L. T. 96; 44 W. R. 379; 60 J. P. 246.

admininistering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than Act of Parliament will suffice."

That case, however, does not go so far as to decide that the Court cannot frame any scheme at all for a charity under statutory management on the contrary, although as observed in the judgment no case of breach of trust or maladministration of any kind was suggested by the Attorney-General against the governing body, and there was no case of failure of the trusts or of the charitable objects of the endowments, the learned Judge, whilst rejecting the Attorney-General's scheme, still held himself at liberty to sanction the scheme submitted by the governors themselves proposing certain alterations to meet the altered circumstances of the time. Following that decision, I think we are entitled in the present case to come to the assistance of the Committee and to introduce certain changes which, under the decisions it is not now open to the Committee to introduce and which are admitted by them to be desirable. Further than this I do not feel justified in going.

The result is that the management will remain in the trustees subject to the statutory superintendence of the Temple Committee and the proposed Board of Control must go. As regards the number of the trustees we think we may enable the Committee to do that which under the decision in *Ganapathi Ayyar* v. *Sri Vedaryasa Alasinga Bhattar* (11) they can no longer do of themselves *viz.*, to appoint two additional trustees, but the nomination must be in the Committee pursuant to the Statute. We may also provide that in future trustees shall hold office for 5 years. This, it is admitted, is one of the most urgent reforms, and the competency of the Committe to introduce it of themselves has been questioned. The proposed treasurer must also be disallowed as an independent officer but we think it desirable that a paid officer of the trustees should be appointed to perform duties similar to those assigned to the treasurer but under the trustees. As regards finance we think it should be the duty of the trustees to prepare a budget annually and submit it to the Committee under whose superintendence they are. We also think an audit should be insisted on. It has been arranged that the 1st plaintiff should submit a revised scheme or schemes on these lines in one month. There will be no order as to costs in this Court.

SESHAGIRI AIYAR, J.—I agree with my Lord. If I travel over the same ground in my judgment, it is because the points raised in appeal are of far-reaching consequences.

Two questions have been raised affecting, to a great extent, the jurisdiction of the Civil Courts. Mr. Venkatrama Aiyar on behalf of the Committee broadly contended at the outset that the scheme sanctioned by the Subordinate Judge was within the powers of the Trichinopoly Temple Committee and that consequently it is *ultra vires* of the Civil Courts to frame a scheme. A somewhat modified contention was advanced at a later stage, that all the provisions in the scheme which interfered with the statutory powers of the Committee should be deleted. Mr. Rangachariar was prepared to support the Committee's contentions only to this extent. On the other hand Mr. Ganapathi Aiyar on behalf of the Dharma Rakshana Sabha argued that the Trichinopoly Temple Committee had no jurisdiction over the Srirangam Temple, as at the time of the passing of Act XX of 1863, there was a hereditary trustee. This contention, if accepted, would leave the Courts unfettered regarding the settlement of a scheme. It is necessary to give a ruling on these preliminary points before considering the merits of the case.

I shall first deal with Mr. Ganapathi Aiyar's contention. I agree with him that the expression "the nomination of the trustee, manager or superintendent thereof" in section 3 includes the entire body of trustees, managers or superintendents [see *Perry* v. *Jackson* (20)]. But it is doubtful whether it was competent to the Board of Revenue under Regulation VII of 1817 to divest themselves of all responsibility for management by handing over the affairs of a Devasthanam to hereditary trustees. The language of section 13 of the Regulation, which confers

(20) 4 T. R. 516; 100 E. R. 1150.

general powers to adopt measures for carrying out the objects of the trust, must be restricted to the cases for which a report is to be called for under the preceding sections. However that may be, I feel no doubt that the Committee has jurisdiction over this temple. There have been numerous suits to which the Committee and the trustees were parties in which it was held that the temple was under the jurisdiction of the Temple Committee, *e. g.*, *Seshadri Ayiyangar* v. *Nataraja Ayyar* (8), *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* (11), etc. These decisions are binding on the Committee and the trustees. The plaintiffs in the present case admit that the temple falls under section 3 of Act XX of 1863. They are not entitled to recede from that position. Moreover, the documents to which our attention was drawn show that only the right to select a trustee was given to the family of the Sthalathars, and that the selection was subject to the approval of the Board of Revenue. It cannot, therefore, be contended that the Board of Revenue created a hereditary trustee over whose appointment they had no control. If this question had been raised in proper time, evidence might have been forthcoming to show that the term hereditary has been loosely applied in this case. I agree with the learned Chief Justice that this temple comes under section 3 of Act XX of 1863 and that the Committee has jurisdiction over it.

The question whether the aid of the Civil Courts can be invoked to frame a scheme when a statutory body like the Temple Committee has the right of superintendence is a far more difficult one.

There is no reliable data regarding the exercise of supervision by the ancient kings of the land over temples. The text of Narada which says " * * * * * * * * * * " "that a king can reduce to slavery a *sanyasin* who is guilty of incontinence," seems to suggest that over religious bodies and institutions, the king had a general power of supervision. Beyond this cryptical saying, there seems to be no authority regarding the jurisdiction of the ancient sovereigns over Hindu temples. When and at what stage the ancient sovereigns exercised superintendence over religious institutions, it is not necessary to consider. In *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (1) the Judicial Committee say that such jurisdiction existed in ancient times. Consequently they very early came to the conclusion that the king as *parens patriæ* should protect the religious institutions from malversation in the same way that he looked after the rights of his lay subjects. Lord Brougham in *Mayor of Lyons* v. *East India Company* (21) says: "The jurisdiction of the Court, moreover, extends over all British subjects residing within the limits of the Charter, whether in the British or native dominions, and this affords facilities for the execution of the charity under the Court's superintendence, which could not exist in any of the cases cited." In *Attorney-General* v. *Brodie* (22), Lord Langdale pointed out that the Supreme Court had an equitable jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities. There is no doubt that the Mofussil Courts had similar powers. In *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (23), which was an appeal from a Mofussil Court, their Lordships of the Judicial Committee proceeded on the footing that Civil Courts had jurisdiction to see that temple funds were properly applied. It is clear from the Charter granted to the East India Company that they were authorised "to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal, according to the laws of the *kingdom* and to execute justice accordingly" (Charter of Charles II in 1661). This authority was confirmed by the subsequent Charters. Their history is fully set out in Cowell's Courts and Legislative authorities in India, and in Ilbert's Government of India. I do not propose to attempt a summary of the various Regulations here. Their purport is best expressed in section 16 (*c*) of the Madras Civil Courts Act: "In case where no specific rule exists, the Courts shall act according to justice, equity

(21) 1 M. I. A. 175 at p. 296; 1 Sar. P. C. J. 107; 18 E. R. 66 at p. 12; 1 Moo. P. C. 175; 3 State Tr. (N. S.) 647; 43 R. R. 27.

(22) 4 M. I. A. 190; 6 Moo. P. C. 12; 11 Jur. 137; Sar. P. C. J. 325; 18 E. R. 671.

(23) 13 M. I. A. 270; 13 W. R. (P. C.) 18; 2 Suth. P. C. J 300; 2 Sar P. C. J. 528; 20 E. R. 552.

and good conscience." This clause only embodies the principle which has been recognised by the British Government from the beginning of its administration of civil and criminal justice in India. It is not necessary to cite authorities for the position that the rule of equity and justice had to be found in the decisions of the English Courts. My conclusion is that the Mofussil Courts in India were Courts of both law and equity and that they exercised jurisdiction over religious and charitable institutions in the same way as Courts of Chancery did in England.

I shall next consider whether the Court of Chancery in England would have had jurisdiction to frame a scheme like the one we are now considering, with special reference to the fact that the Temple Committees as statutory bodies had certain powers delegated to them. It was pointed out in *Rajah Muttu Ramalingal*v. *Perianayamgum Pillai* (1) that the powers delegated to the Board were analogous to the powers conferred on *visitors* in England. The nature of the powers possessed by visitors is not easily ascertainable. In *Philips* v. *Bury* (24) Holt, C. J., thus describes the functions of a visitor: "An authority to inspect the actions and regulate the behaviour of the members that partake of the charity, * * * * * * * * * * to prevent all perverting of the charity, or to compose differences." In Tudor on Charities, the visitatorial tribunal is described as "a domestic forum, the Court of the founder." It was pointed out in *Green* v. *Rutherforth* (25) that the visitor's powers are circumscribed by those given him by the Statute. He should not exceed or depart from them.

Having ascertained to some extent the nature of the duties cast on the visitor, I shall now consider whether the contention that the Courts are powerless when a statutory body is created whose powers are analogous to those of the visitor in England is well founded. The decision in *Attorney General* v. *Governors of Christ's Hospital* (19) was strongly relied on by the appellant. The observations of Chitty, J., do not deny jurisdiction to Civil Courts, although they fetter its exercise a great deal. The language of the Charter and of the Act of Parliament commented on in that case are not before us. Moreover, certain facts are mentioned in the judgment which rendered it inequitable for the Court to interfere. His Lordship says: "To whatever lengths the Court may have gone, it has never assumed legislative authority." From the subsequent reference to the provisions of the Attorney-General's scheme, it is apparent that the learned Judge held on the merits that that scheme should not be accepted. I do not think this case is authority for denying jurisdiction to the Courts altogether. *In re Endowed Schools Act* 1869, *In re Christ's Hospital* (26) does not carry the matter any further. *Clephane* v. *Lord Provost, of Edinburgh* (27) only lays down that the purposes of the trust cannot be altered by the Courts. In *Attorney-General* v. *Dedham School* (28) the Master of the Rolls ruled that where the founder had conferred specific powers on a visitor regarding internal management, the Court should not interfere with such powers. In *Attorney-General* v. *Dixie* (29) the Lord Chancellor says: "I have long been perfectly satisfied that this Court has jurisdiction." The above cases do not sustain the proposition contended for by the appellant that the Court is deprived of jurisdiction by reason of the existence of a visitor or of a statutory body to control the affairs of a trust.

On the other hand, it seems well established that the power is in the Court to administer a charitable or religious trust provided it does not unduly interfere with the visitor or the statutory body. In *Stevens* v. *Chown*, *Stevens* v. *Clark* (30) Farwell, J., quotes with approval Willes, J.'s classification of liabilities relating to trusts: "There is that class where there is a liability existing at Common Law, and which is only re-enacted

(24) (1788) 2 T. R. 346 at p. 352; 100 E. R. 186.
(25) (1750) 1 Vesey, (Senior) 462; 27 E. R. 1144.
(26) (1889) 15 A. C. 172.
(27) L. R. 1 Scotch Appeals 417.
(28) (1857) 23 Beav. 350; 26 L. J. Ch. 497; 3 Jur. (N. S.) 325; 5 W. R. 395; 53 E. R. 138; 113 R. R. 169.
(29) 13 Vesey, (Junior) 519; 33 E. R. 388.
(30) (1901) 1 Ch. 894; 70 L. J. Ch. 571; 84 L. T. 796; 49 W. R. 469; 65 J. P. 470.

by the Statute with a special form of remedy; there, unless the Statute contains words necessarily excluding the Common Law remedy, the plaintiff has his election of proceeding either under the Statute or at Common Law. Then there is a second class, which consists of those cases in which a Statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at Common Law to enforce it. The third class is where the Statute creates a liability not existing at Common Law, and gives also a particular remedy for enforcing it." In my opinion, the Temple Committees come under the first of these classes. I have already referred to the right possessed by the Crown over all religious institutions. The general right possessed by the subject to ask the Court's assistance to set right abuses and to have a scheme framed independent of the Statute has been recognised in numerous decisions. See *Karuppa* v. *Arumuga* (31), *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (32), *Subbayya* v. *Krishna* (33), *Rangasami Naicken* v. *Varadappa Naicken* (34), *Srinivasa Chariar* v. *Raghava Chariar* (35) and *Radhabai* v. *Chimnaji* bin *Ramji Sali* (36). Therefore the powers of the Committee are not exclusive. The observations of Farwell, J., are very apposite to this class of cases: "Now, if I find that the Statute enacts, either by way of new creation or by way of re-statement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so." In *Attorney-General* v. *Wyggeston's Hospital* (17) Lord Langdale, the Master of the Rolls, had to consider the rights of a governor of a hospital. His Lordship held that greater powers were given to him than was warranted by the original Charter. Then he proceeds: "Even if it should appear to be otherwise, and that this was within the power, nevertheless, if in the course of the 200 or 300 years, by acting upon the power, it has turned out, and is shown by experience, to be prejudicial to the objects of the charity, to the extent of giving an equal benefit to persons who are not objects of the charity—namely, to the lessees, for it comes to that—then I think that this Court could not avoid saying, that the circumstances were so changed that the interests of the charity and of the hospital required a new mode of conducting the business and affairs of the charity." These observations apply *mutatis mutandis* to the present case. If after 50 years of administration by the Committee, the Court finds that circumstances have taken place which demand a remodelling of the machinery originally employed, I do not think we are powerless simply because a statutory body had certain powers conferred on it suited to the exigencies of the situation as it then existed.

In *Attorney-General* v. *St. Cross Hospital* (37) Sir John Romilly says: "The only remaining point, then, on this part of the case is, whether the jurisdiction of this Court is taken away by reason of the visitorship of the Bishop of Winchester. If this were the law, it would be very unfortunate, for it does not require the history of this case to teach us that the visitorship, vested in any one, whether a corporation sole or aggregate, or the heir of the founder, is a mere nominal office, *the duties and functions of which are rarely, if ever, spontaneously performed.* But the law is not so. Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a Common Law office and Common Law duties to perform, and does not superintend the performance of the trust which belong to the various officers, which he may take care to see are properly kept up and appointed. *Green* v. *Rutherforth* (25), the case of the *Berkhampstead Free School*, *Ex parte* (38)

(31) 5 M. 383.
(32) 10 M. 375.
(33) 14 M. 186; 1 M. L. J. 95.
(34) 17 M. 462 at p. 466.
(35) 23 M. 28; 7 M. L. J. 281.
(36) 3 B. 27.

(37) 17 Beav. 435; 22 L. J. Ch. 793; 1 W. R. 525; 51 E. R. 1103; 99 R. R. 228.
(38) 2 Ves. & Bev. 134; 35 E. R. 270; 13 R. R. 43.

and several other cases expressly establish the authority of this Court in cases of trusts, and the duty of this Court to see that they are properly performed, notwithstanding that there may be a special or a general visitor." I have made this lengthy extract because it seems to me that in India under the superintendence of Temple Committees we have reached a position where "the duties and functions are rarely if ever spontaneously performed." The written statement of the Committee in this case shows how powerless the Committee were in carrying out their duties, and how little they did or endeavoured to do. It would be disastrous in this country if Courts were to refuse to intervene on the ground that a statutory body has been created to exercise supervision over the trusts.

At the same time, I concede that in formulating a scheme, the Courts should not unduly interfere with the powers entrusted to Committees. The cases quoted by the learned Vakil for the Committee establish that position. *In re Shrewsbury Grammar School* (16) *Attorney General* v. *Aspinall* (39), *Attorney-General* v. *Mayor of Dublin* (40) and *Attorney General* v. *Governors of the Foundling Hospital* (15). The learned Vakil for the Sabha did not seriously contest this position. His argument was directed to showing that the Board of Revenue and their successor, the Committee, had only certain limited powers, and that neither the Regulation nor the Act took away the plenary jurisdiction possessed by the Court. I shall now very briefly examine the provisions of these two Statutes mainly with a view to see how much of the scheme of the Subordinate Judge should be accepted.

The preamble to the Regulation refers to the ground for believing that the produce of the endowments "is in many instances appropriated contrary to the intentions of the donors," and speaks of the duty of the Government to see to its proper application. The *duty*, I take it, is that of the *parens patriæ*. In *Duke of Beaufort* v. *Berty* (41) Lord Macclesfield, Lord Chancellor, says that the protection of children was assumed by the Court of Chancery in analogy of its powers over trusts. Consequently, the care of trusts seems to have been regarded as the first duty of the king. It was, therefore, very early held in Madras that the remedies under the Regulation were not exhaustive but only supplementary of the ordinary remedies. *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar* (42). See also *Kassyvassy Kristna Putter* v. *Vangala Shangaranat Josser* (43). I do not think that the view to the contrary held in *Bheema Raut* v. *Durga Prosad Singh* (44) is consistent with the history of the temple legislation in this country. I shall now deal with the other sections of the Regulation. Section 2 is the most important of them. The right of general superintendence is wide enough to include the power to appoint additional trustees. I am in agreement with the decision in *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar* (10). Even in *Ganapatthi Ayyar* v. *Sri Vadanyasa Alasinga Bhattar* (11) Sir S. Subramania Ayyar, J., says that such appointments can be made for good and sufficient cause. I infer the power to appoint additional trustees from sections 12 and 13 read with section 2. It is not necessary in this case to consider the exact nature of the rights conferred on the Committees by section 2: whatever may be involved in the term *superintendence*, I am of opinion that some of the decisions of this Court to which I shall refer later on have not been shown to be wrong in placing a limit on its import. Further, the right of superintendence must be limited to the exercise of the powers conferred on the Board or on the Committee whose jurisdiction is analogous to that of the visitor in England. Sections 3 to 10 do not call for special notice. Sections 11 to 13 are important. Section 11 requires local agents to report to the Board vacancies and casualties, the names of the persons claiming to be trustees and the mode in which previous appointments were made. Section 12 deals with cases in which the

(39) 7 L. J. Ch. 51; 1 Jur. (N. S.) 812; 2 Mylne & Carig. 613; 40 E. R. 773; 45 R. R. 142.
(40) 1 Blig. (N. S.) 312; 4 E. R. 888; 30 R. R. 43.
(41) 1 Peere Williams 702; 24 E. R. 579.

(42) 7 M. H. C. R. 117.
(43) S. D. A. of 1858 p. 39.
(44) 16 Ind. Cas. 908; 49 C. 323; 17 C. L. J. 183.

Government had the exclusive power of appointment and requires the local agent to suggest names. The 13th section deals with the duties of the Board on the receipt of such reports. It seems to me that the clause "or made such other provision for the trust, etc." should be confined to the appointment contemplated in sections 11 and 12. As I said before, they do not seem to warrant the construction that the Board can appoint hereditary trustees by virtue of this clause so as to deprive themselves of all control over them. Section 14 gives a right of suit to persons aggrieved by the exercise of the powers vested in the Board.

Coming to the Act, it must be premised that it was not the intention of the Legislature to give larger powers to the Committee than was possessed by the Board. Sections 3 and 7 entrust to the care of the Committees all the institutions which were under the control of the Board of Revenue. A feeble attempt was made to show that the Committee could hold possession of the trust property. Section 12 which refers to the transfer of the possession of properties does not provide for the vesting of the properties in the Committee. On the other hand, sections 11 and 13 which speak of the duties of the trustees to keep accounts make it clear that the Committee was not to hold properties.

The course of decisions on this subject is well established in this Presidency. Speaking for myself, I feel no hesitation in saying respectfully that they are perfectly sound. See *Venkatesa Nayudu* v. *Shri Shadagopa Swami* (13), *Panduranga* v. *Nagappa* (45), *Sankaramurti Mudaliar* v. *Chidambara Nadan* (46), *Seshadri Ayyangar* v. *Nataraja Ayyar* (8), *Pattikadan Ummaru* v. *Emperor* (47), *Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswarlu* (48) and *Ramanathan Chettiar* v. *Saminatha Aiyar* (49). It has also been held that the Committee should not concern itself with the internal management of the institution. *Mayandi Chetti* v. *Oliver* (50) and *Subba Naidu* v *Gopalaswamy Naidu* (51). It stands to reason that when there is a trustee who is responsible for the management of the properties and for their application, his control over the servants of the establishment should not be interfered with by the Committee. The very limited power as to accounts given by the second clause of section 13 to the Committee bears out this position. It is doubtful whether the decisions which lay down that no accounts should be called for from hereditary trustees are right. See *Venkatabalakrishna Chettiyar* v. *Kaliyanaramaiyangar* (52), *Fakurudin Sahib* v. *Ackeni Sahib* (53). Section 13, clause 2, refers to all trustees whether hereditary or otherwise. Section 14 has been much debated during the argument. It is a limited remedy that is given by this section to the public. It only empowers the Court to direct the specific performance of duties which have been neglected. Such duties have also been specified. To my mind, the right of suit under the Act has been purposely restricted because the general right of the subject under the Code of Civil Procedure was not intended to be interfered with. The remedies are cumulative and not exhaustive. See *Nelatooru Venkatarangacharyulu* v *Nelathur Krithnamacharyulu* (54). The above examination of the sections of the Regulation and of the Act shows that the power of settling a scheme is not within the competence of the Committee. It is only by virtue of the section 92 of the Code that this remedy can be invoked. In considering the details of the scheme Mr. Ganapathi Aiyar contended that as the body of the trustees will be *functus officio* if one member of it dies, there should be a Board of Control to avoid an *interregnum*. *Santhalva* v. *Manjanna Shetty* (3) no doubt lays down that the death or removal of one of the members incapacitates the others from carrying on the duties of the Committee. With the greatest deference, I am unable to accept this conclusion. The decision in *Doe* v. *Godwin* (5) quoted in *Raghunandan*

(45) 12 M. 366.
(46) 17 M. 143.
(47) 26 M. 243; 2 Weir. 463
(48) 31 M. 111; 3 M. L. T. 241.
(49) 14 Ind. Cas. 520; 23 M. L. J. 278; 12 M. L. T. 155.
(50) 22 M. 261; 8 M. L. J. 196.
(51) 15 M. L. J. 185.
(52) 5 M. H. C. R. 48.
(53) 2 M. 197.
(54) 20 Ind. Cas. 515; 37 M. 184; 14 M. L. T. 44; 24 M. L. J. 697.

*Ramanuja Das* v. *Bibhuti Bhushan Mukerjee* (4) was apparently not brought to the notice of the learned Judges who decided *Santhalva* v. *Manjanna Shetty* (3). In my opinion the statutory body does not become extinct by reason of changes in its constitution.

As in my opinion, the Civil Court alone has power to frame a scheme, and its jurisdiction is not taken away by the creation of the Temple Committee, I shall now proceed to examine the details of the scheme.

The first question for consideration is whether there should be a Board of Control. In my view the powers intended to be conferred on the Board of Control would unduly interfere with the rights of the Temple Committee. In the Conjeevaram scheme the Board of Control was held necessary because the institution was not subject to the control of the Temple Committee. I am clearly of opinion that all provisions in the scheme relating to the Board of Control should be omitted. For the same reason I am of opinion that no right of management should vest in the treasurer. This would be virtually adding to the number of trusteee. I would, therefore, recast clause 3 thus: "that the administration of the Devasthanam shall vest in a Board of Trustees subject to the control of the Committee." Clauses 4 to 7 should be omitted in this view. A great deal of discussion centred on the question whether there should be a Vadagalai trustee for this temple. It is true, as pointed out by Mr. Rangachariar, that the Vadagalai trustee whenever he had an opportunity endeavoured to subvert the uses of the institution by showing his partiality towards the usages of his own section. But ever since 1893 when the present Vadagalai trustee was appointed, no serious complaints of such a nature have been made against him. Moreover, although the temple is mainly Thengalai, the *archakas* and *paricharakas* are Vadagalais and there are a large number of Vadagalai *mirasi* offices in this Temple. In order that their interests might be safeguarded, there should be a Vadagalai trustee. We see no reason for disagreeing with the Subordinate Judge in regard to this matter.

As a counterblast to the argument of Mr. Rangachariar, Mr. Narasimha Aiyangar contended that as there is a hereditary Thengalai trustee there was no necessity for the appointment of another Thengalai trustee. The history of this institution shows that the hereditary Thengalai trustee is not a person on whom the Thengalais can rely to protect their interests. Undoubtedly the Thengalai rights are predominant in this temple; the Subordinate Judge was, therefore, right in providing for the appointment of an additional Thengalai trustee. No serious objection was taken by any of the contending parties for the inclusion in the Board of Trustees of a Smartha and a Madhwa. It is to be hoped that their presence would tend to compose the differences between the two rival sects of Vaishnavas. We do not think that the provision for the appointment of the Sivite and Madhwa trustees by the Court is necessary. The Committe should have the same power with regard to them as they have with reference to the other three trustees. As regards clause 12, in the view that we have taken about the office of the treasurer and having regard to the representations that have been made regarding the funds of the Devasthanam we are of opinion that instead of a treasurer, the trustees should be directed to appoint a cashier on a salary of Rs. 75-0-0 per mensem. Clause 4 which confers certain powers of supervision and control on the treasurer should be modified by investing the Board of Trustees with those powers. Clause 16 should be modified in a similar manner. In addition to the provisions contained in the scheme we think it necessary that the Board of Trustees should once a year prepare a balance sheet of the accounts of the Devasthanam and publish it for the public in the local Gazette. The scheme should be modified as above indicated. As was done with reference to the Conjeevaram scheme, we think liberty should be given to any of the trustees or any member of the Committee or to the 1st plaintiff in this case to move the Court for such alterations in the scheme as seem desirable in the light of the experience that may have been gained of its working.

These appeals and the memoranda of objections by the 4th and 7th respondents in Appeal No. 328 of 1913 and by the 1st respondent in Appeal No. 355 of 1913

coming on for final hearing after the submission of the revised scheme by the 1st plaintiff, the Court delivered the following

JUDGMENT.—The scheme brought in by the 1st plaintiff is accepted by us subject to certain modifications. The scheme as finally approved:—

*General.*

1. The Temple of Sri Ranganadhaswami at Srirangam and the minor temples and shrines attached thereto (inclusive of the temple of Sri Pundarikaksha Perumal at Tiruvallarai) and constituting with the said temple the Srirangam Devasthanam and all the properties, moveable and immoveable, which have been or may hereafter be dedicated to the said deity are and shall be vested in the Sri Ranganadhaswami deity.

2 (*a*) The word "Court" in this scheme and in the rules that may be framed under this scheme shall mean the Subordinate Judge's Court at Trichinopoly or such other Court of original civil jurisdiction of the lowest grade as may have jurisdiction under section 92 of Act V of 1908.

2(*b*) The word "Committee" shall mean Trichinopoly Taluq Devasthanam Committee formed under Act XX of 1863.

2(*c*) The expression "Sri Ranganadhaswami Devasthanam" herninafter referred to as "the Devasthanam,' shall mean and include the shrine of Sri Ranganadhaswami at Srirangam and all the subordinate shrines attached thereto both in Srirangam and outside (inclusive of Sri Pundarikaksha Perumal Temple at Teruvallarai).

3. The administration of the Devasthanam shall vest in a Board of Trustees subject to the control and superintendence of the Committee.

*Board of Trustees.*

4. The Board of Trustees shall consist of five members, *viz.*,

1. A hereditary Stalathar Trustee by rotation as at present,
2. A Thengalai Trustee,
3. A Vadagalai Trustee,
4. A Sivite (including a Smartha),
5. A Madhva,

Trustees Nos. 2 to 5 shall be appointed by the Committee.

5 (*a*) The term of the office of the Trustees appointed by the Temple Committee shall be five years but the said trustees shall be eligible for re-appointment.

5 (*b*) The Stalathar Trustees shall hold office by rotation each for one year commencing with the 1st Chitrai.

6. No office-holder of the temple or a member of the Temple Committee shall be appointed by the Committee as a member of the Board of Trustees.

7 (*a*) No one shall be eligible to be appointed by the Committee as a Trustee of the Devasthanam—

1. Who is under 25 years of age.
2. Who is an uncertificated bankrupt or an undischarged insolvent.
3. Who is suffering from unsoundness of mind, total blindness, total deafness, total dumbness, leprosy, or paralysis of such a nature which unfits him for work.
4. Who is a member of a joint family of which some other member is at the time a member of either the Committee or of the Board of Trustees and
5. Who has been convicted of any offence involving moral turpitude, or against whom orders under sections 109, 110, Criminal Procedure Code, have been passed.

7 (*b*) In the case of a rotation trustee who is a minor or who is subject to any of the disqualifications stated in 2, 3 and 5, the Committee may appoint from among the Stalathars a competent person in his place.

*Cashier.*

8. A cashier shall be appointed by the Board of Trustees on a salary of Rs. 75 per mensem and shall furnish such security as may be determined by the rules framed hereunder.

9. The Board of Trustees shall have powers of supervision and control over the cashier, but shall not suspend or dismiss him unless 4 out of the 5 Trustees are in favour of such a course. An appeal shall lie to the Committee from an order of dismissal, whose decision shall be final.

*Budget.*

10 (*a*) The Board of Trustees shall, three months prior to the commencement of the *fasli*, prepare and submit to the Committee a budget of the estimated receipts and expenditure for the ensuing year.

(*b*) The Committee shall, with such modification as it may deem necessary, pass the budget and send it back to the Board of Trustees at least a month before the beginning of the *fasli*.

(*c*) If the Budget be not sent by the Board of Trustees as aforesaid, the Committee may, after giving 14 days' notice to the Board of Trustees, themselves frame and prepare the budget and send it to the Board of Trustees.

(*d*) If the Committee fail to send the budget within the time fixed above, it shall be competent to the Board of Trustees to act upon the budget sent by them until the Committee send the same approved.

(*e*) The Board of Trustees shall have a permanent advance for urgent expenses of such amount as may be fixed in the rules to be framed in this scheme. But the expenditure which may be incurred by them shall not exceed the provision of the budget nor shall any extraordinary expenditure be incurred without the special sanction of the Committee.

*Accounts and Audit.*

11 (*a*) The accounts shall be audited by an auditor appointed by the Committee upon such remuneration as may be fixed by the Committee, to be paid from the Devasthanam funds. An abstract of the said accounts prepared and certified together with his report shall be sent to the Board of Trustees, who shall submit the same to the Committee with their remarks, if any.

(*b*) It shall be the duty of the Board of Trustees to give the auditor all facilities for carrying on the audit and to produce all accounts, vouchers and other papers required by him.

(*c*) It shall also be the duty of the Board of Trustees to carry out the suggestions made by the auditor in his report and approved by the Committee.

(*d*) The Board of Trustees shall prepare every year a balance sheet of the assets and liabilities of the Devasthanam and publish it after verification by the auditor in the local Gazette and in such other papers as they shall think fit.

(*e*) The accounts of each *fasli*, together with the report of the auditor and the abstract of the accounts and the balance sheet, shall be exhibited at the Devasthanam office from the 15th October to 15th January following and also at the time of the Mukkoti festival at the temple premises and all worshippers of the temple shall be entitled to inspect the same at all reasonable times.

12. All surplus income shall be invested for the benefit of the temple by the Board of Trustees in accordance with the rules to be framed for the purpose.

13 (*a*) No immoveable property of the temple shall be leased for more than three years without the sanction of the Committee.

(*b*) All leases and sales shall be by public auction or in such other manner as may be provided for in the rules.

14. No jewels or other moveable property shall be sold or otherwise alienated without the sanction of the Committee.

15. An inventory of the jewels and other properties shall be maintained by the Board of Trustees and shall be verified by the auditor every year.

16. Rules consistent with this scheme shall be framed by the District Court of Trichinopoly after notice to the Committee and the Board of Trustees subject to the control of the High Court—

1. for ensuring the proper receipts and custody of all offerings, income and funds;
2. for preventing misappropriation or ensuring the proper management of the temple funds and properties;
3. for the conduct of the business of the Trustees:
4. for the framing of the budget,
5. for the duties of the cashier and the amount and form of security to be given by him and by the other servants of the temple and the duties of the auditor,
6. for the investment of any surplus, and
7. for all such other matters as may be necessary for the proper management of the secular affairs of the temple.

The rules so framed shall be liable to alteration in like manner.

17. Any of the plaintiffs or the Dharma Rakshana Sabha or any member

of the Temple Committee or of the Board of Trustees may, by petition, apply to the High Court for such further or other directions in the matter as may be necessary or for modification of this scheme or any of the provisions thereof.

The scheme shall come into operation at once.

Messrs. K. Seshadri Aiyangar and K. Singam Aiyangar who were appointed by the Committee shall hold office for five years from this date. Those that were appointed by the Sub-Court shall cease to hold office from to-day.

*Appeal partly allowed; Scheme modified.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 220 OF 1914.

December 9, 1915.

*Present:*—Mr. Stuart, A. J. C.

*Raja* RAMPAL SINGH—PLAINTIFF—APPELLANT

*versus*

*Mussammat* GANESHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Oudh Laws Act (XVIII of 1876), s. 9, Ch. II—Sale by Hindu widow of her estate in proprietary share without legal necessity, interpretation of Hindu Law—Mitakshara—Pre-emption, right of, if arises.*

A sale made without legal necessity by a Hindu widow, governed by the Mitakshara Law, of her estate as a Hindu widow in a proprietary share is not a sale of a full proprietary estate, nor is it a sale of a proprietary tenure or a share of a proprietary tenure within the meaning of section 9, and no right of pre-emption under Chapter II of Act XVIII of 1876 arises on the occasion of such a sale.

Appeal against an order of the Additional Judge, Lucknow, dated the 16th February 1914, upholding that of the Munsif, South Lucknow, dated the 12th July 1913.

Mr. *Lachman Prasad Varma*, for the Appellant.

Mr. *P. C. Gupta*, for the Respondents.

JUDGMENT.—The question to be decided in this appeal is whether a sale made without legal necessity by a Hindu widow, governed by the Mitakshara Law, of her estate as a Hindu widow in a proprietary share can be held to be the sale of a proprietary tenure or a share of a proprietary tenure within the meaning of section 9, Act XVIII of 1876. Such an estate is not a full proprietary estate, and the question arises whether any title short of a full proprietary title can be held to be covered by the words "proprietary tenure or a share of a proprietary tenure". I have been unable to find any decision directly bearing upon this point. After considering the meaning of these words I decide that the sale of such an estate is not a sale of a proprietary tenure or a share of proprietary tenure. It is true that, if the reversioners fail to take advantage of their rights within a certain period from the death of the widow, the vendee will become a full proprietor of the estate in question. But that circumstance does not show that he holds more than a limited estate at present. It is clear that the Oudh Laws Act confers no right of pre-emption on the execution of a usufructuary mortgage or on the sale of the rights of a mortgagee holding a usufructuary mortgage. But in the case of a usufructuary mortgage the mortgagee will become full proprietor in the course of time if the mortgagor fails to redeem the mortgage, and I do not see that the title of a purchaser of a Hindu widow's estate when the sale is made without legal necessity, is very much superior to that of a usufructuary mortgagee, except in so far that the mortgage on the one hand is liable to redemption and the widow's estate on the other hand remains with the purchaser until her death. I decide that the sale of such an estate by a Hindu widow is not the sale of a proprietary tenure or the share of a proprietary tenure within the meaning of section 9 and that no right of pre-emption under Chapter II of Act XVIII of 1876 arises on the occasion of such a sale.

I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondents.

*Appeal dismissed.*

## MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1830 OF 1913.

April 30, 1915.

*Present:*—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

*Sri Sri Sri* VIKRAMADEO MAHARAJULU GARU, MAHARAJA OF JEYPORE—PLAINTIFF—PETITIONER

*versus*

HARI KRISHNA PATRO *alias* RAGHUNATHA PATRO AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

*Declaratory suit—Suit to declare that property attached is judgment-debtor's, maintainability of—Vizagapatam Agency Rules—Appeal, right of—Inherent power—Civil Procedure Code (Act V of 1908), O. XXI, r. 63.*

Under the law prevailing in the Vizagapatam Agency a suit will not lie for a declaration that a certain property in respect of which a claim petition has been allowed, is the property of the judgment-debtor. [p. 226, col. 2]

*Obiter dicta.*—Where a question is raised whether one of the items attached by the Court does in fact belong to the judgment-debtor, the parties have in justice and equity a right to get this question determined even in the absence of express rules providing for claim petitions. [p. 226, col. 2.]

There is no inherent right of appeal where the Statute does not create one [p. 226, col. 2]

*Quære.*—Whether there is a Common Law right vested in every subject to have his title, which is in dispute, declared? [p. 227, col. 1.]

Petition under rule XX of the Ganjam and Vizagapatam Agency Rules, praying that in the circumstances stated therein, the High Court will be pleased to direct the Agent to the Governor, Vizagapatam, to review his judgment in Appeal Suit No. 6 of 1912, preferred against the decision of the Court of the Special Assistant Agent of Korapat, dated the 18th July 1912, in Original Suit No. 20 of 1908.

The Hon'ble Mr. *B. N. Sarma*, for the Petitioner.

Mr. *T. Rangachariar*, for Respondent No. 3.

ORDER.—The question for decision is whether under the law prevailing in the Vizagapatam Agency, a suit will lie for a declaration that a certain property in respect of which a claim petition has been allowed is the property of the judgment-debtor. The plaintiff is the Maharajah of Jeypore

In execution of a decree for costs, he got attached a *tope*, to which the 3rd defendant advanced a claim that it was in his possession on behalf of a deity to whom it had been gifted before the attachment. The Special Assistant Agent, upon evidence recorded by the Agency Munsif of Jeypore and upon a report, ordered the attachment to be withdrawn and the execution petition to be struck off the file. Now the plaintiff has brought this suit to establish the title of defendants Nos. 1 and 2 to the said *tope* and to get the order on the claim petition vacated. Both the Special Assistant Agent and the Agent to the Governor have held that the suit is not maintainable.

Rule XXVI, clause 2, of the rules framed by the Government under Act XXIV of 1839 for the guidance of the Courts in these Scheduled Districts permits decrees for a sum of money to be executed by selling the lands and other effects *belonging* to the party against whom the judgment may have been given. Where a question is raised whether one of the items attached does in fact *belong* to the judgment-debtor, the parties have in justice and equity a right to get this question determined even though the rules may not expressly provide for claim petitions, and in the present case they did get the ownership of the *tope* decided by the Special Assistant Agent's order of June 19th, 1909. Order XXI, rule 63, of the Civil Procedure Code, which gives the right to a party against whom an order in a claim petition is made to institute a suit to establish the right which he asserts, is a provision of the nature of an appeal, as it provides for the decision of a competent Court of civil jurisdiction being superseded by another decision. This provision has not been extended to the Agency Tracts of Vizagapatam, we think, purposely, to prevent the unsophisticated inhabitants of those regions being harassed by bewildering multiplicity of legal proceedings.

Rule XIII applies to civil trials in Agency Courts only those rules of the Civil Procedure Code which relate to the examination of witnesses in appealable cases. There is no inherent right of appeal where the Statute does not create one. Consequently, the order of June 19th has become a final one. We notice that this order was based on evidence not recorded by the Judge who passed the order, and we have heard arguments as to whether that procedure was legal. Without deciding whether Rule

XIII, which requires that evidence in "all civil trials" shall be taken in the manner prescribed by the Code of Civil Procedure, has any application to claim petitions in this Agency, we are clearly of opinion that the Judge's procedure, assuming it to have been irregular, has no bearing on the question now at issue, for it has not been hitherto the case of the plaintiff that the order is void through not being based on legal evidence (in which case it would be again open to him to attach the released property), but rather that he has a right to have the order superseded by the decision in a regular suit. Moreover, it does not appear that the plaintiff took objection to the procedure of calling for a report from the Subordinate Court and acting on evidence recorded by it, either when the order was passed or in the trial of the present suit or in his grounds of appeal.

The Agency Courts have further decided that no suit could be brought for a declaration under section 42 of the Specific Relief Act, as that Act is not in force in the Scheduled Districts. The Hon'ble Mr. Sarma for the appellant, quoting *Robert Fisoher* v. *Secretary of State for India in Council* (1), contends that independently of the Specific Relief Act, there is a Common Law right vested in every subject to have his title which is in dispute declared. It is unnecessary to discuss this point, for the nature of the present suit is not that of a mere suit for a declaration as to a legal right or character, but is essentially one to set aside a judicial order upon a claim by a 3rd party to property which was the subject of execution, and such a suit will be maintainable only in localities where by an enactment such as the Civil Procedure Code a statutory right has been created.

The present suit has had a previous history.

It was in the first instance dismissed and the dismissal order was set aside by this Court in Civil Miscellaneous Petition No. 2479 of 1907. It was therein held by another Bench of this Court that the ground upon which the Special Assistant Agent had dismissed the suit, namely, that section 244 of the Civil Procedure Code of 1882 was a bar to the suit, was not a good one. The suit was in consequence restored to file and again dismissed.

The point which has now been taken was not argued at the hearing of that civil miscellaneous petition nor should the learned Judges, who decided it, be understood as meaning to say that the suit as laid was maintainable from every possible point of view.

The Agent's judgment is right. We dismiss the petition with costs.

*Petition dismissed.*

(1) 22 M. 270 (P. C.); 26 I. A. 16; 3 C. W. N. 161.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2816 OF 1914.

December 17, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

*Moulvi* MUHAMMAD ISMAIL—PLAINTIFF—APPELLANT

*versus*

SAMAD ALI BHUYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Contract Act* (*IX of* 1872), *s.* 23—*Public policy—Compromise—Contract entered into by a person accused of a compoundable and a non-compoundable offence, for compounding the compoundable offence, validity of—Penal Code* (*Act XLV of* 1860), *ss.* 147, 325.]

Where in a complaint against a person accusing him of offences under sections 147 and 325, Penal Code, the Magistrate after perusing the complaint and examining the complainant issued summons only under section 325 and the accused, with the permission of the Magistrate, compounded the case by entering into a contract in favour of the complainant:

*Held*, that in the absence of anything to show that there was any truth whatsoever in the allegations as to the offence under section 147 or that there was any apprehension in the mind of the accused that he would be convicted under that section, the contract was not void as being opposed to public policy. [p. 229, col. 1.]

*Nujebar Rahman* v. *Muktashed Husain*, 15 Ind. Cas. 259; 40 C. 113; 16 C. W. N. 854; *Williams* v. *Bayley*, (1866) 1 H. L. 200 at p. 220; 35 L. J. Ch. 717; 12 Jur. (N. S.) 875; 14 L. T. 802. referred to.

Appeal against the decree of the Additional Subordinate Judge, Noakhali, dated the 13th

MUHAMMAD ISMAIL *v.* SAMAD ALI BHUYAN.

June 1914, confirming that of the Munsif, Feni, dated the 30th June 1913.

FACTS.—The plaintiff brought a suit for confirmation of possession of a certain property and for a declaration that a *kobala* in respect of that property executed by him in favour of the defendant was invalid and void, on the ground that it was executed under coercion and that it was opposed to public policy inasmuch as it was executed for compounding a criminal case under sections 147 and 325 only, Indian Penal Code, brought against him by the defendant. In that criminal case the complaint of the defendant alleged offences under sections 147 and 325, Indian Penal Code, but the Magistrate issued summons against the plaintiff under section 325 only. The plaintiff, with the permission of the Magistrate, compounded the case by executing the *kobala* and paying some money to the complainant. The plaintiff's suit was dismissed by the Munsif and on appeal the decision of the Munsif was confirmed; the plaintiff thereupon preferred a second appeal to the High Court.

Dr. *Dwarka Nath Mitter* (with him Babu *Gour Chandra Paul*, for the Appellant, contended that the *kobala* was void as being opposed to public policy There were two offences charged against the plaintiff in the petition of complaint—one under section 147 and the other under section 325, Indian Penal Code. The offence under section 147 was not compoundable and there was no knowing that the accused would not have been convicted under that section if the case had not been compounded. The very fact that the accused was charged in the complaint with the offence under section 147 along with an offence under section 325 made the criminal case non-compoundable. There was but one case brought against the accused and that case was non-compoundable by reason of there being an allegation of an offence under section 147. The Trying Magistrate had no justification for assuming that the allegation in the complaint as to the offence of rioting was false before he had examined the prosecution witnesses. Offences of a public nature are very jealously regarded by law and the Magistrate ought not to have passed over such an offence charged against a man in a petition of complaint. In support of his arguments he referred to *Nujebar Rahman* v. *Muktashed Husain* (1) and *Williams* v. *Bayley* (2).

JUDGMENT.—The plaintiff, who is the appellant in this case, sued for a declaration that certain documents executed by him in favour of the defendants were invalid and void for want of consideration. It appears that in the Court of first instance the case was tried on the question whether the plaintiff executed the documents under coercion. The Court of first instance found that there was no coercion exercised upon the plaintiff and the suit was dismissed.

On appeal the finding of the Court of first instance on the point was affirmed, but then it was contended before that Court that the contracts were opposed to public policy as they were entered into for compounding a criminal case. The learned Subordinate Judge points out that the plaintiff had been summoned only under section 325 of the Indian Penal Code. An offence under section 325 can be compounded with the permission of the Court; and the Magistrate gave permission to compound the case. We have been referred to the case of *Nujebar Rahman* v. *Muktashed Husain* (1) by the learned Pleader for the appellant, but in that case the contract was entered into in order to stifle a non-compoundable criminal case, and all that that case decided was that it was contrary to public policy to compound a non-compoundable criminal case and any agreement to that end is wholly void in law.

It was contended by the learned Pleader for the appellants that although an offence under section 325 of the Indian Penal Code is compoundable with the permission of the Court, the plaintiff was also accused of having committed an offence under section 147 of the Code in the petition of complaint before the Magistrate and the learned Pleader relied upon the case of *Williams* v. *Bayley* (2) in support of the proposition that where a contract is entered into in order to avoid a criminal prosecution even

(1) 15 Ind. Cas. 259: 16 C. W. N. 854; 40 C. 113.
(2) (1866) 1 H. L. 200 at p. 220; 35 L. J. Ch. 717; 12 Jur. (N.S.) 875; 14 L. T. 802.

before the case is brought into Court, the agreement is invalid as being opposed to public policy. In that case, however, the father of the person who had been accused of having committed forgery, took upon himself the liability with the knowledge that unless he did so, his son would be exposed to a criminal prosecution with a moral certainty of conviction, and it was held that under the circumstances he was not a free and a voluntary agent and the agreement he made was not enforcible in equity. In the present case the plaintiff, it is true, was accused of having committed offences under sections 325 and 147, Indian Penal Code, in the petition of complaint, but the Magistrate after perusing the petition of complaint and examining the complainant (as he must have done) thought fit to summon the plaintiff only under section 325. Then, again, there is nothing to show that there was any truth whatsoever in the allegations as to rioting or that there was any apprehension in the mind of the plaintiff that he would be convicted under that section. As we have said, the only section under which he was summoned was section 325 and an offence under that section is compoundable with the permission of the Magistrate. The Magistrate did permit it and the parties entered into a compromise for settling their long-standing disputes. It is to be observed that the complainant in that case, who is the respondent in this appeal, was also accused under section 325. The parties settled their long-standing disputes by executing the documents and by payment of money in cash.

We think that under the circumstances the decree of the lower Appellate Court is correct and this appeal must be dismissed, but without costs as the respondents do not appeal.

*Appeal dismissed.*

## COURT OF THE BOARD OF REVENUE, MADRAS.

SECOND APPEAL No. 59 OF 1915.

November 9, 1915.

*Present*:—Mr. Clegg, F. M.

*Sri* RADHA KRISHNADASS GOSWAMI, BEING MINOR BY GUARDIAN SYAMA-SUNDARADASS—APPELLANT

*versus*

BIKARI BEHARA OF GUDISORO, GUMSUR TALUQ AND ANOTHER —RESPONDENTS.

*Madras Estates Land Act (I of* 1908), *ss.* 3, 40—*Grant of village prior to Settlement for subsistence—Grant, whether constitutes an "estate"* Onus *Suit by* ryots *for commutation.*

In order to determine whether a village granted as *inam* to a *Brahmin* by the *zemindar* before the Permanent Settlement subject to the payment of a *jodi* constitutes an estate within the meaning of the Madras Estates Land Act the question of onus depends upon the circumstances of each case. [p. 230, col 2]

Where in a suit for commutation of rent in kind into money rent by the *ryots* in occupation of an *inam* village, it appeared that the *ryots* had been in possession of their holdings at more or less fixed rates for years and there were no relinquishments:

*Held*, (1) that the burden of proving that the grantee was the owner of the *kudivaram* lay on the defendant landlord: [p. 231, col. 1.]

(2) that in the absence of evidence the village must be deemed to be an estate under section 3 (2)(*d*) of the Madras Estates Land Act; [p. 231, col. 1.]

(3) that the plaintiffs were entitled to the commutation asked for. [p. 23 , col. 1 ]

Second appeal against the decree of the Collector of Ganjam in Appeal Suit No. 1 of 1914.

FACTS.—The *ryots* in occupation of certain lands in the *inam* village of Gudisoro in Ganjam District instituted a suit under section 40 of the Madras Estates Land Act for commutation of rent in kind into money rent. The village which was part of the Dharakota *zemindari* was granted as *inam* to a *Brahmin* by the *zemindar* before the Permanent Settlement subject to the payment of a *jodi* of Rs. 75-8 0 per annum. It was subsequently enfranchised and the defendant who purchased it from the *Brahmin inamdar* is its present proprietor. The Deputy Collector held that the village was not an estate and dismissed the suit. The District Collector on appeal held that the village was an estate under section 3 (2), clause (*d*), and allowed commutation. The defendant preferred a second appeal to the Board.

RADHA KRISHNADASS GOSWAMI *v.* BIKARI BEHARA.

Mr. *A. Krishnaswami Aiyar*, for Mr. *P. Narayana Murthy*, for the Appellant.—The District Collector was wrong in throwing the onus of proof on the *inamdar*. In order that the village may be an "estate" it is necessary to show that land revenue alone was granted in *inam*, to a person not owing the *kudiraram* in the village.

There is no presumption that the grantee was not the owner of the *kudivaram* at the date of the grant. The plaintiff who wishes to bring the village under the operation of the Act is bound to prove the fact. *Srimath Kidambi Jagannatha Charyulu* v. *Pidipiti Kutumbarayadu* (1), *Ravulapati Papi Reddi* v. *Nanduru Peda Venkatacharyulu* (2), *Vogoti Chengiah* v. *Putta Ramudu* (3), *Ramala Venkataswami* v. *Kanumalla Narasimhayya* (4) *Indety China Nagadu* v. *Potu Konchi Venkatasubbayya* (5) are clear authorities for this position.

Mr. *V. Ramadas*, for the Respondents.—There is a conflict on the question of onus of proof. See *Adusumulli Suryanarayana* v. *Achhutta Patanna* (6), *Chinnan* v. *Kondam Naidu* (7), *Yeldamapudi Lakshmi Narasimha Row* v. *Repalli Sitaraswami* (8), *Venkatanarasimha Appa Rao* v. *Muppidi Subba Reddi* (9). The question of onus was raised in the cases relied on by appellant's Vakil with reference to the special plea of jurisdiction in Civil Courts. There is no such plea here.

In this suit from facts proved or admitted the District Collector came to findings of fact (1) that the *inamdar* was a *Brahmin*; (2) the tenant had occupancy rights from long occupation; (3) there is a distinction between *hetta* (private) and shared *ryoti* lands in this village. From these facts it may be inferred that the *inamdar* did not own the *kudivaram*. It is a question of fact to be decided on the evidence in each case.

JUDGMENT.—This suit is brought by a *ryot* of the Gudisoro village in the Gumsur *taluk* against the proprietor, who is a *mahant* at Puri for the commutation under section 40 of the Estates Land Act.

(2). The first question is whether the village is an estate as defined in section 3 (2) (*d*) of the Act. There is no evidence of the original grant. All we know is from the *Inam* Register, which shows that at some time previous to the Permanent Settlement a *zemindar* of Dharakota granted the village to a certain *Brahmin* for subsistence. There was a *jodi* of Rs. 75-8-0 payable at the time of the Permanent Settlement to the *zemindar*. It is a correct presumption to make that the grant was of the *melvaram* only and there is nothing to indicate that the lands were waste at the time of the grant or that both *varams* were granted.

It is contended, however, on behalf of the present appellant that there is no presumption that the village was granted in *inam* to a person not holding the *kudivaram* thereof, and that, therefore, the onus of proof lies on the plaintiff, *ryot*, who invokes the assistance of the Revenue Court under section 40 of the Act.

Various decisions of the Madras High Court, *pro* and *con*, have been quoted. The question of onus of proof must depend, I consider, on the circumstances of each case. In the written statement filed by the defendant and in the evidence of one of the defendant's witnesses a distinction is made between *hetta* or home farm lands and shared lands. If the *Brahmin* grantee was the owner of the *kudivaram* at the time of the grant such a distinction, if it existed on the date of the grant, would hardly have survived to this day. The evidence, which in an Uriya village is as might be expected almost entirely oral, shows that the *ryots* have been in possession of their holdings at more or less fixed rates for years and their fathers before them; although there are at times exchanges of land according to custom, there have been no relinquishments. The Collector, I think, has correctly appreciated the meaning of the *muchilikas* filed. The relinquishment clause has not been acted upon,

(1) 25 Ind. Cas. 891; 27 M. L. J. 233.
(2) 26 Ind. Cas. 67; 27 M. L. J. 567; 16 M. L. T. 247; (1914) M. W. N. 794.
(3) 23 Ind Cas. 553; (1914) M. W. N. 367.
(4) 26 Ind Cas. 357; 16 M. L. T. 596.
(5) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.
(6) 22 Ind. Cas 339; 38 M 608; 26 M. L. J. 99; 15 M. L. T. 268.
(7) 23 Ind. Cas. 113; 26 M. L. J. 169 at p. 176; 1 L. W. 41.
(8) 19 Ind. Cas. 440; 24 M. L. J. 288; (1913) M. W. N. 282.
(9) 20 Ind. Cas. 753; 24 M. L. J. 655.

PANDUJI *v.* PANDUJI.

Further it is unlikely that the original cultivators of the soil were *Brahmins* in an Uriya village of this nature.

Taking the above facts into consideration and the natural inferences to be drawn from them, I am of opinion that the burden of proof that the grantee was the owner of the *kulvaram* lies on the defendant; and as he has offered no evidence of it, the village must be deemed to be an estate under section 3 (2) (*d*) of the Act.

(3). As regards the second issue, whether commutation should be allowed, both the lower Courts agree that it should and I agree with them. This, of course, applies to the shared lands or lands in which the plaintiff owns occupancy rights.

(4). The questions raised in the pleadings whether all the lands in the schedule filed by the plaintiff are in his holding and whether certain numbers are *hetta* or private lands of the proprietor, have not been decided. The lower Court will now proceed to frame issues on these points and decide in which number commutation is to be allowed and the sum to be paid under section 40 (2) of the Act.

5. This second appeal will be dismissed with costs.

*Appeal dismissed.*

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 304-B OF 1913.

September 25, 1915.

*Present*:—Mr. Prideaux, Offg. A. J. C.

PANDUJI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

PANDUJI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Interest—Rule of* damdupat—*Usufructuary mortgage—Mortgagee obtaining possession at a date later than the date of document—Rule, whether applicable*

In the case of a usufructuary mortgage in which the mortgagee obtains possession at a date later than the date of document, the rule of *damdupat* does not apply to the interest recoverable during the interval between the date of document and date of obtaining possession. [p. 232, col. 1.]

*Nathubhai Panachand* v. *Mulchand Hirachand*, 5 B. H. C. R. 196, *Sundara Bai* v. *Jagavant*, 24 B. 114; 1 Bom. L. R. 551 followed.

*Gopal Ramchandra* v. *Gangaram Anand Shet*, 20 B. 721, *Dhondshet* v. *Ruji*, 22 B. 86, referred to.

Appeal against the decree of the District Judge, East Berar, Amraoti, dated the 19th September 1913, modifying that of the Subordinate Judge, No. 2, Amraoti, dated the 2nd May 1913.

Mr. *F. W. Dillon*, for the Appellants.

Mr. *P. S. Kotwal*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether in the case of a usufructuary mortgage in which the mortgagees obtain possession at a later date, the rule of *damdupat* should not apply to the interest recoverable during the interval between date of document and date of obtaining possession. Here the mortgage is dated the 29th April 1883, and the mortgagee did not obtain possession until the 11th April 1901. The first Court has found that the mortgagees having been for no fault of theirs out of possession of the mortgaged property, they were not liable to render accounts of the rents and profits until that date and hence the rule of *damdupat* applies until that date, and operates to limit the interest due to that date to a sum not exceeding the principal. On appeal the lower Appellate Court has held that the rule does not in the present case apply.

*Nathubhai Panachand* v. *Mulchand Hirachand* (1) lays down the principle that the rule of *damdupat* applies to mortgages as to other loans, but where the mortgagee enters into possession of the mortgaged property and in taking the accounts between the mortgagor and mortgagee credit is given to the latter for the rents and profits received by him as against the principal and interest due, the above rule cannot equitably be applied. In that case it appears that the mortgaged property was not taken possession of until after the date of the mortgage. The appellants rely on *Gopal Ramchandra* v. *Ganga*

(1) 5 B. H. C. R. 196

*ram Anand Shet* (2), but in *Dhondshet* v. *Ravji* (3) that case was held not to be confined to cases in which at the date of suit an account between the mortgagor and mortgagee was actually being kept. The learned Judges held that the fact hat an account may be taken between the parties of interest on the one side and rents and profits on the other is sufficient to exclude the law of *damdupat*. In *Sundara Bai* v. *Jagavant* (4) it was again held that the rule does not apply where the mortgagee has been placed in possession and is accountable for profits received by him as against the interest due. That is the case here, the mortgagee has been placed in possession, and is accountable: that he did not get immediate possession and had to sue for it does not, in my opinion, affect the question. The weight of authority is in favour of the view adopted by the lower Appellate Court, and no direct authority to the contrary has been shown me. I hold accordingly and dismiss this appeal with costs. The appellants will pay respondents' costs.

*Appeal dismissed.*

(2) 20 B. 721.
(3) 22 B. 86.
(4) 24 B. 114; 1 Bom. L. R. 551.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1229 OF 1914.

November 24, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

ABDUL KARIM MEAN—PLAINTIFF—APPELLANT

*versus*

MIAJAN MIANJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 86—Surrender of portion of joint holding, whether valid—Surrender, when operating as transfer.*

Surrender by one of the joint tenants of his interest in a holding may operate as a valid transfer, if not as a valid surrender, to the landlord of his interest subsisting at the date of the surrender, when the deed of surrender is stamped as a conveyance and is registered.

*Quære.* Whether surrender of a portion of joint holding by one of the tenants is valid?

Appeal against the decree of the District Judge of Noakhali, dated the 10th of February 1914, reversing that of the Munsif, Feni, dated the 25th November 1913.

Babu *Dhirendra Lal Kastgir*, for the Appellant.

Babu *Ramdayal Dey*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued to recover possession of the land in dispute, on the ground that it had been surrendered to him by defendant No. 4, who was one of the tenants who held the tenure which comprised the land in suit. The Court of first instance gave the plaintiff a decree, but on appeal that decree has been reversed and the main ground upon which the lower Appellate Court has dismissed the suit is that the tenancy of Ahmad Ali and his co-sharers being a joint one there could not be a valid surrender of a portion of the holding by one of the tenants. It appears, however, that there was division of the land of the holding as between themselves and that division was binding upon them, although not binding upon the landlord. Ahmad Ali used to pay his share of the rent to the landlord and being unable to pay the arrears of rent, he executed a registered document in favour of the landlord transferring his interest in the holding. Even if there could be no valid surrender, we think the deed operated to pass his interest in the holding in favour of the landlord. It was stamped as a conveyance and registered and in substance it was a conveyance of the interest of Ahmad Ali. We think, therefore, that if Ahmad Ali had any subsisting interest in the holding at the date of the deed, it was transferred to the plaintiff landlord. It is contended, however on behalf of the respondents that the lower Appellate Court has not come to any finding as to whether Ahmad Ali had any subsisting interest at the date of the deed. The case will, therefore, go back to that Court in order that it may find on the evidence whether Ahmad Ali had any subsisting right to the land in suit at the date when he executed the document. If the question is decided in the affirmative the decree of the Munsif will be confirmed, if in the negative the suit will be dismissed.

The costs of this appeal will abide the result.

*Case remanded.*

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 206 OF 1915.

November 15, 1915.

*Present*:—Mr. Justice Phillips.

S. A. AYYATHURAI AYYAR—PLAINTIFF —PETITIONER

*versus*

C. S. SIVARAMA PATTAR KARIKAR—DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 92—Endorsement on promissory note—Presumption—Consideration — Oral evidence, whether admissible to prove contract between parties.*

The law will raise a presumption that, as between an endorser and an endorsee of a promissory note, the endorsement is for the consideration recited in the note, but that presumption will not make it "a contract in writing" within the meaning of section 92 of the Indian Evidence Act, so as to exclude oral evidence to prove what the consideration for the endorsement really was.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 1149 of 19 4.

Mr. *K. P. Ramakrishna Aiyar* for Mr. *P. R. Ramakrishna Aiyar*, for the Petitioner.

Mr. *K. R. Bashyam Aiyangar*, for the Respondent.

JUDGMENT.—The appellant's Vakil contends that as appellant endorsed a promissory note for Rs. 300 in favour of respondent, the contract that is implied by the endorsement includes an acknowledgment of the full consideration, and consequently no oral evidence can be adduced to prove that the consideration that passed was less than Rs. 300. Although the maker of the note may not be allowed to prove that he had not received full consideration as recited in the note, yet the contract between the endorser and endorsee (*i.e.*, the endorsement) contains no recital of consideration and although such endorsement is held to imply a contract between the parties to it similar to the contract in the note, it cannot, in my opinion, amount "to a contract in writing" that the promise is to be performed in consideration of the receipt of the full consideration for the note. To hold this would be to prevent any endorsement being made as a gift or even for a smaller consideration by way of discount, and consequently no such recital can be implied and, therefore, section 92 of the Evidence Act is inapplicable. This being so, the Subordinate Judge's finding becomes one of fact.

The other point argued is one of appreciation of evidence and cannot be considered here.

The petition is dismissed with costs.

*Petition dismissed.*

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 508 OF 1914.

October 29, 1915.

*Present*:—Mr. Batten, A. J. C.

THAKURDAS—DEFENDANT—APPELLANT

*versus*

SOBHACHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 54—Oral sale—Vendee in possession as lessee—Delivery of possession, how effected.*

There can be a valid sale by delivery of possession within the meaning of section 54 of the Transfer of Property Act even if the vendee is already in possession of the lands sold as a lessee, provided that the vendor by appropriate declarations or acts converts the possession of the vendee as lessee into one as purchaser. [p. 235, col 2.]

*Muthukaruppan Samban* v. *Muthu Samban*, 25 Ind. Cas. 772; 1 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768: 27 M. L. J. 497, followed.

*Sibendrapada Banerjee* v. *Secretary of State*, 34 C. 207; 5 C. L. J. 390, dissented from

*Musammat Rupa* v. *Bisambar*, 8 C. P. L. R. 1 *Bansi* v. *Pandoba*, 12 C. P L. R. 154, *Kannan* v. *Krishnan*, 13 M. 324, referred to.

Appeal against the decree of the District Judge, Hoshangabad, dated the 20th April 914, confirming that of the Munsif, Sohagpur, dated the 2 th January 1914.

Mr. *S. Ramdas*, for the Appellant.

JUDGMENT.—The plaintiffs sued for possession of the absolute occupancy fields in suit on the following grounds. They had leased the fields to the defendant for nine years by a written lease in June 1904, but, as the consideration for the lease was not paid, the lease-deed was not registered. They had not sued during the lease period in spite of the deed being void, but now that the lease period was over they brought this suit, which was instituted on the 27th June 1913. The defendant produced the deed of transfer which was not a deed of lease, but an unregistered deed of sale for a consider-

ation of Rs. 65. The plaintiffs thereupon pleaded that the defendant had fraudulently represented that the deed was one of lease. The following is a portion of the defendant's written statement: "The plaintiffs orally sold the land in dispute to the defendant in consideration of Rs. 65 paid in cash accompanied with delivery of possession on 12th June 1904. They also executed a sale-deed on the same date, which is herewith filed."

Issues were framed as to whether there had been misrepresentation as to the nature of the deed, and whether the consideration had been paid, and it was found that the plaintiffs knew the deed was a sale-deed and had been paid the consideration.

The following was the third issue:—

"Whether plaintiffs orally sold the land for Rs. 65 as alleged : was the sale completed by delivery of possession?"

The learned Munsif, following *Musammat Rupa* v. *Bisambar* (1) and *Bansi* v. *Pandoba* (2), held that the existence of the unregistered deed of sale was not a bar to the vendee proving that the sale was effected by payment of consideration and delivery of the property.

It is an admitted fact that the defendant was in possession of the fields in suit as a sub-tenant under the plaintiffs for a year prior to the sale. He has explicitly stated that he had not given up possession at the date of the sale. On the other hand, he has alleged that at the time of the sale the plaintiffs told him he should remain in possession as purchaser, and there is evidence that there was a formal redelivery of the land to the defendant as purchaser, and that since that date the *malguzar* has realized the rent from the defendant. Neither of the lower Courts has recorded a distinct finding as to whether they accept this evidence, though the learned Munsif observes: "What has actually happened in this case is that defendant's possession was merely continued, although afterwards defendant's possession might be said to have been one of a vendee." Both the lower Courts have decided that there was no valid sale to the defendant, because there could be no delivery of the fields to the defendant, who was already in possession, within the meaning of paragraph 3 of section 52 of the Transfer of Property Act.

In taking this view of the law the Courts have followed the ruling of the Calcutta High Court in *Sibendrapada Banerjee* v. *Secretary of State* (3), where it was held that though, when a vendee obtains possession on the date of sale and remains in possession thereafter, it is reasonable to presume that the possession had been given with the assent, express or implied, of the vendor, that principle has no application where the intended transferee had been in occupation from before the date of the transfer. A careful examination of the case shows that there was no suggestion that there had been any attempt at delivery on the date of the alleged sale, and it appears to me that the remarks of the learned Judges do not go so far as to say that there can never be a delivery of possession to a person already in possession, and that what was decided was that there can be no presumption of delivery from the mere fact that possession has remained with the alleged vendee, in the absence of evidence of a fresh delivery. In *Kannan* v. *Krishnan* (4) it was held that when a person was already in possession under a *kanam*, the Malabar form of mortgage, such possession together with an agreement to sell was equivalent to a delivery of possession under the oral agreement to sell, within the meaning of section 48 of the Registration Act. This ruling was followed by me in *Madhodas* v. *Sheopratap* (5).

In *Muthukaruppan Samban* v. *Muthu Samban* (6), the learned Judges construed the Calcutta case cited above as meaning that there can never be a valid sale by delivery of possession if the vendee is already in possession at the time of the oral sale. They discuss the subject as follows:—

"We are unable to see why an oral sale with a request by the vendor to the vendee

(1) 8 C. P. L. R. 1.
(2) 12 C. P. L. R. 154.
(3) 34 C. 207; 5 C. L. J. 390.
(4) 13 M. 24.
(5) Second Appeal No. 400 of 1907.
(6) 25 Ind. Cas. 772; 27 M. L. J. 497; 14 L. W. 754; 16 M. L. T. 344; (1914) M. W. N. 768.

to remain in possession in the capacity of vendee and with absolute rights should not be sufficient to pass title without recourse to the expedient of the vendee quitting the property one moment and entering upon it at another. An arrangement by which the legal nature and character of the previous possession is put an end to and subsequent possession treated as one by the vendee with absolute title is, in our opinion, sufficient to satisfy the requirements of section 54 of the Transfer of Property Act."

After referring to *Kannan* v. *Krishnan* (4) cited above, the learned Judges go on to say:—

"So far as delivery of possession is concerned, there seems to be no difference between the provisions of section 48 of the Registration Act and those of section 54 of the Transfer of Property Act. . . . Unless there is something in section 54 of the Transfer of Property Act which compels us to do so, there is no reason for putting on this section a construction which would in effect require sales of properties below Rs. 100 to be only by registered instruments in the numerous classes of cases where the vendee is already in possession as tenant or mortgagee. With due deference to the learned Judges who decided *Sibendrapada Banerjee* v. *Secretary of State* (3), we are unable to accept that case as a correct exposition of the provisions of section 54 of the Transfer of Property Act. The conclusion we have come to is that, *if there was an oral sale of the properties, the fact that the vendee was already in possession would not render the sale invalid if the vendor had by appropriate declarations or acts converted the possession of the vendee as mortgagee into one as purchaser.* The difficulty in the present case, however, arises from the fact that no oral sale has been pleaded; on the contrary the case for the defendants has been that there was an unregistered document evidencing the sale which was accompanied by delivery of possession. No issue was raised as to any oral sale having preceded Exhibit II, but issues 1 and 2 are framed on the footing that the defendants' title is based on a deed of sale coupled with delivery of possession. Under these circumstances we do not think that it is open to the appellants to set up an oral sale as to which there was no issue or any evidence."

In whatever sense the words 'oral sale' were used in that case, there is in this case no such difficulty as was felt by the learned Judges; for an oral sale has been distinctly pleaded and an issue has been framed regarding it.

Whether or not there is a real conflict between the Calcutta and Madras views, I am convinced that the words I have italicized in the Madras judgment constitute a correct exposition of the law. The learned District Judge has, in my opinion, wrongly held that in no circumstances can there be such a delivery of possession as is contemplated in section 54 of the Transfer of Property Act when the vendee is already in possession.

I, therefore, remand the appeal for re-trial, and it must be determined whether or not there was an 'oral sale' accompanied or followed by such declarations or acts as would convert the position of the defendant as tenant into one as purchaser. A refund certificate will issue as regards the Court-fee paid in appeal, other costs will be costs in the suit.

*Case remanded.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3731 OF 1912.

December 20, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

ABDUL WAHAB AND OTHERS—PLAINTIFFS —APPELLANTS

*versus*

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS —RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 424—Notice—Defective—Suit against Secretary of State, maintainability of.*

A notice under section 424 of the Civil Procedure Code, 1882, is not a proper notice if the case set up in the plaint is altogether different from the case stated in the notice and, therefore, a suit instituted upon such a notice cannot be maintained. [p. 236, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 27th August

NAMA v. GOPALYA.

1912, confirming that of the Subordinate Judge, first Court, Chittagong, dated the 27th of June, 1911.

Babus *Dawarka Nath Chakerbutty* and *Kali Kinker Chakerbutty*, for the Appellant.

Babu *Ram Chandra Mitra*, for the Government.

Babu *Dhirendra Lal Kastgir* and Babu *Prabhat Chandra Dutt* for Babu *Kshitesh Chandra Sen*, for the Respondent.

Babu *Satish Chandra Ghose*, for the Defendant No. 2, Respondents.

Babu *Biraj Mohan Mozumdar*, for the Deputy Registrar.

JUDGMENT.—We think that the suit of the plaintiffs-appellants must fail on the ground that the notice given under section 424 of the Code of Civil Procedure was not a proper notice. The question of notice was raised in the sixth issue in the case and the Subordinate Judge's decision on that issue runs as follows :

"The case set up in the plaint is altogether different from the case stated in the notice, Exhibit 13, served on the defendant No. 1. In the notice the plaintiffs admitted the principle of distribution of the Collector to be quite correct, but said that the map drawn was not correct, inasmuch as instead of drawing the boundary lines at right angles to their *jote* land, they were drawn so as to include obtuse angles, so the notice appears to be defective and the suit must fail on that ground."

The lower Appellate Court, no doubt, has not come to any finding upon this point, apparently because the plaintiffs did not argue the point before it. But we think the Subordinate Judge is right in holding that the notice is defective, and upon such a notice the suit cannot be maintained. The suit must, therefore, fail on that ground. The appeal is accordingly dismissed with costs.

*Appeal dismissed.*

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION NO. 2 OF 1915.

November 20, 1915.

*Present:* Sir Henry Drake-Brockman, KT., J. C.

NAMA AND OTHERS—DEFENDANTS—APPLICANTS

*versus*

GOPALYA—PLAINTIFF—OPPOSITE PARTY.

*Provincial Small Cause Courts Act (IX of 1887), Sch II, Art. 35, cl. (l)—Suit to recover damages for causing pollution—Jurisdiction.*

A suit to recover damages for having caused pollution to the plaintiff and his consequent excommunication is one to recover compensation for injury to the person within the meaning of Article 35, clause (*l*), of the Second Schedule to the Provincial Small Cause Courts Act and is not triable by a Small Cause Court. [p. 37, col. 1.]

*Ganga Narain Moytro* v. *Gulabur Chowdhry*, 13 W. R. 434, distinguished.

*Gobind Balkrishna* v. *Pandurang*, 15 Ind. Cas. 505; 36 B. 443; 14 Bom. L. R. 323, referred to.

Civil revision against the order passed by the Munsif as Judge Small Cause Court, Hinganghat, on the 3rd November 1914.

Mr. *W. R Bobde*, for the Applicants.

Mr. *G. R. Pradhan*, for the Opposite Party.

JUDGMENT.—This application for revision arises out of a suit brought by the non-applicant, a Mahar, to recover damages on the following allegations. The non-applicant's bullock trespassed into the applicants' field. The applicants, intending to cause pollution to the non-applicant, tied a dog's bone to the bullock's neck and drove it towards the non-applicant's house. The non-applicant discovered the bone the same evening when tying up the animal. He was then excommunicated according to the custom of the caste, and the necessary purification entailed expenditure amounting to Rs. 50, which sum was claimed. The defence included, besides a general denial of the allegations in the plaint, an *alibi* on the part of each applicant.

The case was tried by the Munsif of Hinganghat in the exercise of his Small Cause Court powers. He found that the defendants had done the act complained of, that the plaintiff was consequently outcasted and that he had to incur Rs. 50 for purification as alleged by him. The claim was, therefore, decreed in full.

In this Court a number of specific objections to the frame of the suit and the adequacy of the evidence adduced have been

put forward which, to judge from the lower Court's record and particularly from the statement of the points for determination, were not raised at the trial, though the defendants were throughout represented by a Pleader. It is, however, unnecessary to consider the said objections, because I am satisfied that the application must succeed on the ground that the suit is not one which could be tried by a Small Cause Court, being brought for injury to the person in a case falling under clause (*l*) of Article (35) in the Second Schedule to the Provincial Small Cause Courts Act, 1887. The non-applicant's learned Pleader cites *Gunga Narain Maytro* v. *Gudadhur Chowdhry* (1) as authority for his contention that inasmuch as actual pecuniary damages have resulted from the personal injury complained of, the suit can be tried by a Small Cause Court. That case, however, like several others which might be cited in the same connection—*e. g.*, *Brojo Soondur Bhadooree* v. *Eshan Chunder Roy* (2), *Mansing Lalung* v. *Theram Doloye* (3), *Durga Pershad* v. *Asa Jolaha* (4), *Debi Singh* v. *Hanuma Upadhya* (5) and *Jiwa Ram Singh* v. *Bhola* (6)—was decided when the Mufassil Small Cause Courts Act, 1865, was in force. Section 6 of that Act laid down that a suit might be brought in a Small Cause Court for damages, but that no action shall lie in such Courts on account of an alleged personal injury unless actual pecuniary damage had resulted from the injury. Article 35 of the Second Schedule to the Act now in force is evidently framed on a different basis, which seems to be that even where actual pecuniary loss has been sustained, questions of importance and difficulty may arise making a summary trial undesirable.

Had the applicants themselves touched the non-applicant with the bone, they would have been liable for a direct assault, and in *Gobind Balkrishna* v. *Pandurang* (7) it was held that a suit based on assault was one for injury to the person within the meaning of Article 35 (*l*) aforesaid. Where the object is to cause loss of reputation the liability of the defendant should not be affected by the mere fact that he achieves his end by applying the necessary force indirectly through an animal. To such an act the maxim *qui facit per alium, facit per se* should manifestly be applied. To cause loss of reputation is to inflict a personal wrong of a serious description, and according to the plaintiff's allegations in the present case the position reached is analogous to the result of defamation, a suit for compensation for which falls under clause (*d*) or clause (*e*) of the Article.

The case must be re-tried on the regular side of the Munsif's Court. When taking the defence the Munsif should be careful to ascertain precisely which allegations of fact in the plaint are denied and to use the power of calling for further particulars that may be needed which is conferred upon him by rule 5, Order VI, First Schedule to the Civil Procedure Code. A general denial of numerous allegations can seldom be satisfactory, and to judge from the form of denial given under head (4), Appendix A, *ibid.*, is not contemplated by the Code.

The objection which has succeeded here not having been raised in the lower Court I make no order as to costs in this Court. Costs hitherto incurred in the Munsif's Court will abide the event.

*Case remanded.*

(1) 13 W. R. 434.
(2) 15 W. R. 179.
(3) 22 W. R. 395.
(4) 5 C. 925; 6 C. L. R. 487; 3 Shome L. R. 156.
(5) 3 A. 747.
(6) 10 A. 49; A. W. N. (1887) 268
(7) 15 Ind. Cas. 505; 14 Bom. L. R. 323; 36 B. 443.

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 271 OF 1914.

December 8, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

BUGATA APPALA NAIDU—PLAINTIFF—APPELLANT

*versus*

CHENGALVALA JOGIRAJU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Specific Relief Act* (*I of* 1877), *s.* 27—*Contract to*

*sell land—Prayer for possession, whether can be included in suit for specific performance—Vendor's mortgagee, whether can be impleaded.*

A claim for possession may be included in a claim for specific performance of a contract for the sale of immoveable property, but it is not open to the plaintiff to implead the vendor's mortgagee who is in possession under a usufructuary mortgage.

*Taskar* v. *Small*, 3 My. & Cr. 63; 6 Sim. 625; 5 L. J. Ch. (N. S.) 321; 40 E. R. 848; 45 R. R. 212, followed.

*Krishnasami* v. *Sundarappayyar*, 18 M. 415; 5 M. L. J. 164, distinguished.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Original Suit No. 25 of 1913.

Mr. *K. Raja Aiyar* for Mr. *S. Srinivasa Aiyangar*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—It is the practice in this and other Courts to allow a claim for possession to be included in a claim for specific performance of a contract for the sale of immoveable property, and we are not prepared to question it. But in the present case the plaintiff has gone further and has impleaded the vendor's mortgagees who are in possession under a usufructuary mortgage. We have not been referred to any authority in this Court for joining such a claim against the vendor's mortgagees with a claim against the vendor and in *Tasker* v. *Small* (1) it was expressly decided that this cannot be done. In *Krishnasami* v. *Sundarappayyar* (2) a subsequent vendee was joined under section 27 (*b*) of the Specific Relief Act and the case is distinguishable. This misjoinder was not in our opinion a sufficient reason for dismissing so much of the suit as asks for specific performance against the 1st defendant, and the decree will be modified accordingly. Further, as the 1st defendant now disputes the validity of the mortgage, the amount due thereunder will be paid into Court by the plaintiff under section 83 of the Transfer of Property Act; if within three months the 1st defendant has not taken proceedings to set aside the mortgage and to establish his right to the money, it will be paid over to the mortgagees. The 1st defendant must pay the plaintiff's costs in both Courts. Defendants Nos. 2 and 3 will be exonerated without prejudice to the plaintiff's right to proceed against them in future.

*Appeal partly allowed; Decree modified.*

(1) 3 My. & Cr. 63; 6 Sim. 625; 5 L. J. Ch. (N. S.) 321; 40 E. R. 848; 45 R. R. 212.

(2) 18 M. 415; 5 M. L. J. 164.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE NO. 415-B OF 1914.

August 31, 1915.

*Present*:—Mr. Stanyon, A. J. C.

RANGAPPA—PLAINTIFF—APPELLANT

*versus*

BISMILLA KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Negotiable Instruments Act (XXVI of 1881), s 80, scope of—Promissory note silent as to interest—Collateral written agreement as to interest made contemporaneously, effect of—Rate of interest chargeable.*

Section 80 of the Negotiable Instruments Act embodies a purely enabling provision for dealing with cases in which there is no contract in fact or capable of legal proof with regard to interest. [p. 240, col. 1.]

Where, therefore, contemporaneously with the execution of a promissory note a collateral written agreement as to interest is made, the two documents represent in fact a single transaction and the holder is entitled to charge interest at the rate agreed upon. [p. 240, col. 1.]

*Ghanshiam Lalji* v. *Ram Narain*, 29 A. 33; 17 M. L. J. 35; 11 C. W. N. 105; 34 I. A. 6 (P. C.); 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. L. J. 7, followed.

*Basanti Bibi* v. *Sheo Mangal Parshad*, 2 Ind. Cas. 199; 6 A. L. J. 233, dissented from.

*Best* v. *Haji Muhammad Suit*, 23 M. 18; *Fathuma Bibi* v. *Ammal Hanumanthu Row*, 17 M. L. J. 296, referred to

Appeal against the decree of the Additional District Judge, Akola, dated the 10th September 1914, confirming that of the Subordinate Judge, Buldana, dated the 5th February 1914.

Mr. *J. Mittra*, for the Appellant.

Mr. *N. R. Alekar*, for the Respondents.

JUDGMENT.—On the 16th December 1910, the defendants executed in favour of the plaintiff two documents, namely, (1) a promissory note for Rs. 1,000, which was silent as to interest, and in which no date

was fixed for re-payment of the money, and (2) an agreement to pay interest on the said sum of Rs. 1,000 at Rs. 2 per cent. per month. The defendants paid Rs. 600 on the 2nd April, and Rs. 100 on the 3rd April, 1911, but failed to pay the balance. The plaintiff credited the payments to the principal sum, and brought this suit for recovery of Rs. 300, the balance of the principal, *plus* Rs. 265-4-0 as interest, on Rs. 1,000 to the 2nd April 1911, and on Rs. 300 from the 3rd April 1911. The Courts below have applied section 80, Negotiable Instruments Act, 1881, and allowed interest at the rate of 6 per cent. per annum. The plaintiff has, therefore, appealed, and it is urged for him that the above section was wrongly interpreted to defeat his rights under the collateral written agreement for interest made contemporaneously with the contract embodied in the promissory note, the two documents representing, in fact, a single transaction. I am of opinion that this contention is well-founded.

Section 80, Negotiable Instruments Act, 1881, is in these terms:—

"When no rate of interest is specified in the instrument, interest on the amount due thereon shall, except in cases provided for by the Code of Civil Procedure, section 532, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

"*Explanation.*—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour."

In *Best* v. *Haji Muhammad Sait* (1) it was held that, where a promissory note is silent as to interest, customary interest could be allowed, though under section 80 aforesaid it must be limited to six per cent. In *Fathuma Bibi* v. *Ammal Hanumantha Row* (2) it was decided that where a promissory note is silent as to interest, oral evidence is not admissible in proof of a contemporaneous agreement to pay a certain rate of interest; but in such cases interest at the rate of 6 per cent. should be awarded under section 80 of the Negotiable Instruments Act. This case has no bearing because the collateral agreement pleaded was oral, evidence whereof was excluded by section 92, proviso (2), Indian Evidence Act, 1872. But in *Basanti Bibi* v. *Sheo Mangal Parshad* (3) it was laid down that "no agreement not embodied in a negotiable instrument can override the provisions of section 80 of the Negotiable Instruments Act." Consequently where, in a promissory note, no mention was made as to the rate of interest, but there was a collateral written agreement for the payment of interest at 4 per cent. per month, it was held that only 6 per cent per annum should be allowed. This ruling is directly in point and has been relied on by the lower Appellate Court. With due respect I am of opinion that it is not a correct exposition of the law. It contains no express mention of the decision of their Lordships of the Privy Council in *Ghanshiam Lalji* v. *Ram Narain* (4), except in a note at the foot added by the editor of the publication. In the Privy Council case it was found that there was a custom according to which *hundis* made no mention of interest, and the stipulation as to interest was always embodied in a separate document as a collateral agreement. Their Lordships held that by Act XXVIII of 1855 interest was recoverable at the rate agreed upon by the parties and section 80 of the Negotiable Instruments Act was not applicable. The *ratio decidendi* is given in these words at pages 36 and 37:—

"Section 80 of the Negotiable Instruments Act does not purport to deprive those dealing with such instruments of the freedom of contract possessed by other contracting parties. It purports to confer a right to interest, not to take away such a right otherwise existing. When a plaintiff has to rely upon the section as the ground of his claim to interest, no doubt the terms of the section must be followed. But to read

(1) 23 M. 18.
(2) 17 M. L. J. 296.
(3) 2 Ind. Cas. 99; 6 A. L. J. 233.
(4) 29 A. 33; 17 M. L. J. 35; 11 C. W. N. 105; 34 I. A. 6 (P. C.); 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. L. J. 7.

the section as depriving him of a contractual right of interest would be to read into it something which it does not say, and which cannot reasonably be implied from its language."

It is manifest that their Lordships did not decide that the usage or custom proved before them overrode the law, and that but for the custom section 80 would have prevailed. They decided that section 80 embodies a purely enabling provision for dealing with cases in which there is no contract in fact or capable of legal proof with regard to interest. If, therefore, the words "there is no allegation of any usage as to the rate of interest such as would take this case out of the operation of the Statute" which appear at page 235 in *Basanti Bibi* v. *Sheo Mangal Parshad* (3) were intended to distinguish the Privy Council ruling, they indicate a misapprehension on the part of the learned Judges as to the *ratio decidendi* of the Supreme Tribunal.

In the present case the two documents represent one instrument, and it is possible to argue that the case is not one in which the negotiable instrument, taken as a whole, was silent as to interest. But let it be supposed that the promissory note and the agreement as to interest were separate so that only the former could be negotiated, and that in any suit between subsequent indorsees interest could only have been obtained by applying section 80 aforesaid. I am unable to see why, as between the original parties to the two documents, before any negotiation of the note has been made, the whole of the terms of a lawful contract should not be enforced. The Privy Council decision is a direct authority for its enforcement.

The appeal is, therefore, allowed: the decrees of the Courts below are set aside and the plaintiff's claim in full is decreed with costs in all Courts.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2994 OF 1915.

December 16, 1915.

*Present*:—Mr. Justice Holmwood and Mr. Justice Mullick.

KARTICK CHANDRA DAS—DEFENDANT—APPELLANT

*versus*

SATYA SREE GHOSAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Practice—Remand of appeal, whether whole appeal is re-opened—High Court's power of remand—Permanent tenancy, presumption of—Tenancy under* shebaits—*Presumption*—"Bharatia" *tenant—Appellate Court's decision on ordinary meaning of a word, finality of—Second appeal.*

A remand made by an Appellate Court without retaining the appeal on its own file necessarily re-opens the whole case and the lower Court of Appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance. [p. 241, col. 1.]

A High Court in the exercise of its powers of supervision under the Charter can assume, in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them on its own file But in such a case, it is absolutely essential that the High Court should lay down clearly that it did intend to limit the scope of the appeal to certain specified questions. [p. 241, cols. 1 & 2.]

In the absence of any limitation, the whole appeal on remand becomes open for decision by the lower Appellate Court. [p. 241, col. 2.]

No presumption of a grant of permanent tenancy can arise, if at the point of (ancient time where the origin of the tenancy is lost in obscurity, it was held under *shebaits* whose origin is also lost in obscurity and the tenants were described as *bharatia* tenants. [p. 241, col 2.]

A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal. [p. 242, col. 1.]

Appeal from a decree of the Sub-Judge, 24 Pergannahs, dated the 30th June 1913, affirming that of the Munsif, Alipore, dated the 31st July 1908.

Babu *Shib Chandra Palit* and Sir *Rash Behari Ghose*, for the Appellant.

Babus *Mohini Mohan Chatterjee* and *Sarat Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal after remand from the judgment and decree of the learned Subordinate Judge of the 24-Pergannahs, who agreeing with the Court of first instance has decreed the plaintiffs' suit for ejectment of the defendants. The defendants claimed a permanent right in the land which is situated in Kidderpore, a suburb of Calcutta. They alleged that they had acquired such a right by long

possession beyond the memory of man at a fixed rent and that their predecessors had erected permanent structures on the land. In the first appeal from the Munsif's judgment which was heard by another Subordinate Judge, it was held that the *kabuliat* set up by the plaintiffs of the year 1301 was a forgery and that the defendants were entitled to the presumption from long possession and from the existence of permanent structures and he accordingly dismissed the plaintiffs' suit. The plaintiffs appealed to this Court and the appeal was heard by Jenkins, C. J., and Nalini Ranjan Chatterjea, J., who remanded the case reversing the decree of the lower Appellate Court and sending back the appeal for re-hearing in the light of the remarks they had made. Those remarks were chiefly two in number, *firstly*, that the presumption which was made by the Subordinate Judge in the first Court offended a legal principle, inasmuch as if the original lessor was a *shebait* of *debutter* he would not have acted in discharge of his duty as *shebait* by fixing a rent for all time which would in future be wholly inadequate, and it was, therefore, necessary to make a further inquiry into the origin of the tenancy, whether at the origin of the tenancy the property had acquired a *debutter* character, as upon this would depend the applicability of the presumption. There was a *further* suggestion that the weight to be attached to the word *bharatia* should also be considered by the learned Subordinate Judge.

In strict law a remand made by an Appellate Court without retaining the appeal in its own file necessarily re-opens the whole case, and the Court of Appeal to which the case was remanded is bound to hear the appeal upon the judgment of the Court of first instance and on nothing else. It is true that this Court in the exercise of its powers of supervision under the Charter has assumed, and we think rightly assumed, in certain cases authority to limit the scope of certain appeals remanded to the lower Courts without keeping them in its own file. But whenever this is done, it is in our opinion absolutely essential that this Court should lay down clearly without any possibility of mistake that it did intend to limit the scope of the appeal to certain specified questions. We are, therefore, of opinion that the learned Subordinate Judge who has now re-heard the case was right in holding that the whole appeal was open to him for decision. The importance of this lies in the fact that the first Appellate Court found that the *kabuliat* which is now found to be the real origin of the present tenancy was a forgery.

The Subordinate Judge on remand has found and has given very good reasons for finding that this *kabuliat* must have been a genuine document. He, therefore, holds that there is no question that at the inception of this tenancy in 1301 the lessor was the *shebait* of *debutter* property. But he has gone further and has found that eliminating this *kabuliat* as the origin of the tenancy there can be no presumption of a grant of a permanent tenancy, the earliest *dakhila* which is the first evidence of the existence of this tenancy being of the year 1246 and in this also the landlord signed as *shebait*. If the appellants say that the tenancy originated before 1246 and that at that time the land was not *debutter*, the learned Subordinate Judge says that that fact must, he thinks, be proved by evidence, but they have not been able to produce any evidence on the point.

We come, therefore, to the fact that at the point where the origin of the tenancy is lost in obscurity and where the presumption would arise if it ever arose, the tenancy was held under *shebaits* whose origin must also be considered to be lost in obscurity, and not only was it held under *shebaits* but it was expressly stated that the tenants were *bharatia* tenants. This was the second point which the learned Subordinate Judge was specially directed to devote his attention to in deciding the appeal, and his finding on this point is that the word *bharatia* which has been used from the earliest times to describe these tenants cannot be said to mean permanent tenants. The learned Judge, who is an officer of very great experience and very sound judgment and must be intimately acquainted with the use of such terms as *bharatia*, says: "I have never seen the word *bharatia* used with

reference to annual tenants with permanent rights, the word as ordinarily used signifies monthly tenants of houses or lands without any permanent right." Now this is not a question for the Judge as to the legal effect of the word. It is a question essentially for the Jury of the ordinary meaning of word in common use, and the decision of the learned Subordinate Judge on the point is, therefore, final and not open to us to discuss in second appeal.

We think, therefore, that on all the points the appeal of the defendant fails and must be dismissed with costs.

*Appeal dismissed.*

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 548 OF 1913.

October 30, 1915.

*Present:*—Mr. Batten, A. J. C

ASARAM—PLAINTIFF—APPELLANT

*versus*

RATANSINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Manager, whether guardian of minor co-parceners—Sale by manager of family property—Suit by minor co-parcener on attaining majority for possession of his share Limitation Act (IX of 1908), Sch. I, Arts. 144, 44, 91.*

The manager of a joint Hindu family is the manager of the whole family property, whether his co-parceners are minors or majors, but cannot be called the guardian of the property of the minors in the sense in which the word guardian is used in Article 44 of the first Schedule of the Limitation Act nor can such a manager alter the real relations between the parties by calling himself guardian of his minor co-parceners. [p. 243, col. 2, p. 245, col. 2.]

*Gharibullah* v. *Khalak Singh*, 25 A. 407; 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165 (P. C.), followed.

A suit by a minor co-parcener on attaining majority to set aside an alienation by a manager of joint family property is governed by Article 144 and not by Article 44 or 91 of the first Schedule of the Limitation Act. [p. 245, cols. 1 & 2.]

*Sham Chandra Dafadar* v. *Gadadhar Mandal*, 9 Ind. Cas. 377; 13 C. L. J. 277; *Mahableshwar* v. *Ramchandra*, 21 Ind. Cas. 350; 15 Bom. L. R. 882; 38 B 94, distinguished.

*Unni* v. *Kunchi Amma*, 14 M. 26; *Sheo Shankar Gir* v. *Ram Shewak Chowdhri*, 24 C. 77, followed.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 30th June 1913, confirming that of the District Judge, Betul, dated the 30th April 1912.

Messrs. *Vivian Bose* and *S. K. Bardinge*, for the Appellant.

Mr. *J. Mittra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Ganu son of Mayaram for possession of his half share in certain family immoveable property, on the ground that the sale of the share by his half-brother Deorao to the defendants-respondents was without any right or legal necessity. The suit was instituted on the 21st November 1910, 9 years and 6 months after the date of the sale which was the 21st May 1901. Deorao and Ganu were sons of Mayaram by different wives. The findings of fact, which cannot be impeached in this Court in second appeal, are that Ganu had attained majority a little more than three years before the institution of the suit, and that on the date of the sale the property sold was the joint property of the plaintiff and Deorao, Deorao being the manager, and the plaintiff a minor. The sale-deed, which was executed by Deorao, contains the following recitals:—

"Sale-deed . . . . executed by Deorao Patel, son of Mayaram Patel, for himself and for Ganu Patel, minor aged 12 years, son of Mayaram Patel, through brother and guardian Deorao Patel."

Deorao signed the sale-deed twice, once for himself and once as "guardian and real brother on behalf of the minor Ganu." The sale conveyed the interests of both brothers in the estate.

The learned Divisional Judge upheld the decision of the first Court that the suit was time-barred. Neither Court decided the question whether the sale of the minor's share was for legal necessity.

Ganu died during the suit, and the appeal is made by his son Asaram. The sole question for decision in this Court is whether the suit was rightly dismissed as time-barred.

I will quote the passages in the judgment of the learned Divisional Judge on the question of limitation:—

"Ganu in appeal attacks this decision on the following grounds . . . . that even supposing that the two brothers were joint and Deorao the manager . . . . no guardian in such case was necessary and that Article 44 or 91 of the Second Schedule of the Limitation Act does not apply to the sale of property by the manager of a joint Hindu

family whose authority is a limited one; . . . . and lastly that Article 144 of the Second Schedule of the Limitation Act applies.

"The first question for decision is what Article of the Second Schedule of the Limitation Act applies to the case. The lower Court has applied Article 44.

"It is argued for the appellant that the manager of an united Hindu family, the co-proprietors being minors, is not the guardian of such minors for the purpose of binding them by the execution of a bond charging the estate, *Durgapersad* v. *Keshopersad* (1); *Gharibullah* v. *Khalak Singh* (2).

"It seems to me that the present case is one where the deed of sale is not *ab initio* void. The brother Deorao, as manager of the joint family, had power under certain conditions to sell appellant's share in the village. The deed is voidable by the plaintiff, not void. Can the appellant recover without setting aside the alienation? I do not think he can, as the instrument under which defendants have possession is not void, as the executant had power under certain contingencies to execute it and to alienate the share plaintiff now seeks to recover. It is clearly within the power of a manager of a Hindu joint family to alienate, for certain reasons, joint family property, even if that property be ancestral. Appellant states that these powers do not exist, and that his brother in no circumstances possessed the power; but it has been established beyond reasonable doubt that at the time of sale, and as a matter of fact at the time of suit, Deorao was the manager of the united family. He possessed the powers, limited though they were, of his position. The existence of the document does obstruct the plaintiff's right, and it is necessary for him to have it set aside.

"Article 44 has, I think, been rightly applied to the case. It does not, in my opinion, fall under Article 91 of the Second Schedule of the Limitation Act. As observed by the lower Court, Deorao was 'manager of the joint family property and in that capacity guardian of the estate of the plaintiff.' . . . . . Taking the evidence as a whole the decision of the lower Court that appellant filed his suit over three years from coming of age is justifiable."

It is contended for the appellant that neither Article 44 nor Article 91 of the Limitation Schedule applies and that the period of limitation is the 12 years ordinarily allowed in suits for possession of immoveable property.

In support of this contention it is first of all urged that the manager of a Mitakshara joint family is not the guardian of the property of the minor co-parceners; he is manager of the whole family property, whether his co-parceners are minors or majors, but cannot be called the guardian of the property of the minors in the sense in which the word guardian is used in Article 44 of the Second Schedule of the Limitation Act. This view appears to me to be correct. In *Gharibullah* v. *Khalak Singh* (2), their Lordships of the Privy Council held that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. The case was one in which a mortgage was executed by a major son and by a mother as the certificated guardian of a minor son. Their Lordships held that there could be no guardian appointed for the minor, and that the mortgage must be regarded as one executed by the major son as *karta* of the joint family. The case was one under the Guardians and Wards Act, but the principle underlying the decision, as has been explained in numerous cases, is that there cannot be a guardian having the care of an undivided interest in the property of a joint Hindu family. Deorao was actually manager of the joint property of himself and his minor brother, and he could not by styling himself guardian alter that position. He must be regarded as having sold the shares of himself and of his brother as manager of the joint estate.

This being so, the next question is whether the plaintiff is bound to set aside the sale-deed before he can recover possession of the property. If he is, then either Article 44 or 91 of the Limitation Schedule applies, and the suit is time-barred. In *Ganpati* v. *Musammat Janki* (3) Drake-

(1) 8 C. 656; 11 C. L. R. 210; 9 I. A. 27; 6 Ind. Jur. 272; 4 Sar. P. C. J. 332.

(2) 25 A. 407; 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165 (P. C.)

(3) Second Appeal No. 649 of 1907

ASARAM v. RATANSINGH.

Brockman, J. C., had before him a case in which the facts were very similar to those in *Gharibullah* v. *Khalak Singh* (2). He held that the mother had no power to alienate the minor's property. The minor's adult brother was Jairam, and the learned Judicial Commissioner goes on to say:

"In conclusion I may point out that even, if the sale be regarded as one by Jairam of the plaintiffs' interest in addition to his own, there would be a serious difficulty in the way of applying Article 44 of the Limitation Schedule to the claim. In the first place such a sale would be effected by virtue of his position as manager of the family, not as guardian, and he could sell as manager whether his co-parceners were minor or major. If he exceeded his powers, his major co-parcener would apparently have 12 years in which to recover possession on the principle laid down in *Unni* v. *Kunchi Amma* (4) and applied by Banerji, J., in *Abdul Rahman* v. *Sukhdayal Singh* (5). Why should the minor co-parcener be put off with a shorter period? Similarly, if the manager was the father and the property ancestral (as here) the other co-parceners would have 12 years under Article 126 in which to sue for setting aside a sale, and they should have no less where the manager is a brother or uncle."

The principle of *Unni* v. *Kunchi Amma* (4) was again affirmed in *Bachan Singh* v *Kamta Pershad* (6), where the following extracts from the Madras judgment are quoted: –

"'When a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument, and the three years' rule enacted by Article 91 applies to any suit brought by such person. But 'where an instrument of alienation is executed by a person who is not the full owner of the property, but has only conditional authority to dispose of it, that Article would not apply.' . . . 'Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a divided Hindu family. In these cases . . . it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted by delivery of possession.'"

The Madras case was also cited with approval in *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (7), which was the case of an alienation by the manager of a Hindu endowment. The learned Judges observed:

'We also think that we must hold that Article 91 of the Limitation Act has no application to the present case. A forcible argument was addressed to us on behalf of the respondents in order to induce us to hold that that Article applied, and a large number of authorities were cited to us. In no one of them do we find that Article 91 has been applied to an alienation by the manager of an endowment, the manager of an infant heir, a Hindu widow, or any other of the persons whose powers are placed in the same footing by *Hunoomanpersaud Panday* v. *Baboee Munraj Koonweree* (8) and the cases which follows the decision in that case."

In *Banwari Lal* v. *Sheo Sankar Misser* (9), another case relied on for the appellant, Article 91 was held not to be applicable, and the limitation period was held to be 12 years, but that was a case in which the alienation was by a co-parcener who was not the manager.

In a recent case, *Kalyan Singh* v. *Pitambar Singh* (10), the alienation was by a major and his mother of property which belonged jointly to himself and his minor brothers. The facts were, therefore, parallel to those in *Gharibullah* v. *Khalak Singh* (2) and in *Ganpati* v. *Musammat Janki* (3) of this Court. Chamier, J., observes:—

(4) 14 M. 26.
(5) 28 A. 30 at p. 32; A. W. N. (1905) 176; 2 A. L. J. 507.
(6) 5 Ind. Cas. 585; 32 A. 392; 7 A. L. J. 337.
(7) 24 C. 77.
(8) 6 M. I. A. 393; 18 W. R. 81 *n.*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.
(9) 1 Ind. Cas. 670; 13 C. W. N. 815.
(10) 27 Ind. Cas. 687; 13 A. L. J. 94.

"I am unable to accept the contention that Article 44 applies to this suit. When the sale was made *Musammat* Kaunsilia was not guardian of the property of the plaintiffs-respondents [see *Gharibullah* v. *Khalak Singh* (2)]. The property was part of the joint family property of the plaintiffs and their brother, Sardar Singh. *Musammat* Kaunsilia must, I think, be disregarded altogether. She had no right whatever to deal with the property of the family after Sardar Singh came of age. Regarded as a sale by her alone the sale was void altogether and Article 44 does not apply to such a case [see *Sham Chandra Dafadar* v. *Gadadhar Mandal* (11)]. The sale should, I think, be regarded as having been made by Sardar Singh, and even if it be assumed that he was *karta* of the family he was not guardian of the property of his brother within the meaning of Article 44. This Article has never been applied to a suit to set aside a sale by a *karta* of joint family property. Nor, as far as I am aware, has Article 91 ever been applied to such a case as this. It appears to me that the relevant Article is 144, that the prayer in the plaint that the sale may be set aside is probably superfluous and that the suit is well within time."

The learned Counsel, for the respondents, relies on the decision in *Sham Chandra Dafadar* v. *Gadadhar Mandal* (11), in which Article 44 was held applicable, and it was remarked that if Article 44 did not apply, Article 91 did. But the alienation in that case was by the minor's *de facto* guardian who had no share in the property herself. The case of a *karta* is very different. In *Mahableshwar* v. *Ramchandra* (12), Article 44 was applied to a suit to set aside an alienation by a *mukhtyar* appointed by the manager of a joint family. The *ratio decidendi* was that the alienation was by a properly appointed guardian after the death of the adult managing member. It was not an alienation made by a *karta* having an interest in the joint property.

It appears to me that there is overwhelming authority for the view that Articles 44 and 91 do not apply to a suit to set aside an alienation by a manager of joint family property, and that such a manager does not alter the real relations between the parties by calling himself guardian of his minor coparceners.

The suit has wrongly been held to be time-barred and I remand the appeal for further trial in respect of the other questions that have to be decided. Refund certificate will issue in respect of the Court-fee paid in appeal. Other costs will be costs in the suit.

*Appeal allowed*; *Case remanded.*

(11) 9 Ind. Cas. 377; 13 C. L. J. 277.
(12) 21 Ind. Cas. 350; 15 Bom. L. R. 832; 38 B. 94.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 444 OF 1913.

January 26, 1915.

*Present*:—Mr. Justice Ayling and Mr. Justice Tyabji.

KODIALBAIL RYMOND SEBASTIAN LOBO—PLAINTIFF—APPELLANT

*versus*

KODIALBAIL DEVU SHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 116—Suit for possession under a contract of lease, nature of—Claim for mesne profits, whether affects suit.*

A suit for possession under a contract of lease and for mesne profits is substantially one for damages for breach of contract and is governed by Article 116 of the Limitation Act. [p. 246, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 153 of 1911, preferred against that of the Court of the District Munsif of Mangalore, in Original Suit No. 291 of 1909.

FACTS.—Defendant No. 1 represented one branch of an Alyasanthana family; defendant No. 2 and one Manjayya Shetty represented another branch. Manjayya Shetty borrowed from the plaintiff a sum of Rs. 1,000, and leased out certain family lands to him for a period of 20 years on condition that he should get the premium discharged out of the usufruct. Out of this a sum of Rs. 300 went towards the discharge of a debt contracted by both 1st defendant and Manjayya Shetty with the Kadri temple on a previous mortgage. Manjayya Shetty died. Plaintiff sued for possession of the plaint lands or in the alternative for the return of Rs. 1,000 paid as premium and for mesne profits for the period of three years, during which he was kept

out of possession of the leased lands. Defendants pleaded that the lease was not for a family purpose and was not binding on them. The District Munsif found the lease invalid and that it did not bind defendants Nos. 1 and 2, and the claim for possession was accordingly given up; he found also that the suit for mesne profits was barred, having been instituted beyond three years from the date they accrued due, but he decreed the plaintiff's claim to the extent of Rs. 320, the amount paid to Kadri temple, on the principle of subrogation. On appeal the Subordinate Judge upheld the view of the District Munsif as to mesne profits, but reversed it so far as his view regarding subrogation was concerned and dismissed the suit in its entirety. The present appeal is against that decree.

Mr. *K. P. Lakshmana Rao*, for the Appellant.

Mr. *K. Sundara Rao*, for the Respondents.

JUDGMENT.—The Subordinate Judge has dismissed the suit as barred by limitation. It is argued by the appellant's Vakil that apart from the prayer for possession under the lease, which has been abandoned, the suit is substantially one for damages for breach of contract, that the proper Article applicable is Article 116 and that in that view the suit is not time-barred.

We think this view of the nature of the suit is correct and even if the relief claimed is the allowance of mesne profits this does not affect the true nature of the suit. [Vide *Ganesh Krishn* v. *Madhavrav Ravji* (1), *Nobocoomar Mookhopadhaya* v. *Sirn Mullick* (2) and *Ambalavana Pandaram* v. *Vaguran* (3).] If the suit is one for damages for breach of the lease contract it is admittedly not time-barred.

We must, therefore, set aside the decree of the Subordinate Judge and remand the appeal for disposal on its merits. As the appellant has failed to take the point argued before us sufficiently clearly in his appeal memorandum he will bear his own costs in this Court.

The respondents' costs will abide the result of the appeal in the District Court.

*Appeal allowed ; Suit remanded.*

(1) 6 B. 75.
(2) 6 C. 94; 6 C. L. R. 679.
(3) 19 M. 52; 5 M. L. J. 228.

## PRIVY OUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 6, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

JAMSHED KHODARAM IRANI—APPELLANT

*versus*

BURJORJI DHUNJIBHAI CONTRACTOR—RESPONDENT.

*Contract Act (IX of 1872), s. 55—Contract—Specific performance—Time as essence of contract—Express stipulation or nature of property or circumstances, effect of—Jurisdiction—Equity—Intention—Requisitions as to title, when valid.*

Under section 55 of the Contract Act, which lays down the same principle as obtains under the law of England a Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by a contract, either for completion or for the steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. But the special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation; and to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakeable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. [p. 249, cols. 1 & 2.]

Equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. [p. 249, col. 2.]

Equity will infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. [p. 249, col. 2.]

*R* agreed in writing by a document to sell his lease-hold interest in a certain property to *B*. *B* paid a certain amount as a deposit or earnest agreeing to complete the purchase in two months or forfeit

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the earnest money. In investigating the title *B* made certain requisitions some two months after the date of the contract. *R* did not comply with these requisitions and gave notice to *B* that the contract to sell was at an end and the earnest money forfeited, on the ground that *B* had failed to complete his purchase within the date fixed:

*Held*, that the case was governed by section 55 of the Contract Act, 1872, and that there was nothing in the language of the contract or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. [p. 248, col. 2; p. 250, col. 1.]

*Held*, further that the requisitions were legitimately made. [p. 248, col. 2.]

*Lennon* v. *Napper*, 2 Sch. & Lef. 682; *Roberts* v. *Berry*, (1852) 3 D. G. M. & G. 284 at p. 289; 22 L J. Ch. 398; 43 E. R. 112; 20 L. T. (o. s.) 215; 98 R. R. 139; *Tilley* v. *Thomas*, 3 Ch. App. 61; 17 L. T. 422; 16 W. R. 166; *Stickney* v. *Keeble*, (1915) A. C. 386, approved.

Appeal from a judgment and decree of the Bombay High Court, dated February 17th, 1913, reported in 20 Ind. Cas. 469, reversing those of the same Court, Original Side, dated July 30th, 1912.

FACTS of the case are sufficiently set forth in their Lordships' judgment as well as in the judgment of the High Court reported in 20 Ind. Cas. 469.

Sir *Robert Finlay*, *K. C.*, and Mr. *Brown*, for the Appellant.—Time was not of the essence of the contract and did not become so by reason of the subsequent correspondence. Section 55 of the Indian Contract Act laid down the principle on which specific performance was ordered in India. It was the same in England. Equity interfered where the intention of the parties was not to make time as essence of the contract [*Stickney* v. *Keeble* (1)]. *Prima facie* the rule in equity was to ascertain the intention of the parties, whether they intended the time mentioned as essence of the contract, from the surrounding circumstances as existed at the time of signing the contract. The law was the same in India. The claim in the contract was assumed by both parties not to make time as essence of the contract.

(Counsel for respondent were directed to argue the aforesaid point.)

Messrs. *Leslie*, *Scott* and *Raikes*, for the Respondent.—Time was of essence of the contract.

[Lord Haldane referred to *Lennon* v. *Napper* (2) and *Roberts* v. *Berry* (3)].

Time being of the essence of contract was to be gathered from the language of the contract itself. The language in *Stickney* v. *Keeble* (1) was essentially different. You must look to the substance of the contract.

[Lord Haldane: You must show that there was imported into the contract an intention to introduce the equity jurisdiction.]

Time was of the essence of the contract unless it was expressly otherwise stipulated or the nature of the contract did not admit of it or from the surrounding circumstances it appeared that parties did not wish it to be of the essence. The last condition is to be found in *Inglis* v. *Buttery* (4). When the Court of Equity said in connection with the question of specific performance that you must look at the surrounding circumstances, it laid down a rule much wider than the ordinary rule of the Common Law as laid down in *Inglis* v. *Buttery & Co.* (4). Equity in effect varied the contract by saying that time was not of the essence of the contract and evidence was admissible to rebut the presumption. All the authorities agreed (1) that contract made time of the essence of the contract, and (2) that when the Court looked at the surrounding circumstances to ascertain the intention of the parties, it was not to vary the effect of the contract.

[Lord Wrenbury referred to *Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (5).]

Equity jurisdiction in India was defined by the Specific Relief Act, but it drew no distinction between law and other contracts. Plain and unambiguous meaning of words in a deed was the rule of construction, although parties had interpreted them differently.

Reference was made to *Seton* v. *Slade* (6); *North Eastern Railway Co.* v. *Lord Hastings* (7); *Tillay* v. *Thomas* (8); *Inglis* v. *Buttery* (4); *Hudson* v. *Temple* (9); *Gelye* v. *Montrose* (10); *Barclay* v. *Messenger* (11); *Hudson* v. *Bartram* (12), Specific Relief Act, sections 12 and 26; Transfer of Property Act, section 55; Indian Evidence Act, sections 91 and 92.

(1) (1915) A. C. 386. (2) 2 Sch. & Lef. 682.
(3) (1852) 3 D. G. M. & G 284 at p. 289; 22 L. J. Ch. 398; 43 E. R. 112; 20 L. T. (o. s.) 215; 98 R. R, 139.
(4) (1878 3 A. C. 551.
(5) (1914) A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.
(6) 7 Ves. 265; 32 E. R. 108; 6 R. R. 124.
(7) (1900) A. C. 260; 69 L. J. Ch. 516; 82 L. T. 429; 16 T. L. R. 325.
(8) 3 Ch. App. 61; 17 L. T. 422; 16 W. R. 166.
(9) 29 Beav. 536; 30 L. J. Ch. 251; 7 Jur. (N. S.) 248; 3 L. T. 495; 9 W. R. 243; 54 E. R. 735; 131 R. R. 699.
(10) 26 Beav 45; 53 E. R. 813; 122 R. R. 19.
(11) 43 L. J. Ch. 449; 30 L. T. 351; 22 W. R. 522.
(12) (1818) 3 Madd. 440; 56 E. R. 566.

Sir *Robert Finlay* was not called upon to reply.

JUDGMENT.

VISCOUNT HALDANE.—The question in this appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod, J., decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition, or provision of the lease the lessor had the right to re-enter and determine the lease. The lease was transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911 the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the lease-hold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th clause provided that on payment of the Rs. 81,000, as provided by clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period above mentioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to re-sell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's Solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his Solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question, therefore, lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in section 55 of the Indian Contract Act, 1872, which provides that "When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contract to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper* (2), which was adopted by Knight-Bruce, L. J., in *Roberts* v. *Berry* (3). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* (8) and by the House of Lords in the recent case of *Stickney* v. *Keeble* (1). Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas* (8):—

"The construction is and must be in equity the same as in a Court of Law. A Court of Equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties and if [as Lord Justice Turner said in *Roberts* v. *Berry* (3)], there is nothing in the 'express stipulations between the parties, the nature of property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds...mentioned by Lord Justice Turner, 'express stipulations' requires no comment. The 'nature of the property' is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakeable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley* v. *Thomas* (8) (*supra*), where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod, J., in the view that there is nothing said in it sufficient to exclude the equitable cannon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and the judgment of Macleod, J., restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors for the Appellant: Messrs. *Latteys and Hart.*

Solicitors for the Respondent: Messrs. *T. L. Wilsom & Co.*

## PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1039 OF 1913.

April 29, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice LeRossignol.

*Musammat* GULAB KHATUN AND OTHERS—DEFENDANTS—PETITIONERS

*versus*

CHAUDHRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, Sch. II, paras. 15, 16—Arbitration—Award—Decree based on award—Appeal—Revision—Grounds—Jurisdiction.*

No appeal lies from a decree based on an award when the decree is in accordance with the award. [p. 250, col. 2.]

An omission of sanction under Order XXXII, rule 7, Civil Procedure Code, 1908, is no ground for revision. [p. 250, col. 2.]

No revision is maintainable on the ground of objections as to the conduct of the arbitrators. [p. 251, col. 1.]

The revisional jurisdiction is exercised only in extraordinary cases where no other remedy is available to the aggrieved person. [p. 251, col. 1.]

Petition for revision of the decree of the District Judge, Jhelum, dated the 5th July 1913.

Mr. *Nanak Chand*, for the Appellants.

Mr *Badr-ud-Din*, for the Respondents.

JUDGMENT.—This case and the connected Case No. 1038 of 1913, which were instituted as revisions, have been registered as appeals by the office, though on 16th November 1913 the admitting Judge remarked that apparently no appeal lay, the decree in each case being in accordance with the award and the point was left for decision by the Division Bench. We rule that no appeal lies.

The law as to the circumstances in which revision by this Court is allowable in cases of decrees based on, and in accordance with, awards and as to the scope of such revisions, is pretty clearly defined in the Full Bench rulings *Hansraj* v *Ganga Ram* (1) and *Panna Lal* v. *Mussammat Soman* (2), which interpret and apply the Privy Council ruling *Ghulam Jilani* v *Muhammad Hassan* (3) and *Uda* v. *Mul Chand* (4), Division Bench case. Under the last mentioned ruling the omission of sanction under Order XXXII, rule 7, Civil Procedure Code, is no ground

(1) 88 P. R. 1902 (F. B.); 119 P. L. R. 1902.
(2) 89 P. R. 1902 (F. B.); 120 P. L. R. 1902.
(3) 25 P. R. 1902 (P. C.); 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C. W. N. 226; 29 C. 167; 29 I. A. 51.
(4) 4 P. R. 1907; 20 P. W. R. 1907.

for revision, and this *dictum* wipes out ground I (*b*) of the printed grounds now before us. The distinction between *Uda* v. *Mul Chand* (4) and the present case suggested in ground I (*c*) is fallacious, for the objection was not taken in the lower Court *in time*, that is, within the 10 days allowed for objections.

Ground I (*a*) might be a good ground for revision if it could be established, but it cannot. We have examined the record and we find that the learned Advocate has overlooked the fact that *Musammat* Khan Bano was guardian of four minors and that she appointed one Pahar Khan her and their agent, and of course his acts are their acts. One point raised in argument but not mentioned in the grounds is that Anar Khan, defendant, who signed as a major, was really minor; we do not think that on revision a point like this should be sprung upon the plaintiffs.

The second ground in the printed memorandum is certainly no ground for revision, being wholly concerned with the conduct of the arbitrators—*Cf. Ghulam Jilani* v. *Muhammad Hassan* (3), reference to *Jhangi Ram* v. *Mussammat Budhu Bai* (5).

Apart from all the above reasons for dismissing these revisions, the doctrine must always be borne in mind that this Court's revisional jurisdiction is meant for use in extraordinary cases where no other remedy is available to the aggrieved person. In the present case it will apparently be open to the minors, when they come of age, if so advised, to sue to set aside decrees and orders passed to their detriment contrary to law and justice.

For these reasons we dismiss these petitions but in all the circumstances we think the parties might be left to pay their own costs.

*Revision dismissed.*

(5) 84 P. R. 1901; 112 P. L. R. 1901.

## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1965, 2216, 2217, 2218 AND 2219 OF 1913.

December 10, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

KALIS CHANDRA SAHA AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

DARBARIA SHEIK AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 29—Landlord and tenant*—Hajat—*Landlord's right to claim full rent after allowing* hajat *for some years—Non-occupancy* raiyat—*Agreement to pay full rent stipulated in lease after getting* hajat *for some years, if valid—Evidence of subsequent agreement or of conduc to vary rent stipulated in registered lease, admissibility of—Evidence Act (I of 1872), s. 92—Evidence that rent was always paid at lower rate than that stipulated in lease, admissibility of.*

An agreement of a non-occupancy *raiyat* contained in his *kabulyat* that for the term of the lease a portion of the stipulated rent will be deducted as *hajat* (kept in suspense) and after the expiry of the term, if he chooses to occupy the land full rent will be payable, does not contravene the provisions of the Bengal Tenancy Act and is not invalid. [p. 252, col. 2.]

*Srimati Mohamaya Kar* v. *Kishore Chang*, 21 Ind. Cas. 948; 18 C. W. N. 738; 18 C. L. J. 502, distinguished.

The mere fact that the landlord on the expiry of the term of a written lease realised rent at a reduced rate for a few years, is not sufficient to deprive him of his right to claim rent at the rate stipulated in the lease. [p. 252, col. 2.]

*Durga Prosad Singh* v. *Rajendra Narain Bagchi*, 4 Ind. Cas. 713; 10 C. L. J. 570; 37 C. 293; *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*, 21 Ind. Cas. 750; 41 C. 493; 18 C. W. N. 66; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42; *Baijnath Prasad Sahu* v. *Raghunath Rai*, 14 Ind. Cas. 817; 16 C. W. N. 496, applied.

Where such a lease is registered, evidence of any subsequent agreement or evidence of conduct is inadmissible for the purpose of varying the stipulated rent. [p. 253, col. 1.]

Evidence that since the execution of a *kabulyat* the tenant has been paying rent at a lower rate than that stated in the *kabulyat*, is admissible to show that from the very first the intention of the parties was that the *kabulyat* should not be acted upon or that there has been a waiver of the strict terms of the lease. [p. 253, col. 1.]

*Beni Madhub Gorani* v. *Lalmoti Dassi*, 6 C. W. N. 242, applied.

Appeals against the decrees of the District Judge, Rangpur, dated the 10th March 1913, modifying that of the Munsif, Kurigram, dated the 28th February 1912.

FACTS of the case appear from the judgment.

KALIS CHANDRA SAHA *v.* DARBARIA SHEIK.

Babu *Surendra Chandra Sen*, for the Appellant.—The defendants are bound by the terms of the *kabulyats*, and the landlord is, therefore, entitled to claim the payment of higher rent as reserved in the *kabulyats*. The fact that the landlord has realised rent at the lower rate does not disentitle him to claim the higher rent reserved in the lease at any time he likes, there is no waiver. On the expiry of the terms of the *kabulyats* the tenants held over on the same terms and as the *kabulyats* are perfectly valid, the tenants are bound by their terms to pay the stipulated rent. They enjoyed a deduction for some years, but that does not give them any right to claim the deduction against the wishes of the landlord.

Babu *D. N. Bagchi*, for the Respondent.—It was not the intention of the parties from the beginning that the provision relating to higher rent should be acted upon. Moreover, section 29 of the Bengal Tenancy Act precludes the imposition of the higher rent reserved, as it exceeds by more than two annas in the rupee. I rely upon the decision reported as *Srimati Mohamaya Kar* v. *Kishore Chang* (1).

[N. R. CHATTERJEA, J.: This case relates to occupancy *raiyats* but your clients are non-occupancy *raiyats*.]

The principle of the decision is applicable to these cases. Under the Bengal Tenancy Act, the landlord can enhance the rent of non-occupancy *raiyats* according to the procedure laid down in the Act in sections 43 and 46. The attempt of the landlord to enhance rent in the way adopted by him is contrary to law.

Babu *Surendar Chandra Sen*, in reply.—There is absolutely no evidence on the record that it was the intention of the parties that the terms relating to the payment of higher rent would not be acted upon. What the landlord is claiming is not enhanced rent but rent which was stipulated in the *kabulyats*. Section 29, section 43 or section 46 has no application.

JUDGMENT.—These appeals arise out of suits for rent based upon certain *kabulyats*. The *kabulyats* in three of the cases were for the term of one year and the *kabulyats* in the remaining two cases were for three years each. Certain rent was settled in each case but a portion was deducted as *hajat* (kept in suspense) and the balance was stated to be the rent payable for the term. It was stipulated, however, in the *kabulyats* that on the expiry of the term the tenant would take a fresh settlement and if he continued in occupation without taking any fresh settlement, the amount of *hajat* would not be allowed. The plaintiff in these suits has claimed rent at the full rate. The Court of first instance gave a decree for rent at the full rate, but on appeal the learned District Judge held that plaintiff was entitled to recover rent only at the reduced rate. The plaintiff has appealed to this Court.

Now the defendant is not an occupancy *raiyat*. The case of *Srimati Mohamaya Kar* v. *Kishore Chang* (1), upon which reliance was placed on behalf of the respondent, related to an agreement made by an occupancy *raiyat* and the agreement contravened the provisions of section 29 of the Bengal Tenancy Act, and, therefore, cannot govern the present cases. The agreement contained in the *kabulyats* in these cases as to payment at the full rate after the expiry of the term if the tenant chose to occupy the land, does not contravene the provisions of the Act relating to non-occupancy *raiyats*, and is not invalid.

The learned District Judge, however, has held that even after the expiry of the term the plaintiff did not realise rent at the full rate, but realised rent at the reduced rate. Although there is evidence to show that rent was not realised at the full rate, there is no evidence that rent was realized at the reduced rate, and the finding of the Court below on the latter point, therefore, is not based upon any evidence. It does not appear at what rate rent was actually realised since the expiry of the term. Assuming, however, that rent was realised at the reduced rate for a few years before suit, we do not think that that fact by itself is sufficient to deprive the landlord of his right to claim rent at the rate stipulated in the *kabulyats*. The contract as to the rent payable after the expiry of the term is contained in the *kabuliyats*. The mere fact that the rent for some years has been received at a

(1) 21 Ind. Cas. 948; 18 C. L. J. 50; 18 C. W. N. 738.

reduced rate does not bind the lessor to accept rent at that rate in future, because that is consistent with the reduction being a mere temporary abatement and is an indulgence on the part of the lessor. See *Durga Prosad Singh* v. *Rajendra Narain Bagchi* (2), *Durga Prasad Singh* v. *Rajendra Narayan Singh* (3) and *Baijnath Prosad Sahu* v. *Raghunath Rai* (4). The learned Judge has practically held that the landlord by accepting rent at the reduced rate after the expiry of the term of the leases has varied the rent by putting an end to the agreement to pay rent at the full rate. No such case, however, was made by the defendant, and in four of the cases in which the leases were registered evidence of any subsequent agreement or evidence of conduct is inadmissible.

We are accordingly of opinion that the plaintiff accepting rent at the reduced rate is not precluded from claiming rent at the rate agreed upon in the *kabulyats*.

The defendant, however, pleaded in his written statement that the stipulation in the *kabulyats* that the amount of *hajat* would not be allowed on the expiry of the term of the lease was inserted as a mere matter of form, in other words, that it was never intended to be acted upon. We think that this question should be gone into. In the case of *Beni Madhub Gorani* v. *Lalmoti Dassi* (5), this Court held that evidence that since the execution of the *kabulyat* the tenant paid rent at a lower rate than that stated in the *kabulyat*, is admissible to show that the intention of the parties was that the *kabulyat* from the very first was not intended to be acted upon or that there had been a waiver of the strict term of the lease. We agree with the above view and we think the lower Appellate Court should come to a decision whether it was the intention of the parties from the beginning that the *kabulyats* were not to be acted upon, or in the alternative whether there was a waiver of the terms. The decrees of the Court below are accordingly set aside and the cases remanded to that Court for disposal after a decision of the question indicated above. It will be open to both parties to adduce further evidence on the point. Costs to abide the result.

*Decree set aside; Case remanded.*

(2) 4 Ind. Cas. 713; 10 C. L. J. 570; 37 C. 293.
(3) 21 Ind. Cas. 750; 18 C. W. N. 66; 41 C. 493; (1914) M. W. N. 1; 40 I. A. 223; 15 M. L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42.
(4) 14 Ind. Cas. 817 16 C. W. N. 496.
(5) 6 C. W. N. 242.

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MADRAS HIGH COURT.

CIVIL APPEALS NOS. 94, 95, 180, 217 AND 218 OF 1912.

October 27, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN A. S. NO. 94 OF 1912

ADUSUMALLI KRISHNAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 2 —APPELLANTS

*versus*

ADUSUMALLI LAKSHMIPATHI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5 AND DEFENDANTS NOS. 3, 4 AND 6— RESPONDENTS.

IN A. S. NO. 95 OF 1912

SURAPANENI SOBHANADRAMMA— DEFENDANT NO. 3—APPELLANT

*versus*

ADUSUMALLI LAKSHMIPATHI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5 AND DFFENDANTS NOS. 1, 2, 4 AND 6— RESPONDENTS.

IN A. S. NO. 180 OF 1912

ADUSUMALLI LAKSHMIPATHI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5— APPELLANTS

*versus*

ADUSUMALLI KRISHNAYYA AND OTHERS —DEFENDANTS NOS. 1 TO 4 AND 6— RESPONDENTS.

IN A. S. NOS. 217 AND 218 OF 1912

ADUSUMALLI VENKATARAMAYYA AND ANOTHER—DEFENDANTS NOS. 4 AND 6 —APPELLANTS

*versus*

ADUSUMALLI LAKSHMIPATHI AND OTHERS—PLAINTIFFS NOS. 1, 2, 4 AND 5 AND DEFENDANTS NOS. 1, 2 AND 3— RESPONDENTS.

*Hindu Law—Adoption by widow—Consent of* sapindas—*Remoter* sapindas, *when may be consulted—Widow ignoring nearer* sapindas *on account of hostility —Adoption with consent of remoter* sapindas, *whether*

ADUSUMALLI KRISHNAYYA *v.* ADUSUMALLI LAKSHMIPATHI.

*valid—Authority acted upon long after it was given, effect of.*

A Hindu widow desirous of making an adoption can do so only with the assent of the *sapindas*. As the assent is regarded as a substitute for the authority of the husband and as the Hindu Law enjoins that such an assent should be obtained from those who would be the natural advisers and protectors of the widow, *prima facie* it should be sought from those who are next in the line of succession. [p. 257, col. 2.]

Where there are one or two near "*sapindas*" who from improper motives withhold their consent, it is open to the widow to apply to more remote *sapindas*. But before doing so she must consult the nearer ones: even though they be inimical to her, she has no right to conclude on *a priori* reasoning that the consultation would be futile. [p. 257, col. 2; p. 258, col. 1.]

Courts will be justified in conning with care an adoption which purports to be based on an authority given many years before the event. [p. 258, col. 1]

Where, therefore, a Hindu widow after the death of her unmarried son adopted a son with the consent of the remote *sapindas* of her husband but without having consulted the nearer *sapindas*, who were entitled to succeed to the property of her son in case she did not make an adoption, and they sued as reversioners to recover the property:

*Held*, that it was her duty to have applied to the plaintiffs for the consent and that this not having been done, the adoption was invalid and the plaintiffs were entitled to recover. [p. 258, col. 1.]

Appeals against the preliminary and final decrees of the Court of the Temporary Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 40 of 1908.

IN A. S. No. 94 of 1912

Messrs. *T. Rangachariar* and *V. Ramadoss*, for the Appellants.

Messrs. *V. Ramesam S. Srinivasa Aiyangar*, *P. Narayana Murthy*, for the Respondents.

IN A. S. 95 of 1912

Mr. *P. Narayana Murthy*, for the Appellants.

Messrs. *V. Ramesam* and *V. Ramadoss*, for the Respondents.

IN A. S. 180 of 1912

Mr. *V. Ramesam*, for the Appellants.

Messrs. *P. Narayana Murthy*, *K. V. L. Narasimham*, *B. Somayya* and *V. Ramadoss*, for the Respondents.

IN A. S. Nos. 217 and 218 of 1912

Mr. *K. V. L. Narasimham*, for the Appellants.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

A. S. No 94 OF 1912.

SESHAGIRI AIYAR, J.—The plaintiffs sue as reversioners of one Narasamma to recover possession of the plaint properties. The last male owner was Venkatasubbiah, a boy of 14 years. He was murdered in 1888. Two brothers of the 2nd and 4th plaintiffs were suspected of this murder. They were convicted by the Sessions Court but acquitted in appeal. On Venkatasubbiah's death his mother Narasamma inherited the properties. She died in 1908.

The 1st defendant is the adopted son of Narasamma. Although the factum of adoption was denied in the Court of first instance, the finding of the Subordinate Judge that the adoption did in fact take place has not been questioned in appeal. The 2nd defendant is an alienee from the adopted son. She is the daughter of the 3rd defendant and grand-daughter of Narasamma. The case for the defendants is that the adoption of the 1st defendant by Narasamma is valid.

There are questions both of fact and of law to be considered in deciding whether the adoption was validly made. It is clear that Narasamma made strenuous efforts to obtain the permission of her *sapindas* to adopt a son. She took the advice of Mr. Pundarikakshadu, a leading Vakil of Masulipatam. As a result of this advice, she obtained Exhibit I, giving her authority to adopt a boy from 14 persons who were *sapindas*. At this time, there were six persons who were entitled to succeed to the property of her son, in case she did not make an adoption. Of the six, only one signed Exhibit I. The other signatories to Exhibit I, though *gnatis*, were not the next reversioners. The genealogical tree printed in the judgment shows that counting from the common ancestor, Seshadri, almost all of them were heads of the various branches into which Seshadri's descendants had ramified. The main question which was argued related to the sufficiency of the consent obtained under Exhibit I. Mr. Rangachariar contended that all the nearest reversioners were asked to give their consent, but that they refused to accede to the request from improper motives.

We are not satisfied on the evidence that this is made out. It has to be remembered that when Mr. Pundarikakshudu's advice was sought, there were observations in *Venkatakrishnamma* v. *Annapurnamma* (1) to the effect that in seeking the consent of

(1) 23 M. 486; 10 M. L. J. 73.

the *gnatis* nearness of relationship need not be considered. The advice which the Vakil gave was apparently with reference to this dictum. Moreover there is evidence that five out of the nearest reversioners were not on friendly terms with the widow. Two of them were brothers of the men who were suspected of the murder of Venkatasubbiah. The third was one of the persons suspected, the 4th and the 5th were close friends of the other three. Their attitude was one of hostility to the widow. Under these circumstances, it is unlikely that they would have been asked to give their consent with reference to the state of the law then regarded as correct. The fact that a meeting was thought of, shows that what Narasamma and her advisers had in view was a general family council without reference to nearness of relationship. The evidence adduced shows that the defendants wanted to strengthen their position with reference to the observations of Benson and Bhashyam Aiyangar, JJ., in *Subrahmanyam* v. *Venkamma* (2).

Reliance was placed on the deposition of plaintiff's witness No. 29, the daughter of Narasamma and the 3rd defendant in this case. Before the adoption, there was an arrangement between Narasamma on the one hand and the 1st defendant and his natural father on the other, by which a good portion of the deceased property was left at the absolute disposal of Narasamma (see Exhibit II). Two weeks after this arrangement, the 1st defendant and Narasamma made a gift of most of the properties obtained under Exhibit II to the 2nd defendant (Exhibit III). This 2nd defendant is the daughter of the 3rd defendant. Under these circumstances, it is extraordinary that this lady should have been examined as a witness on the side of the plaintiffs. Notwithstanding the condemnation by the Judicial Committee of the practice of calling the opponent as one's own witness, the parties and Pleaders in the Mofussil Courts do not seem to realise the seriousness of the step they are taking. Naturally, advantage was taken by defendants Nos. 1 and 2 of the presence of the 3rd defendant in the witness-box to elicit statements to the effect that plaintiffs Nos. 1 to 4 were consulted prior to the execution of Exhibit I. Having regard to her evident bias in the case, much importance cannot be attached to her evidence. We have to see if, there is other independent and reliable evidence to support her testimony. D. W. No. 4 is altogether unreliable. He has filed his schedule in insolvency. It is this witness who is said to have brought plaintiffs Nos. 1 to 4 to the meeting. His story is on the face of it improbable. The Subordinate Judge does not believe him and we see no reason to differ from him. Defence witness No. 1 is the writer of Exhibit I. He was Narasamma's clerk and is now under the defendants. We do not differ from the lower Court in its estimate of this man's credibility. These are the principal witnesses on whom reliance is placed. Defence witnesses Nos. 5 to 11 also speak to the meeting and the consultation. As against this evidence we have the evidence of P. W. No. 8, P. W. No. 9 and P. W No. 21. We concur with the Subordinate Judge in holding that the defendants have not proved either that plaintiffs Nos. 1 to 4 were present at the meeting of the *gnatis* or that they were consulted regarding the adoption.

Mr. Rangachariar argued that even on this finding the adoption is valid. The learned Vakil's contention is that the Hindu Law does not require that the immediate reversioners should be consulted. All that need be shown, according to him, is that the majority of the *gnatis* had assented to the adoption. Before dealing with the case law on the point, it should be mentioned that the foundation for the theory of the assent of the *sapindas* is a verse in Yagnavalkya's Smrithi which says :

*Rakshet kanyam pita vinam patih putrastu vardhke, abhave gyatyastesham na swatantrayam kwachit-shtriyah.*

"Let a female be taken care of by her father while a maiden, by her husband when married, and by her sons in old age. If none of these exists let other *gnatis* take care of her. A woman is never fit for independence." The idea underlying this passage is that woman should have the advice and assistance of men in her conduct of temporal affairs and should not act of

(2) 26 M. 627; 13 M. L. J. 239.

her own accord. The learned Vakil laid much stress upon the religious significance of an adoption. It is true that the motives which ought to guide the widow in making an adoption should be to minister to the spiritual wants of her deceased husband. It does not follow from this that the assent of the *sapindas* should be regarded as a religious act. Yagnavalkya's text implies that it is protection in temporal affairs that is contemplated. Consequently, it is not right to argue that the guardianship of the widow who has no son should vest in the entire body of *gnatis*. The natural interpretation of the text is that she is dependent on the advice of those nearest to her husband. This apparently is the interpretation which the author of Viramitrodaya places on it:

*Mritetashmin yatparannayantdanumati rewupeskshita, evam sati dristarhta bhavati pratikhedhasya.*

"But when the husband is dead, the assent of those only is necessary on whom she is dependent. In this view, the object of the prohibition becomes reasonable." The word "only" would be meaningless, if the consent of the entire body of *gnatis* is contemplated.

As regards decided cases *Collector of Madura* v. *Mottoo Ramalinga Sathupathy* (3) was most relied upon by the appellant. Their Lordships of the Judicial Committee, no doubt, say that as women are presumed to be incapable of acting by themselves, the authority of the kindred is necessary. At the same time, they say that the consent of the mother-in-law and of a *sumanolaka* was enough. This view proceeds on the theory that the assent of immediate guardians of the adopter would make up for the incapacity. This coincides with the view enunciated by the author of Viramitrodaya. In *Sri Virada Pratapa Raghunanda Deo* v. *Sri Brozo Kishore Patta Deo* (4), the Judicial Committee differed from the dictum of Holloway, J., that the assent of a remote *sapinda* will validate the adoption and point out that in an undivided family, the consent must be sought from the members of the family alone. This again shows that the text of Yagnavalkya should be understood as limiting the expression *'gnatis'* to those who are in the line of heirs to the last owner. It is in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (5), that the expression by what may be called a 'family council' is first introduced. But it was contended that the widow in obtaining the consent did not act on spiritual considerations. In negativing this plea the Judicial Committee say that the consideration which should guide both the widow and the *sapindas* is the expediency of substituting an heir by adoption to the deceased husband. The expression 'family council' was not intended to suggest that all the available *sapindas* should be asked to sit in conclave and decide the question. In *Parasara Bhattar* v. *Rangaraja Battar* (6) Sir Charles Turner, C. J., and Innes, J., reviewed all the previous authorities on the question of the *sapindas'* consent. The learned Judges say: – "Without the express or implied authority of the husband, such a second adoption could be made only under the sanction of the nearest *sapindas*." This is a clear pronouncement on the nature of the *sapinda* sanction. *Venkatakrishnamma* v. *Annapurnamma* (1) contains certain observations on which the appellant naturally relies. On the facts found, that case presents no difficulty. Three out of the four nearest *sapindas* gave their consent to the adoption. The fourth man who held out contested the adoption on the ground that his refusal rendered the adoption invalid. The learned Judges overruled this plea. They held that the assent of the majority of the nearest *sapindas* was sufficient. Subramania Ayyar, J., further went on to say: – "It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their assent, such assent was given on *bona fide* grounds. If, however, it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the

(3) 12 M. I. A. 397 at p. 442; 1 B. L. R. (P. C.) 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

(4) 1 M. 69; 25 W. R. 291; 3 I. A. 154; 11 Mad. Jur. 188; 3 Sar. P. C. J. 583; 3 Suth. P. C. J. 263.

(5) 1 M. 174; 4 I. A. 1; 1 Ind. Jur. 63; 26 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353.

(6) 2 M. 202. 4 Ind. Jur. 393.

party relying on it. If the above view is correct, it would further follow that any distinction, based upon the degree of relationship, as to whose assent is or is not essential becomes immaterial". We are unable to see how the conclusion in the last sentence follows from the proposition stated in the preceding sentence. In an earlier passage, the learned Judge stated:— "Now, even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of her husband or the assent of her father-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the co-parcenary is absolutely necessary." If the consent of all the co-parceners in a joint family is not necessary, *a fortiori* the consent of all *sapindas* in divided branches is unnecessary. We do not think that the learned Judge intended to lay down that the consent must be sought from *sapindas* of every grade in divided families. Benson and Bhashyam Aiyangar, JJ., in *Subrahmanyam* v. *Venkamma* (2) lay down the law in explicit terms after a careful examination of all the previous authorities. The learned Judges say: "The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of *sapindas* and *samanodakas* or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bona fide* and not from any corrupt motive, that would be sufficient authority on which she could act and it would not be necessary that she should seek the assent of remoter reversionary heirs". We entirely agree with this statement of the law. This decision was affirmed by the Judicial Committee in *Venkamma* v. *Subramaniam* (7); and it is clear that their Lordships proceeded on the same lines as did the Judges of this Court. The observation of the learned Judges who made the remand order in *Suryanarayana* v. *Venkataramana* (8), that there is no authority for the proposition that the assent must be that of the nearest *sapindas* is not correct, as *Parasara Bhattar* v. *Rangaraja Bhattar* (6) does lay down that proposition. The actual decision on the return of the finding was based on other grounds. In *Kandukuri Veera Basavaraju* v. *Kandukuri Balacurya Prasada Rao* (9), the nearest reversioner was not consulted. The sentence "she made no such *bona fide* effort to take the opinion of the *sapindas* or a majority of them as the law requires," does not mean that the majority of all remote reversioners should be obtained. They are all the authorities on the subject. We are of opinion that as the assent is regarded as a substitute for the authority of the husband and as the Hindu Law enjoins that such an assent should be obtained from those who would be the natural advisers and protectors of the widow, *prima facie* it should be sought from those who are next in the line of succession. There is no direct authority which holds that where there are near *sapindas*, the adoption is invalid if the remoter ones are not consulted. It would introduce an inconvenient and unworkable principle, if it were held that in a large family the assent of the majority of persons who are capable of giving their consent should be obtained. Mr. Rangachariar felt the difficulty and suggested that the assent of all persons observing 10 days' pollution would be enough. This suggestion is opposed to *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (3), where a *samanodaka* is mentioned as being competent to give consent. No general principle applicable to all cases can be laid down. Where the nearest *sapindas* are a sufficiently large number as in this case, it is unreasonable to contend that they should be ignored, and that the widow is entitled to apply to persons more remote. Where there are only one or two near *sapindas* who from improper motives withhold their consent, it may be open to the widow to apply to more remote *sapindas*. We are clearly of opinion that it was the duty of Narasamma to have

(7) 30 M. 50; 9 Bom. L. R. 89; 17 M. L. J 114; 4 A. L. J. 150; 5 C. L. J. 140; 34 I. A. 22 (P. C.); 2 M. L. T. 91; 11 C. W. N. 345.

(8) 26 M. 681.
(9) 25 Ind. Cas. 3; (1914) M. W. N. 502.

applied to the plaintiffs in this case for their consent and as we have found that that has not been done, we hold that the adoption is invalid. We cannot accede to the contention that as the plaintiffs would surely have refused to give their consent as they were inimical to her, Narasamma was justified in not consulting them. As was pointed out in *Subrahmanyam* v. *Venkamma* (2) and *Venkamma* v. *Subramaniam* (7), it was her duty to have asked their permission. She had no right to conclude on *a priori* reasoning that the consultation would prove futile.

Another contention against the validity of the adoption was raised by Mr. S. Srinivasa Aiyangar. The consent under Exhibit I was obtained in 1901. The actual adoption was in 1908. The learned Vakil for the respondent argued that the authority had spent itself out by such a long delay. There is no doubt that at the time of the adoption some of the signatories to Exhibit I were dead. It was said that four out of the 14 had died. In *Mani* alias *Nagappan* v. *Subbarayar* (10) it was held that lapse of time was a bar to acting on the authority. See also *Veera Basavaraju* v. *Balasurya Prosada Rao* (9) and *Nagarampalli Kanesam* v. *Nagarampalli Batchamma* (11). It is not necessary for us in this case to decide whether the authority loses force by the mere lapse of time. Courts will be justified in conning with care an adoption which purports to be based on an authority given many years before the event. In the result, we agree with the Subordinate Judge in holding that the 1st defendant was not validly adopted and that the alienations made by him and Narasamma are not binding on the plaintiffs. The appeal is dismissed with costs.

WALLIS, C. J.—I agree.

IN APPEAL No. 95 OF 1912.

We allow the appeal as to items 10, 27 and 28 of schedule B and item 71, 1·60 as of item 72 and item 74 of schedule A, as the evidence on behalf of the 3rd defendant appears to establish her right to these items. The appeal is allowed as to these items and is otherwise dismissed. The appellant will pay and receive proportionate costs of this appeal throughout.

(10) 19 Ind. Cas. 663; 36 M. 145; 24 M L. J. 484.

(11) 24 Ind. Cas. 257; (1914) M. W. N. 620; 1 L W. 511.

IN APPEAL No. 180 OF 1912.

We agree with the Subordinate Judge as to the items of schedule B included in this appeal and as regards the 3rd defendant we dismiss the appeal with costs. As regards schedule C we allow the plaint to be amended by including a prayer for possession on payment of the necessary Court-fees in both Courts. As to this the appeal is allowed, and the decree will be varied by giving a decree to the plaintiffs for joint possession with defendants Nos. 4 and 6, but the appellant must pay the costs of the 4th and 6th defendants here and below. The memorandum of objections is dismissed.

IN APPEAL SUIT No. 217 OF 1912.

We allow the appeal. There will be no order as to costs.

IN APPEAL SUIT No. 218 OF 1912.

The decree is set aside and a fresh final decree will be passed in accordance with our decisions in other appeals.

*Appeal* No. 94 *dismissed.*

*Appeals Nos.* 95, 180, 217 *and* 218 *allowed;*

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## PRIVY COUNCIL.

APPEALS FROM THE MADRAS HIGH COURT.

November 16, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

M. R. M. A. SUBRAMANIAN CHETTIAR —APPELLANT

*versus*

*Rajah* RAJESWARA DORAI—AND OTHERS RESPONDENTS.

*Trusts Act* (*II of* 1882), *s* 36—*Trust*—*Mortgage of trust property*—*Consent of settlor*—*Consideration*—*Charge, validity of*—*Civil Procedure Code* (*Act V of* 1908), *O. XXXII, r.* 7—*Minor*—*Compromise of suit*—*Consent of Court, necessity of*—*Practice*—*Mortgage without consent, validity of.*

One *R* executed a deed of voluntary settlement whereby he conveyed and assigned all his property, subject to the payment of the debts which he then owed and to certain allowances to the members of his family including himself, in the favour of a minor and others. *R* appointed a trustee and a co-adjutor. To save the estate a large sum of money had to be borrowed at a moderate rate of interest, and negotiations were entered into between the trustee, the co-adjutor, and certain financiers in England. The intending lenders required that *R* should be

come a party to the deed and that the allowances specified in the voluntary deed should be expressly postponed to their security. In order to obtain the assent of *R* and the consent of the persons entitled to the payment of allowances, the trustee agreed to give a mortgage for 4 lakhs of rupees to *R* on the security of the estate. The charge promised to *R* was used to create a mortgage in favour of a creditor of *R* in pursuance of a compromise in a suit brought by the creditor to recover the amount due to him:

*Held*, that the trustee was not justified in placing a burden of Rs. 4 lakhs on the trust estate and that he had not acted properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage-bond to that amount in favour of *R*. [p. 264, col. 2.]

*Held*, further, that the compromise and the mortgage were invalid and that an additional charge in favour of the creditor on the trust estate was not created as there was no evidence that the trustee or the coadjutor had any intention to create such a charge apart from the agreement with *R* to create a charge, which failed. [p. 265, col. 2.]

The provision in the Civil Procedure Code making it necessary to obtain the leave of the Court before compromising a suit in which a minor is a party, is of great importance to protect the interests of the minor and it is not sufficient that the terms of the compromise are before the Court. [p. 265, col. 2.]

Therefore, a mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad litem* of a minor *without the sanction of the Court* is invalid though supportable on other grounds. [p. 265, col. 2]

*Manohar Lal* v. *Jadu Nath Singh*, 33 I. A. 128; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 28 A 585; *Ganesha Row* v. *Tulja Ram Row*, 19 Ind. Cas. 515; 40 I. A. 132; 17 C. W. N. 765; 11 A L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 295 (P. C.). approved.;

Consolidated appeals from the judgments and decrees of the Madras High Court, dated April 21st, 1909, reported as 2 Ind. Cas 963, affirming those of the Court of the Subordinate Judge of Madura East, dated March 30th, 1903.

FACTS.—Rajah M. Bhaskara Sethupathi of Ramnad on July 12, 1895, executed a deed of voluntary settlement whereby he conveyed and assigned the Ramnad *zemindari* and all his other property, both real and personal, to Venkata Rangier Avergal (reserving to himself certain annual payments) in favour of the respondent, who was a minor, and others. The Rajah owed the appellant's father Rs. 1,30,000. He further borrowed Rs. 24,000 and other sums subsequent to the settlement. In 1897 the trustee entered into negotiations with a firm in London to obtain a loan at a reduced rate of interest which would enable him to discharge all the debts due on the estate. On June 13, 1897, the trustee executed a mortgage of the whole estate subject to the trust for the sum of Rs. 1,70,000 payable by instalments extending over a term of years. The lenders insisted upon the allowance of the Rajah and other allowance holders under the deed of settlement being postponed to the yearly payments in discharge of the loan. The trustee entered into an agreement with the Rajah whereby in consideration of the Raja giving his own consent and obtaining the consent of the other members of the family to the postponement of their allowances he undertook to give the Rajah a second mortgage upon the trust estate for four *lakhs* of rupees. In the meantime, on November 17, 1897, the appellant's father and the appellant sued the trustee and all allowance holders for a declaration that the deed of settlement was invalid and the settled properties were liable for the satisfaction of the Rajah's debts. The trustee on January 16, 1899, entered into an agreement by way of compromise with the appellant (his father being dead) for the withdrawal of the said suit on certain terms. The English loan having been completed on June 13, 1899, and the trustee being unable to pay the amounts agreed upon to the appellant executed the two deeds in suit. On July 30, 1899, in pursuance of the compromise a petition was presented praying that the suit be dismissed with costs and on September 17, 1899, an order was made accordingly. The trustee made various payments to the appellant, but the appellant brought the present suit for a declaration that the said compromise was binding upon all and for the recovery of the amounts due. The Subordinate Judge as well as the High Court having decided against the appellant, appeal to His Majesty in Council was preferred in due course.

Mr. *P. Ogden Lawrence*, *K. C.*, (with him Messrs. *De Gruyther*, *K. C.*, and *Kyffin*), for the Appellant, directed the argument to the following seven points:—

( ) Whether the trustee had power to enter into an agreement with the Rajah?

(2) Whether it was done in breach of trust or in the interest of the estate.

(3) Whether he was justified in consenting

in face of the fact that some members of Rajah's family did not give their consent.

(4) Whether the trustee was entitled to compromise an action to set aside the settlement.

(5) If he was entitled to compromise, whether the terms of the compromise were improvident and in breach of trust.

(6) Even if agreement with the Rajah constituted a breach of trust, whether the appellant had notice of it or was privy to the breach of trust.

(7) Whether the infant was entitled to have the compromise under section 642 of Civil Procedure Code of 1882 declared void.

(1) The agreement was not only for the postponement of the Rajah's allowance, but for his joining in the English mortgage. It was apart from any question of power. A trustee could do all acts which would be beneficial for the preservation of trust property. This was in the interest of the trust. Taking trusts generally a trustee was empowered to do any reasonable act. There might not be power to do a specific thing, but it was held that he could do it under the general power. The act could not have been done but for necessity. Protection might involve borrowing. Under the English Law paying off a claim against the estate was such an act [*Forshaw* v. *Higginson* (1)]. Under section 36 of the Indian Trusts Act he could do anything which was reasonable and proper.

[LORD HALDANE: If you take section 36, there could be no limit.]

That was the difficulty in fact in setting limits to. If section 36 had been incorporated into the English Law, the Court would have held it as proper and reasonable.

[LORD WRENBURY: If it is done with a view to authorise, it is not a breach of trust. It will be a question of *bona fides* ]

If the loan was obtained on most advantageous terms, the only question would be of necessity. If the transaction had been carried out by the lenders, it would not have been breach of trust at all. If the lenders had dealt with the Rajah direct, it would have been all right. It was a reasonable transaction as he could not have got this without raising the amount. What was really to be shown was that it was free from impropriety. *Attorney-General* v. *Norwich* (2) laid down the English Law on the point.

(2) The trustee was acting on legal advice and the whole transaction was on business lines. One had to show whether it came under section 36.

(3) The lenders paid sufficient to the members of the Rajah's family to get their consent. He had substantially fulfilled his part of the bargain and the trustees could have been in the same position if they had not acted.

(4) By 13 Eliz. Chap. 5, a settlement to defeat or delay creditors is void against the beneficiary only and not against the trustee.

[LORD HALDANE: It remains good as against beneficiaries to the extent of surplus.]

It remained a perfectly good trust. By *Tanqueray* v. *Bowles* (3) a trustee was held liable for not compromising. That showed that a trustee had power to compromise. If it was a valid deed, they would have power to compromise and it was liable to be set aside as against creditors. There was a decision in *Sims, In re, Sheffield, Ex parte* (4), as against a trustee in bankruptcy, but this case had nothing to do with bankruptcy. It was voidable for delaying or defeating the creditors.

(5) The terms of the compromise were such as a reasonable man could agree to and adhere to. All he did was to pay off 4 lakhs not to the Rajah, but to his creditors at his instance. He was not putting the estate to a penny more expense. The point was that if you did not withdraw the suit the whole estate would go. No unreasonable thing was being done [*Eatan* v. *Buchanan* (5) House of Lords per Lord Atkinson]. All these securities were very valuable to the trustee. The estate might not have suffered a penny worth more than by compromise which was reasonable on the very face of it. It was an honest transaction.

(6) The appellant had notice of the agreement, that is to say, the Rajah was willing to postpone his allowance of Rs. 75,000 in the

(1) (1857) 8 De G. M. & G. 827; 26 L. J. Ch. 342; 3 Jur. (N. S.) 476; 5 W. R. 424; 44 E. R. 609; 114 R. R. 356.

(2) (1837) 2 My. & Cr. 406; 1 Jur (o. s.) 398; 40 E. R. 695; 45 R. R. 110.
(3) (1872) 14 Eq. 151.
(4) 45 W. R. 189; 3 Manson, 940.
(5) (1911) A. C. 253.

interest of the estate. He had no notice of any fact which would make it breach of trust. Therefore he had power to enter into an arrangement with the Rajah [*Bovell* v. *Dann* (6)]. It was not our duty [*Hire Purchase Furnishing Co., Ltd* v. *Richens* (7)]. The Court had held that the onus was on us. If it was within their power their exercise of power would have been breach of trust if not beneficial to the estate. Powers were restricted only in respect of taking consent of the co-adjutor. The trustee had the power of an owner and he never became party to a breach of trust. The transaction was *bona fide* and appellant had no notice of breach of trust. There was no fact within his knowledge. It was for the respondent to show affirmatively that we had notice of breach of trust. The whole transaction centred round getting the English loan. If it was not got the infant could not have got a single penny. The trustee had to preserve the estate and he had wide powers subject to the consent of the co-adjutor.

(7) As to the compromise on behalf of the minor party the trustee was appointed guardian *ad litem*. The minor had power to elect at the age of 21. The compromise if valid at all was on behalf of the whole estate and not on behalf of the minor. It was a compromise of whole estate as against one person. Power was given to the trustee and the law was binding on those who claimed under him. The agreement was made quite irrespective of the minor. It was in his character of trustee, as owner of the estate.

Sir *Robert Finlay*, *K. C.*, and Mr. K. *Brown*, for the Respondent.—It was not an appeal on a point of law. There were concurrent findings on inferences of fact. There was the important question of notice. Both Courts had found as an inference of fact that the trustee was not acting in the interest of the estate, but was under the influence of the Rajah. The Rajah had gone on incurring debts after the settlement which was to prevent him from doing the same. The first defendant was not called upon to show how the trustee was acting. He was purposely kept out of the witness-box. It was impossible to see another case in which a trustee more failed to discharge his duty. He ought to have gone to the annuitants and spoken to them of the English loan.

[LORD HALDANE: The trustee was not dishonest.]

He knew that under the deed of settlement their consent was unnecessary. There was a concurrent finding that he was not acting in the interest of the trust at all. There was no charge of dishonesty. The trustee was looking more after the Rajah's interest than that of the estate.

[LORD HALDANE: A trustee is bound to exert every means for meeting emergencies.]

The compromise was bad as the matter was not submitted to the judgment of the Court. They knew that it was imminently necessary to obtain the opinion of Court.

[LORD HALDANE: The only question was against creditors.]

The plaintiff said, if you give me a large slice of the estate I will drop the case. He was more liable for post-settlement debts. In effect the compromise was in the interest of the plaintiff and his object was to get at the object of the settlement.

Reference was made to *Manohar Lal* v. *Jadu Nath Singh* (8) and *Ganesha Row* v. *Tulja Ram Row* (9).

Mr. *P. Ogden Lawrence*, in reply, said that he could not add to what he had already said.

JUDGMENT.

LORD PARMOOR.—These are consolidated appeals from three judgments of the High Court of Judicature at Madras. The appeal which has been argued before their Lordships is one in which M. R. M. A. Subramanian Chettiar is appellant, and Rajah Rajeswara Dorai is respondent. It is unnecessary to refer further to the other two appeals, since it is admitted that the decision in those cases depends on the decision given in the case which has been argued.

(6) (1843) 2 Hare. 440; 67 E. R. 181.

(7) (1887) 20 Q. B. D. 387; 58 L. T. 430; 36 W. R. 65.

(8) 33 I. A. 128; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710 (P. C.); 28 A. 585.

(9) 19 Ind. Cas. 515; 40 I. A. 132; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 295 (P. C.)

SUBRAMANIAN CHETTIAR *v.* RAJESWARA DOBAI.

The question involved in the appeal is the validity of an agreement of compromise executed on the 16th day of January 1899, and of two mortgages, dated respectively the 6th July 1899 and 13th July 1899. The validity of these documents is largely dependent on the consideration whether the trustee under a voluntary settlement of 12th July 1895, had power to give a mortgage-bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad estate to the then Rajah of Ramnad.

The father of the appellant lent considerable sums to the respondent's father, who at all material times was the Rajah of Ramnad. On the 12th July 1895 the Rajah owed his creditors sums of money amounting to 20 lakhs of rupees, including a sum of Rs. 1,30,000, which he owed to the appellant's father. At that date the Rajah executed a deed of voluntary settlement settling all his Ramnad *zemindari* and certain other property, subject to the payment of the debts which he then owed and to certain allowances to members of the family including the Rajah himself therein directed to be made and to the several trusts, provisoes, and declarations therein contained, on the present respondent, who was a minor. The Rajah appointed as trustee Venkata Rangier, and as co-adjutor P. Chentsal Rao, and it was provided that the trustee should not without the permission in writing of the co-adjutor enter into any agreement with the creditors or mortgage or sell any part of the trust premises. Subsequent to the execution of the voluntary deed, the Rajah borrowed further sums from the appellant's father giving as security certain jewels and furniture and his allowance under the deed of settlement.

The sums due to the creditors had been borrowed at a high rate of interest, and the income in the hands of the trustee was not sufficient to meet the charges on the trust estate. To save the estate, it became necessary to borrow a large sum of money at a moderate rate of interest, and negotiations were entered into between the trustee, the co-adjutor, and certain financiers in England. On the 18th June 1897 a preliminary agreement was made between the trustee, Charles Augustus Verner and Ogilvie, Gillanders, & Co., to raise for payment of the debts existing at the date of the settlement of the 12th July 1895 the sum of £1,60,000, and the equivalent in sterling of the Government revenue for a quarter of one year, to be secured by a trust deed vesting the Ramnad *zemindari* freed from all incumbrances in trustees for debenture holders. This arrangement was not completed until the 13th of June 1899, on which date the trustee, with the privity and consent of the co-adjutor and the Rajah executed a mortgage of the whole trust estate for the sum of £1,75,000, repayable by instalments with interest at the rate of 5 per cent. The validity of this deed is not in question. Before its execution there were prolonged negotiations between the trustee and the intending lenders. Their Lordships recognise the difficulties which confronted the trustee and it was clearly of the first importance to obtain a large loan at a moderate rate of interest in order to pay off debts carrying compound interest at the rate of 12 per cent.

In the course of the negotiations for the English loan the intending lenders required that the Rajah should become a party to the deed, and that the allowances specified in the voluntary deed should be expressly postponed to their security. It is contended on behalf of the appellant that in order to obtain the assent of the Rajah, and the consent of the persons entitled to the payment of allowances, it became necessary, and was reasonable and prudent on the part of the trustee, to agree to give a mortgage for 4 lakhs of rupees to the Raja on the security of a suitable portion of the Ramnad estate, such security being subsequent to the mortgage given for securing the repayment of the English loan. This proposal is contained in a letter from the trustee to the Rajah on 25th April 1898, and on the same day the Rajah wrote to the agents of the intending lenders informing them that in the event of their advancing to the trustee a loan on the agreed conditions he would agree that the lenders, or their nominees, should have a first charge upon the Ramnad *zemindari* and that no part of the marginally-noted allowance payable to him

under the voluntary settlement should be paid in any year until all charges, that might be payable to the lenders under the present mortgage, had been paid in full, and that he undertook to execute in favour of the lenders or their nominees such documents as in their opinion might be necessary for carrying out the arrangements. The High Court of Madras have held that assuming without deciding —it to be within the power of the trustee to create such a charge on the trust estate, the power was not exercised properly and reasonably and in the interest of the estate. Their Lordships concur in the conclusions of the High Court. There is no satisfactory evidence that the Rajah would not have executed the English mortgage-deed and consented to postpone his allowance without some payment or consideration. The Counsel for the appellant was pressed in his argument before their Lordships to refer them to the evidence in support of his proposition that the Rajah would not have assented to sign the deed and postpone his allowance without receiving payment or consideration. Their Lordships were not referred to any such evidence and the Counsel for the appellant relied on a general statement that the Rajah was a difficult person for the trustee to influence. Apart from any payment or consideration it was in the interest of the Rajah that the intending loan should be satisfactorily arranged and, in the absence of evidence, there is no room for a presumption that he would not sign the deed, or would refuse to postpone his allowance, without some payment or consideration. On the other hand, the documents to which their Lordships have been referred do not support the contention put forward on behalf of the appellant.

The preliminary agreement for the loan was signed on 18th June 1897. On the 22nd September 1897, the co-adjutor, P. Chentsal Rao, without whose assent the trustee had not the power to arrange the English loan, sent a telegram to Messrs. Lovelock and Lewes, Chartered Accountants, acting on behalf of the lenders, that —"the Rajah consented to sign mortgage-deed and Rs. 66,000 or possibly Rs. 76,000 of the allowances can be postponed, letter follows." A further telegram was sent on the 28th September 1897 explaining tha the Rajah was willing to give a charge upon the *zemindari* free of the payment of allowances of Rs. 66,000 and possibly Rs. 76,000, and that this is what the coadjutor meant by postponement. These telegrams were followed by a letter of 29th September 1897 in which the later telegram was confirmed, and the co-adjutor again states, that the Rajah is quite willing to do what Messrs. Lovelock and Lewes propose, namely, to give a charge on the *zemindari* free from the payment of Rs. 66,000 or possibly Rs. 76,000, out of the allowances of Rs. 1,30,000, referred to in the trust deed. The position taken up by the intending lenders on the question of the allowances is explained in a letter of 25th November 1897, which was brought to the notice of the trustee, and to which the trustee refers in a letter of 24th December 1897. It is stated that the intending lenders are prepared to proceed with the negotiations for the loan provided that all the allowances in favour of the Rajah and the members of his family are postponed to the security to be given to the debenture holders, both as regards the current payment required for the service of the loan and also in the event of the security having to be enforced. The consent of six members of the Rajah's family was not obtained to the postponement of the allowances, but the consent of the other allowance holders was accepted as sufficient after the intending lenders had obtained an opinion from Mr. Mayne that such consent was not required having regard to the terms of the trust deed.

The material factor is that the letter written by the Raja on 25th April 1898 after receiving the promise of a payment or consideration of Rs. 4,00,000 secured by mortgage bond on a suitable portion of the Ramnad estate, does not give any undertaking beyond that contained in telegrams and letter of September, 1897. Under these circumstances their Lordships are of opinion that the appellant has failed to prove the *first* step which is necessary to justify the placing of a charge of Rs. 4,00,000 on the trust estate,

In the *second* place, the appellant has failed to establish that the consent of the allowance holders was required to enable the trustee to postpone their rights to the security of the debenture holders, or that the intending lenders would have pressed their objection if the legal position had been explained to them. This point was not argued at any length before their Lordships, though it was evidently a main point in the argument in the High Court. The relevant paragraphs of the voluntary settlement are 7, 23 and 24. In paragraph 23 the settlement sets out in the sixth place a trust to make payment of the allowances specified in the second schedule, but these allowances are placed for the purpose of payment after (in the fifth place) the specified debts and the interest on and principal of such other debts and sums of money as shall be incurred or become payable by the trustee for the purpose of paying off all or any of the said debts and sums of money, although under paragraph 24 the trustee is not bound to make the payments in the order mentioned in the deed. Paragraph 7 provides that notwithstanding anything contained in the voluntary settlement, an assign for value in execution of those trusts should hold the estate or interest purporting to be conveyed or assigned to him, in the premises thereby assigned free and discharged of the trusts, provisoes, directions, and declarations therein contained, except as otherwise expressly provided in such assignment. The joint effect of sections 7 and 23 is that the trustee had power to place the loan security for the payment of the specified debts in priority to the allowance payments and that the assign for value would hold the estate or interest conveyed or assigned to him assured free and discharged of the trusts contained in the voluntary settlement except as otherwise expressly provided.

Section 24, which provides that the trustee shall make the several payments under the voluntary settlement as and when the same shall be required, cannot be construed to curtail the discretion given to the trustee in paragraph 23. It is material to observe that the trustee in a telegram to the co-adjutor on 18th March 1898 said that he and the co-adjutor must point out to the London people that under the trust deed they are empowered to attend to the service of interest prior to payment of allowances. A similar opinion was expressed by Sir V. Bhashyam Iyengar on 30th June 1898, and by Mr. Mayne on 20th September 1898. The Counsel for the appellant justified the action of the trustee in giving consideration for the consent of the Rajah to postponement, although such consent was not legally required, on two grounds. In the *first* place, he said that, apart from questions of strict right, the intending lenders insisted on the postponement of the specified allowances. The answer is that there is no evidence that the intending lenders would not have altered their attitude if the true legal position had been insisted on throughout the negotiations. They did alter it so far as regards six of the allowance holders, after obtaining the opinion of Mr. Mayne. In the *second* place, it was said that, although the trustee might have had the power to postpone the payment of allowances, he was justified in his action out of regard to the position of the Rajah and his family, and his unwillingness to incur the ill-will of the Rajah and of the other allowance holders, which he might have incurred if he had used his power without their consent. Their Lordships cannot accept this explanation as justifying the trustee in placing a burden of Rs. 4,00,000 on the trust estate, or come to any other conclusion than that the trustee was not acting properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage-bond to that amount in favour of the Rajah.

The next question is whether the agreement of compromise of 6th January 1899 and the two mortgages of the 8th and 16th July 1899 can be supported if the promise to give the mortgage bond of Rs. 4,00,000 on the security of the trust estate is invalid as not being within the powers of the trustee. The recitals of the compromise deed recite the agreement with the Rajah to give a mortgage-bond for Rs. 4,00,000 on the trust estate, thus giving the appellant full notice. Moreover the compromise deed is based, not on imposing a new charge on the trust estate, but on utilising the charge, already promised to the Rajah. The deed carries out this proposal by providing for the pay-

ment of certain sums to the appellant so soon as the English loan is obtained, and by giving as security a third mortgage on the trust estate, a first mortgage being executed to secure the English loan, and a second to secure the loan of Rs. 1,00,000 due to another creditor. In other words. the compromise deed assumes the validity of the agreement with the Rajah and there is no evidence that the trustee or the co-adjutor had any intention, apart from the agreement with the Rajah, to place an additional charge in favour of the appellant on the trust estate.

The mortgage of the 6th July 1899 was executed in pursuance of the provision contained in the deed of compromise. The amount thereby secured was Rs. 4,73,143, with further interest thereon less the sum of Rs. 50,000 which the trustee agreed to pay in one week. Toward this sum the trustee paid to the appellant Rs. 20,000, and secured the balance by a mortgage on crops on the 13th July 1899. This is the second mortgage to which this appeal relates. On the second mortgage the appellant has received certain payments from the trustee and has been ordered to re-pay the sums to the credit of the trust estate. It is impossible that these mortgages can be regarded as valid and binding upon the properties therein comprised if the deed of compromise is not valid, and their Lordships concur in the conclusion of the High Court both as to the validity of the deed of compromise and of the two mortgages and as to the amount of the re-payment order to be made by the appellant to the credit of the trust estate.

If on other grounds the deed of compromise could be supported, it is invalid in not complying with the condition imposed by section 462 of the Code of Civil Procedure applicable when the compromise was made. One of the parties to the suit was a minor, the present appellant, and the trustee of the voluntary settlement was appointed his guardian *ad litem*. Section 462 of the Code of Civil Procedure enacts "that no next friend or guardian for the suit shall, without the order of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian." In the present case the leave of the Court was not obtained, and in the absence of such leave the compromise cannot be supported. Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of a minor. It clearly applies to the compromise in question in the present appeal. It may be well to quote the language used by Lord Macnaghten in *Manohar Lal* v *Jadu Nath Singh* (8):—

"It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained."

Reference may also be made to the more recent case of *Ganesha Row* v. *Tulja Ram Row* (9)

In the opinion of their Lordships these appeals fail and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

*Appeals dismissed.*

Solicitor for the Appellants: Mr. *Douglas Grant.*

Solicitors for the Respondents: Messrs. *Chapman, Walker* and *Sheppard.*

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## MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL NO. 10 OF 1914.

November 19, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THOLASINGA MUDALI—PLAINTIFF—APPELLANT

*versus*

NAGALINGA CHETTY—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage by conditional sale—Transfer by mortgagee—Redemption—Notice.*

The plaintiff mortgaged his properties by conditional sale to one *T*, who, after the expiry of the time fixed for payment, sold them to one *V*, who purchased them with the knowledge that *T* was only a mortgagee *V* then sold the properties to the defendant. It was found that the defendant had purchased them without knowledge that *T* was only a mortgagee. The plaintiff sued the defendant for redemption. The Court found that the plaintiff had notice of the defendant's purchase within three years of suit:

THOLASINGA MUDALI *v.* NAGALINGA CHETTY.

*Held*, that the plaintiff was entitled to redeem. [p. 267, col. 1.]

Article 134 of the Indian Limitation Act, 1877, has not been materially altered by the substitution in the Act of 1908 of the words "transferred by" for the words "purchased from." [p. 267, col. 1.]

*Singaram Chettiar* v. *Kalyanasundaram Pillai*, 26 Ind. Cas. 1; (1914) M. W. N. 735; 1 L. W. 687, followed.

Appeal against the decree of the City Civil Court at Madras, in Original Suit No. 67 of 1913.

FACTS.—The properties in suit originally belonged to the plaintiff and were conveyed by him under Exhibit A, which was ostensibly a sale-deed, to one Thennurangier. The latter executed a counter-agreement, Exhibit B, agreeing to reconvey the properties conveyed under Exhibit A to the vendor in case the purchase-money under that document was repaid to him by a certain time therein fixed. The money was not paid as stipulated and Thennurangier applied to the Collector of Madras for the issue of a certificate in his name. This application was opposed by the plaintiff on the ground that Thennurangier was only a mortgagee and not an absolute owner. One Veerasami Pillai, the vendor of the defendant and the owner of the adjoining lands, also opposed the application on the ground that the application included his land also. The Deputy Collector of Madras dismissed the application, referring the parties to a civil suit. This decision was confirmed by the Collector on appeal. About four months after this Veerasami Pillai purchased the properties from Thennurangier by a registered sale-deed, dated 16th June 1893. He continued in possession till 13th August 1909, when he sold the properties to the defendant under a registered sale-deed, Exhibit II. The plaintiff instituted the present suit in 1913 for redemption. The City Civil Judge dismissed the suit. The plaintiff appealed.

[This appeal came on for hearing before the above Bench when a finding was called for on the following issues:

1. Had Veerasami Pillai actual knowledge that Thennurangier was only a mortgagee and not an absolute owner when Veerasami Pillai obtained his sale-deed from Thennurangier?

2. Had the defendant actual knowledge of the same fact when he purchased the properties from Veerasami Pillai?

3. Did the plaintiff obtain knowledge of the sales to Veerasami Pillai and to the defendant only within three years before suit? When did he so obtain such knowledge?

The learned City Judge found issue 1 in the affirmative and issue 2 in the negative and as regards the issue 3 he found that the plaintiff became aware of the sale to defendant by Veerasami within three years of suit].

Mr. *S. Krishnamurthi Iyer*, for the Appellant.—The learned City Judge has found that Veerasami had actual knowledge that Thennurangier had only the mortgagee's interest in the property purchased by him. So it could not be contended that the purchase was made in the full belief that the transferor had an absolute interest. *Vide Radanath Doss* v. *Gisborne & Co.* (1). Consequently the right of redemption is not lost. *Vide* also *Singaram Chettiar* v. *Kalyanasundaram Pillai* (2). The suit being within three years of plaintiff's coming to know of defendant's purchase is within time.

Messrs. *S. T. Srinivasagopalachariar*, *Duraiswami Mudaliar* and *Natarajan*, for the Respondent.—The finding of the lower Court as to the knowledge of Veerasami is not supported by the evidence. Further, the case of *Radanath Doss* v. *Gisborne Co.* (1) was decided under the old Limitation Act of 1877. The wording of the new Article 134 of the Act of 1908 is entirely different, the words "purchased from" being replaced by "transferred by." Consequently the conditions imposed by the case of *Radhanath Doss* v. *Gisborne & Co.*(1) are inapplicable to a transferee who claims the benefit of Article 134 of the new Act. This change in the language of the Article was not given sufficient weight to in the case reported as *Singaram Chettiar* v. *Kalyanasundaram Pillai* (2).

JUDGMENT.—The lower Court has found that Veerasami had actual knowledge that his vendor had only a mortgagee's interest when Veerasami made his purchase in 1893. We cannot say that this finding is wrong and, on the other hand, the circumstantial evidence fully corroborates the oral evidence of the plaintiff and supports the

(1) 14 M. I. A. 1; 15 W. R. (P. C.) 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687.

(2) 26 Ind. Cas. 1; 1 L. W. 687; (1914) M. W. N. 735.

findings of the lower Court. If Veerasami had actual knowledge, he could not have purchased "in the full belief" [see *Radanath Doss* v. *Gisborne & Co.* (1)] that his transferor had an absolute interest.

The further argument of the respondent's learned Counsel was that the change in the language in the Limitation Act of 1908 (Article 134) by the substitution of the words "transferred by" for the words "purchased from" made the conditions imposed by the decision in *Radanath Doss* v. *Gisborne & Co.* (1), on the purchaser who wished to take advantage of the corresponding Article in the older Limitation Act, inapplicable to a transferee who claims the benefit of Article 134 in the Act of 1908.

The whole question was fully considered in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (2) after the passing of the 1908 Limitation Act by the present Chief Justice and Hannay, J., and we cannot accept the argument that the change in the language was not given sufficient weight to by the learned Judges We might add that the change does not appear to us material on this point.

Following *Singaram Chettiar* v. *Kalyanasundaram Pillai* (2), we hold that the plaintiff is entitled to redeem the lands from the defendant and pass a preliminary decree under Order XXXIV, rule 7 (*a*) and (*c*), of the Code of Civil Procedure.

The parties will bear their respective costs up to date.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 418 OF 1911.

July 27, 1915.

*Present*:—Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UPENDRA NATH NAG CHOWDHURY AND OTHERS – DEFENDANTS NOS. 1, 2 & 4 —APPELLANTS

*versus*

BHUPENDRA NATH NAG CHOWDHURY AND OTHERS—PLAINTIFS AND REMAINING DEFENDANTS—RESPONDENTS.

*Will—Suit for administration—Two successive executors—Second executor, whether liable for his predecessor's accounts—Sale of property in order to pay off liabilities—Executor, whether liable for dereliction of duty—Appointment of debtor as executor, effect of —Testator, whether can give directions about marriage of grandchildren—Costs to be paid out of estate—* Benami *transaction—Motive and subsequent conduct of parties—Previous statements, when can be based against witness—Evidence Act (I of 1872), s. 145.*

Where a testator appoints two persons successive executors of his Will, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator is diverted from a due course of administration. [p. 269, col. 2.]

In order to determine whether a person in whose name a conveyance is taken is intended to be the beneficial owner or a mere name-lender, reliance must be placed not only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct. [p. 272, col. 1.]

*Ram Narain* v. *Muhammad Hadi*, 26 C. 227; 26 I. A. 38 (P. C.); 3 C. W. N. 113; *Dalip Singh* v. *Nawal Kunwar*, 30 A. 258; 35 I. A. 104; 12 C. W. N. 609 (P. C.); 4 M. L. T. 141; 10 Bom. L. R. 600; 14 Bur. L. R. 151, referred to.

Where, therefore, a certain house belonging to a testator was mortgaged by him and having been sold in execution of the mortgagee's decree, the purchaser gave out leases to the testator's family who continued to live there and sometime afterwards conveyed the house to the testator's daughter-in-law for consideration which was not proved to be her separate property:

*Held*, (1) that applying the two principal tests of *benami*, namely, the source of the purchase-money and possession of the property the inference could legitimately be drawn that the house was purchased for the benefit of the estate in the name of the daughter-in-law; [p. 272, col. 1.]

(2) that the subsequent conduct of the parties also showed that the purchase in the name of the daughter-in-law was not for her benefit and that

the house was allowed to form part of the estate of the testator. [p. 271, col 1.]

Previous statements, unless used to contradict or discount the evidence of a witness given in a suit, cannot be legitimately used and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. [p. 272, col. 2.]

*Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit*, 29 Ind. Cas. 639; 22 C. L. J. 1; 13 A. L. J. 570; 19 C. W. N. 729; 17 Bom. L. R. 527; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 39 B. 441 (P. C.), referred to.

Where an executor, on coming into possession of the estate of a testator, finds it in a condition of considerable embarrassment and has to sell a portion of it in order to meet certain liabilities, his failure to raise money on interest with a view to save the property from sale does not necessarily amount to a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale. [p. 273, col. 2.]

Where a debtor of a testator is appointed executor, the debt due from him is considered to have been paid to him by himself and he is accountable for the amount of his debt as assets. [p. 274, col 2.]

Directions given by a testator in respect of the marriage expenses of his grandchildren are valid in law. [p. 275, col. 2.]

*Najar Chandra Kundu* v. *Ratnamala Debi*, 7 Ind. Cas. 921; 13 C. L. J. 85; 15 C W. N 66; *Dinesh Chandra Roy Chowdhury* v. *Biraj Kamani Dasi*, 11 Ind. Cas. 67; 39 C. 87; 14 C. L J. 20; 15 C. W. N. 945, followed.

In a suit for the construction of a Will and for administration of the estate of a testator, the costs of all Courts must be paid out of the estate. [p. 276, col. 1.]

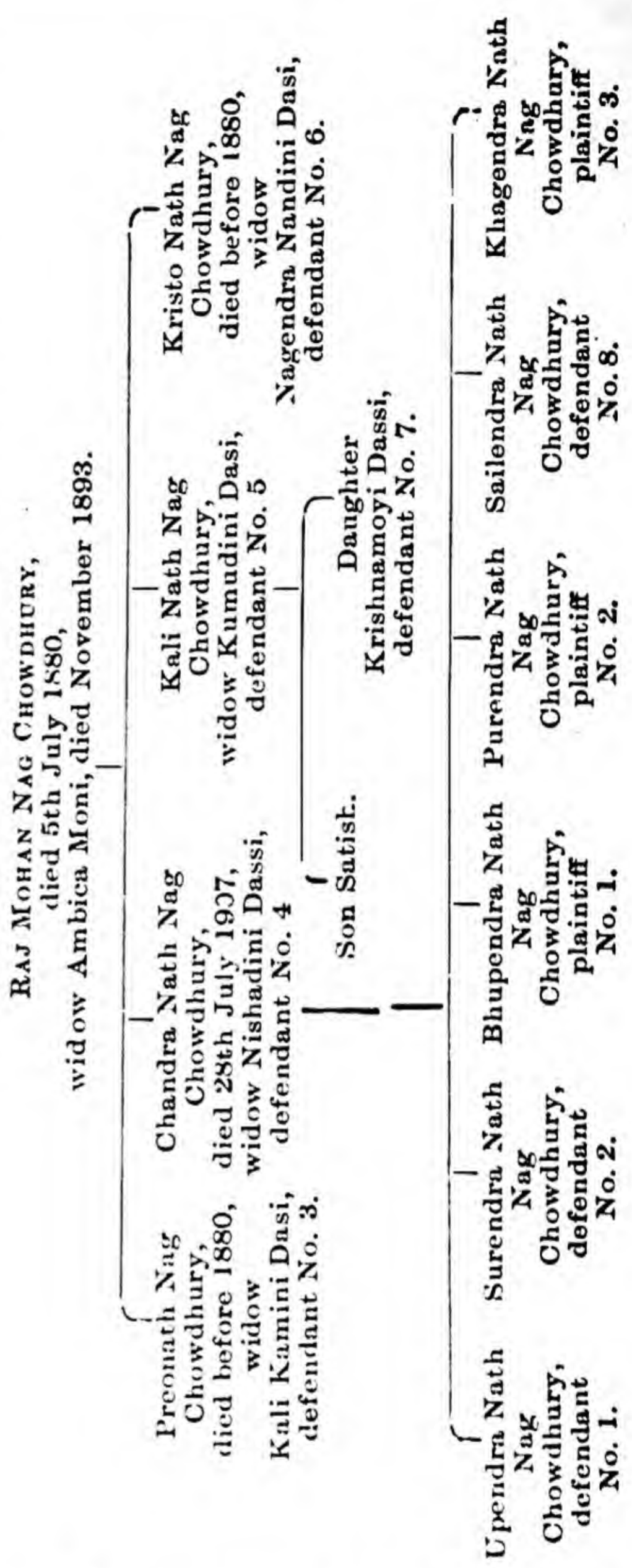
*In re Love, Hill* v. *Spurgeon*, 29 Ch. D. 348; 54 L. J. Ch. 816; 52 L. T. 398; 33 W. R. 449, followed.

Appeal against the decree of the Subordinate Judge, 3rd Court of 24-Parganahs, dated the 16th of June 1911.

Babus *Nilmadhab Bose*, *Shib Chandra Palit*, *Biraj Mohan Mozumdar*, *Satendra Nath Mukerjee* and *Bankim Chandra Mukerjee*, for the Appellants.

Mr. *N. Sarkar* and Babus *Tarkeshwar Pal Chowdhury*, *Charu Chandra Biswas* and *Harendra Nath Mukerjee*, for the Respondents.

JUDGMENT.—This appeal, which has been preferred by some of the defendants in the Court below, is directed against the preliminary decree in a suit for construction of the Will of one Raj Mohan Nag Chowdhury, for administration of the estate left by him, for settlement of the accounts of the executor, for partition of such properties as may be left after payment of the debts, and for other incidental reliefs. The position of the parties will be clear from the annexed genealogy:—




Raj Mohan died on the 5th July 1880. On the day previous to his death, he had made a testamentary disposition of his properties and appointed his second son Chandra Nath and his eldest grandson Upendra Nath successive executors. Chandra Nath took out Probate of the Will of his father and administered the estate till his death, which took place on the 28th July 1907. On the 18th May 1908, Upendra Nath obtained Probate and continued to discharge his duties as executor till his removal on the 20th April 1910. On

the 30th August 1909, Bhupendra, Purendra and Khagendra, three of the sons of Chandra Nath, instituted the present suit for the purposes already specified. They joined as defendants their three brothers, their mother and also the other members of the family who were interested in the estate left by their grandfather as legatees or annuitants. The suit was based on allegations of mismanagement which were repudiated by the executor. Various questions also arose in respect of the title to some of the properties claimed by the plaintiffs as part of the estate of the testator and alleged by some of the defendants to be the exclusive property of the widow of Chandra Nath. The Subordinate Judge, after a protracted trial, made a preliminary decree, which directed the executor to render accounts for the period subsequent to the death of Chandra Nath, that is, from the 29th July 1907 to the 20th April 1910. The latter date was fixed in view of the circumstance that from that date, by an order of the Court, Upendra Nath ceased to be executor and was appointed Receiver in charge of the estate during the pendency of the litigation. The preliminary decree also decided the disputed question of title and gave directions for the administration of the estate. Both parties were dissatisfied with this decree, three of the defendants, inclusive of the executor Receiver, having preferred this appeal, while the plaintiffs-respondents have preferred a cross-appeal. After a careful scrutiny of the grounds selected by the appellants and the respondents for presentation to the Court, the following points emerge for consideration. *First*, did the Panchannagram properties form part of the estate of Raj Mohan or have they passed into the hands of Nishadini as beneficial owner; *secondly*, did the Calcutta house form part of the estate of Raj Mohan at the time of the sale on the 9th November 1908, when it admittedly passed into the hands of a stranger; *thirdly*, did the *gauti* tenures, some of which have been found by the Subordinate Judge to belong to Nishadini, the widow of Chandra Nath, and the others to the estate of Raj Mohan, still form part of that estate; *fourthly*, are the *debutter* properties capable of partition and is the executor liable to submit an account of their income; *fifthly*, is the executor liable for the sale of the Calcutta house in execution of the decree of the mortgagee; if so, what is the extent of his liability; *sixthly*, was there a real sale, by Sailendra Nath, of his interest in the estate of his grandfather to his mother Nishadini, on the 16th December 1896; *seventhly*, what direction, if any, should be given with regard to the provisions in the eleventh paragraph of the Will of Raj Mohan for the marriage expenses of his great-grandsons and great-grand-daughters; *eighthly*, what direction should be given for the costs of the suit in the Court below and of the appeal in this Court.

It is necessary to explain, before we deal with these questions in the order stated, that all the parties are now agreed that the executor should be called upon to render accounts, only from the 29th July 1907 to the 20th April 1910. They have intimated to us that they abandon the claim for accounts for the period of the executorship of Chandra Nath. The reason for this attitude is obvious. As ruled by this Court in the case of *Baroda Prasad Banerji* v. *Gajendra Nath* (1), the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator was diverted from a due course of administration. Consequently, it would be the duty of Upendra Nath to realise from himself and his five brothers whatever might be found due to the estate of their grandfather on an examination of the accounts of their father as executor. Such an investigation is obviously not beneficial to the parties and although they are by no means friendly to each other, they are united upon one point, namely, that the accounts of their father as executor should not be taken. A different attitude, we may add, was adopted in the Court below, and some of the sons of Chandra Nath

(1) 1 Ind. Cas. 289; 9 C. L. J. 383; 13 C. W. N. 557.

sought to fasten a special liability upon the others on the allegation that they were the trusted advisers of their father during the period of his executorship, and shared his responsibility for due administration of the estate. This endeavour was not successful, and as we have said, in this Court all the parties by common consent have agreed that the accounts are not to be investigated for the period antecedent to the 28th July 1907 when Chandra Nath died.

The *first* ground raises the question of title to the lands known as Panchannagram properties. They originally formed part of the estate of Raj Mohan and are still included therein, if it is not established that they have passed into the hands of a stranger. On the 25th June 1885, Chandra Nath, for an alleged consideration of Rs. 1,000, executed a conveyance in respect of these properties, which comprise 25 *bighas* of land and are situated in the neighbourhood of Calcutta, in favour of one Srinath Bose who was his intimate friend. Subsequently, on the 13th June 1895, the purchaser executed a conveyance in favour of Nishadini, the wife of Chandra Nath, for a consideration of Rs. 500 only. The plaintiffs contend that these transactions were fictitious and that the properties never ceased to form part of the estate of Raj Mohan. The Subordinate Judge has found that Srinath did not get himself registered in the Collectorate and did not take possession of the properties, though he continued to be the ostensible owner for a period of eight years. During this interval he never paid rent to the Collector, and although tenants are said to have attorned to him, no documentary evidence has been produced in that behalf. There is also no reliable evidence to prove that Nishadini was ever in possession of these properties. No account papers have been produced to show that the profits of these properties were realized and spent by her. Against all this, it is urged by the appellants that the Court is bound to give effect to the ostensible title and should not base its decision on mere suspicion. But the obvious answer is that, except the recital in the conveyance, there is no trustworthy evidence that any consideration was paid by Srinath. If consideration had been paid, the money would have been credited to the estate, and an entry to that effect would have found a place in the account books presumably kept by Chandra Nath. No account books, however, have been produced, nor is it alleged that Chandra Nath did not keep regular accounts of the estate whereof he was the executor. The inference is that the account books have not been produced, because they do not favour the contention of the appellants. We feel no doubt whatever that the Subordinate Judge is correct in his conclusion that the conveyances by Chandra Nath in favour of Srinath and by Srinath in favour of Nishadini were both fictitious transactions.

The *second* ground raises the question of title to the Calcutta house. It is the common case of all the parties that the house belonged to Raj Mohan, and on the 12th May 1874 was mortgaged by him to Mary Ratter. After the death of Raj Mohan Mary Ratter sued to enforce her security and obtained a decree on the 1st September 1884. The house was sold in execution of this decree on the 20th June 1885 and was purchased for Rs. 8,700 by one Shama Charan Ballabh, a friend of Raj Mohan. The family of Raj Mohan, notwithstanding this sale, continued in occupation of the house as they took leases from the purchaser on the 5th August 1885 and 5th December 1886. On the 30th April 1887, Shama Charan conveyed the house to Nishadini, the wife of Chandra Nath, for a consideration of Rs. 11,000. The question in controversy is whether this transfer to Nishadini was for the benefit of the estate of Raj Mohan or whether by this transaction the house became her private property. According to Nishadini she had Rs. 3,000 with her at the time of the purchase of the house, and she borrowed Rs. 8,000 from her daughter to make up the requisite amount of purchase-money. There is no documentary evidence to support the alleged advance by her daughter, and the statements made by Upendra Nath on this point are, as the Subordinate Judge has pointed out, not self-consistent. It is quite improbable that Nishadini could borrow this money without security and without even a written instrument. We may also refer to the subsequent conduct of the parties which, as the Judicial Com-

mittee have said, affords valuable evidence as to whether the person in whose name the conveyance is taken is intended to be the beneficial owner or a mere name-lender [*Ram Narain* v. *Muhammad Hadi* (2), *Thakro* v. *Ganga Prasad* (3), *Dalip Singh* v. *Nawal Kunwar* (4)]. Thus there is the significant circumstance that when the house was mortgaged to Harendra Lal Roy on the 20th September 1887, the document was executed not by Nishadini alone, but also by Chandra Nath and Upendra Nath. This is consistent with the view that the house at the time was deemed to form part of the estate of Raj Mohan in the hands of Chandra Nath as executor. This mortgage also militates against the theory put forward by Nishadini that she re-paid the advance from her daughter out of the sum received from the mortgagee. The mortgage-bond clearly shows that the security was given on account of advances made to Upendra Nath to enable him to carry on a *banianship* business. We have also the significant fact that when the property was subsequently mortgaged to Twidale to raise money to pay off Harendra Lal Roy, the document was executed not by Nishadini alone but by Nishadini and Chandra Nath. Here again the property was treated as if it still formed part of the estate of Raj Mohan. The same inference is deducible from the fact that on the 27th February 1904, the property was mortgaged to Sib Charan Laha by Nishadini and Chandra Nath (the ostensible owner and the executor to the estate of Raj Mohan) jointly to satisfy the dues of Twidale. It is consequently plain that there is no trustworthy evidence to prove that the purchase-money for the house was paid by Nishadini from her own funds or from sums borrowed by her. This by itself is sufficient to justify the inference that the purchase in her name was not for her benefit. This conclusion does not rest on mere suspicion which, as their Lordships of the Judicial Committee have repeatedly held [*Sreemanchunder Dey* v *Gopaulchunder Chuckerbutty* (5), *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (6), *Faez Buksh* v. *Fukeer-ood-deen Mahomed Ahassun Chowdry* (7), *Uman Parshad* v. *Gandharp Singh* (8), *Suleiman Kadr Bahadur* v. *Nawab Mehndi Begum* (9), *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (10)] cannot be made the foundation for a judgment in cases of this description. But the plaintiffs have been able to carry the matter further. They have established that on the 31st March 1886, Chandra Nath obtained the sanction of the District Judge with a view to raise a loan of Rs. 16,000 for the purpose of re-purchasing the Calcutta house. This purpose, indeed, was said to have been abandoned in subsequent applications to the District Judge for his sanction to raise loans. But it has been suggested, not without good grounds, that this was a mere blind, as subsequent events show. On the 29th March 1887, Chandra Nath entered into an agreement with Shama Charan Ballabh for the purchase of the Calcutta house. On that very day, he borrowed Rs. 20,000 by execution of two mortgages in favour of Shama Sundaree and Dakshyani, two relatives of Shama Charan Ballabh. This money was taken from the firm of Shaw and Company whereof Shama Charan himself was a partner. It is proved that on the day following, that is, the 30th March 1887, Chandra Nath received from the firm Rs. 12,800; this is significant when we remember that the price for the house had been fixed approximately in the agreement at Rs. 12,451. Much stress has been laid on behalf of Nishadini upon the circumstance that the serial numbers of the currency notes as entered in the conveyance are not identical with the serial numbers of the currency notes received by Chandra Nath from Shaw and Company. But as has been pointed out by the Subordinate Judge, the notes could easily be changed so as to render difficult a future investigation into the true nature of the transaction. We have also the important circumstance that the allegations of necessity made in the applications of Chandra Nath to the District Judge for sanction of the loan

(2) 26 I. A. 38; 26 C. 227 (P. C.); 3 C. W. N. 13.

(3) 15 I. A. 29; 10 A. 197 (P. C.); 5 Sar. P. C. J. 133.

(4) 35 I. A. 104; 30 A. 258; 12 C. W. N. 609 (P. C.); 4 M. L. T. 141; 10 Bom. L. R. 600; 14 Bur. L. R. 1.

(5) 11 M. I. A. 28; 7 W. R. 10 (P. C.); 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 275; 20 E. R. 11.

(6) 13 M. I. A. 395; 14 W. R. 4 (P. C.); 5 B. L. R. 578; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599.

(7) 14 M. I. A. 234; 9 B. L. R. 456; 2 Suth. P. C. J. 490; 2 Sar. P. C. J. 733; 20 E. R. 775.

(8) 14 I. A. 27; 15 C. 20; 1 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 98.

(9) 25 C. 473 (P. C.); 23 I. A. 15; 2 C. W. N. 186.

(10) 25 I. A. 225; 26 C. 11.

are demonstrably untrue in material particulars. One of the purposes mentioned was the satisfaction of a debt due to Bharat Chandra Ray, who, it has been conclusively established, was at the time not a creditor of the estate. We have, consequently, on the one hand, incontestible proof that Chandra Nath intended to re-purchase the house, that he raised money ostensibly for other purposes which had no real existence, and that no explanation is available as to the mode in which the sum borrowed was actually applied. We have, on the other hand, the fact that Nishadini is not proved to have funds requisite for the purchase of the house nor was she ever in possession of the property. When, therefore, we apply the two principal tests of *benami*, namely, source of the purchase-money [*Dhurm Das Pandey* v. *Shama Sondri Debiah* (11), *Gopeekrist Gosain* v. *Gungapersaud Gosain* (12)] and possession of the property [*Imambandi Begam* v. *Kamleswari Pershad* (13)] we find that the inference may legitimately be drawn that the house was purchased by Chandra Nath for the benefit of the estate in the name of his wife Nishadini. We must also remember that there were strong motives for a step of this description; as Sir Arthur Wilson said in *Dalip Singh* v. *Nawal Kunwar* (4) reliance must be largely placed, not only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct. Kalinath, the brother of Chandra Nath, had under the Will of his father a right of residence in this house, a right which he subsequently sought to enforce by litigation. It is not improbable that Chandra Nath would allow the house to be sold in execution of the decree of Mary Ratter with a view to defeat the claim of his brother. It is also not improbable that he would entertain a wish to purchase the ancestral family dwelling house, and if he accomplished his project, it would be obviously desirable to place the property in the name of his wife, not only to defeat the claim of Kali Nath but also to save the property from the creditors to whom the estate was heavily indebted. Against all this, reliance has been placed upon statements made on the 10th November 1905 by five of the sons of Chandra Nath in the plaint in a suit instituted by them against the executrix to the estate of Kali Nath. Reference has also been made to the deposition of Purendra in that suit given on the 24th April 1907, to a letter from Bhupendra to Upendra written on the 27th November 1908, and to the terms of settlement dated the 5th December 1894 in the suit instituted by Kalinath against Chandra Nath for the establishment of his right of residence. The last document is of no real assistance in the solution of the question raised before us, and does not justify the inference that the house was the private property of Nishadini; on the other hand, it tends to show that Kali Nath, though he admitted that the house belonged to Nishadini, practically released his right of residence to Chandra Nath for a sum of Rs. 3,800 to be paid out of the estate of Raj Mohan. The other statements are admissions by parties to the present suit and might have been used to contradict their testimony in this case under section 145 of the Indian Evidence Act. They were, however, not so used. The specific statements were not put to the parties sought to be contradicted. Consequently, as pointed out by the Judicial Committee in the case of *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (14), they cannot be used in evidence. Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. Apart from this circumstance, it is plain that no reliance can be placed upon the previous statements mentioned. It is no serious disparagement to the parties to this litigation to state that they have not been particularly scrupulous in their dealings, and assertions appear to have been made from time to time just as the needs of the moment required. We feel no doubt, on the whole, that the Subordinate Judge has correctly

(11) 3 M. I. A. 229; 6 W. R. 43 (P. C.); 1 Suth. P. C. J. 147; 1 Sar. P. C. J. 271; 18 E. R. 484.

(12) 6 M. I. A. 53; 1 W. R. 46 (P. C.); 1 Sar. P. C. J. 493; 19 E. R. 20.

(13) 13 I. A. 160; 14 C. 109; 10 Ind. Jur. 468; 4 Sar. P. C. J. 732.

(14) 29 Ind. Cas. 639; 22 C. L. J. 1; 13 A. L. J. 570; 19 C. W. N. 729; 17 Bom. L. R. 527; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 39 B. 441 (P. C.).

held that the transfer of the Calcutta house by Shama Charan Ballabh to Nishadini on the 29th April 1887 was for the benefit of the estate of Raj Mohan and that the ostensible transferee did not acquire any beneficial interest thereunder.

The *third* ground raises the question of title to the *gauti* tenures which stand in the name of Nisbadini, either because they were created by Chandra Nath in her favour or were acquired in her name. According to the plaintiffs, all these tenures are fictitious and have no real existence. According to Nishadini and such of her sons as have taken her side, the tenures are real and are binding on the estate of Raj Mohan. The Subordinate Judge has decided partly in favour of the plaintiffs and partly in favour of the defendants. His decision is consequently assailed by both sides. After some discussion at the Bar, it was agreed that these *gauti* tenures should be deemed to hold good during the life-time of Nishadini and should terminate on her death, so that the lands will then revert unencumbered to the estate of Raj Mohan. This arrangement is, in our opinion, eminently satisfactory, and we sanction it; our approval is necessary, as one of the plaintiffs, Bhupendra, has died during the pendency of the litigation and has been succeeded by his infant son. The decree of the Subordinate Judge will be varied in this respect and a declaration as stated will be inserted therein by consent of parties. On behalf of Nishadini, an undertaking has been given that no encumbrances have been created by her or with her assent on these *gauti* tenures, nor have any permanent under-tenures been created by her. A description of the *gauti* tenures is appended to this judgment and will be annexed to the decree.*

The *fourth* ground raises the question of the nature of the parcels of land described as *debutter* properties (schedule *ka* Nos. 26 and 27). The controversy between the parties is whether these lands constitute *debutter* or *shebattar*. The determination of this question is immaterial for the purposes of the present suit. Whatever the nature of the dedication, they are endowed properties and cannot consequently be partitioned. But if Upendra has enjoyed their income, he must account therefor.

The *fifth* ground raises the question of the liability of Upendra for sale of the Calcutta house. The Subordinate Judge has imposed a liability on Upendra on the ground that the sale was held in satisfaction of a debt originally incurred by Chandra Nath for the benefit of Upendra. This view has been attacked by the appellants and has not met with unqualified support from the respondents. In this connection, four alternative points of view have been placed before us for acceptance by one or other of the contesting parties, and each of them requires careful examination.

In the *first* place, it has been contended that Upendra as executor should have saved the property from sale and that his failure to do so amounts to a grave dereliction of duty. In our opinion, this position has not been established. The suit was instituted by the mortgagee, Shib Charan Laha, against Chandra Nath who mortgaged the property to him. Upon the death of Chandra Nath during the pendency of the litigation the mortgagee brought on the record all his six sons. The sons other than Upendra apparently took no objection to this course. They did not contend that the mortgage had been executed by Chandra Nath in his capacity as executor and that consequently his successor in that office alone was liable to be placed on the record. The result was that a decree was obtained against the six sons, and in execution thereof the property was put up to sale. There is nothing to show that the price obtained at the sale was inadequate, consequently it cannot be contended that the sale of the house and its conversion into money have been prejudicial to the estate, nor is there any evidence to show that, at the time, Upendra had funds of the estate in his hands which might have been applied to avert the sale. The estate which had come into his hands only a few months before, was admittedly in a condition of considerable embarrassment, and failure to raise money on interest with a view to save the property from sale was not necessarily a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale. Consequently Upendra cannot be held liable merely on the ground that he did not prevent

*This is omitted from the judgment, as it is not material for the report.—*Ed.*

the sale of the house at the instance of the mortgagee.

In the *second* place, the view has been put forward that Upendra is liable as the sale was occasioned by a debt ultimately traceable to loans incurred by Chandra Nath for the benefit of Upendra himself. The position is clearly unsustainable. The parties have agreed that accounts are not to be taken in respect of the period of executorship of Chandra Nath, the reason for this attitude has already been explained. Now let us assume that the mortgage in favour of Shib Charan Laha was created to pay the mortgage of Twidale, which, in its turn, had been effected to satisfy the security given to Harendralal Rai in respect of money received by Chandra Nath for payment to Upendra Nath. It is plain that Chandra Nath may be liable to the estate of Raj Mohan for all sums raised by him in his capacity as executor and not applied for the benefit of the estate. Consequently, the present representatives of Chandra Nath, that is, his six sons, are responsible to the extent of the assets, if any, of their father in their hands, to indemnify the estate of Raj Mohan for losses sustained by unwarrantable acts of their father. This matter, in all its bearings, they have declined, by common consent, to submit for investigation by the Court. Five of the brothers cannot clearly be permitted to single out one transaction of Chandra Nath and to hold Upendra liable in respect thereof. There is considerable force in the contention that if all the accounts of the period of executorship of Chandra Nath were taken, it might transpire that he had made advances to his other sons in respect whereof each of them on the same principle might be held responsible to the estate. We are of opinion that as the parties have agreed not to investigate the accounts of the period of executorship of Chandra Nath, they cannot impose a liability on Upendra Nath on the ground that the money raised by this particular transaction was applied by the then executor for the benefit of one of his sons.

In the *third* place, the contention has been put forward that as the money raised by Chandra Nath from Harendralal Rai was applied for the benefit of Upendra, the transaction was in essence a loan to Upendra and that inasmuch as Upendra subsequently succeeded Chandra Nath as executor, he is liable to recoup the estate to the extent of the benefit received by him therefrom. In support of this view, reference has been made to the well-established principle that the effect of the appointment of a debtor to the office of executor is that the debt due from the debtor executor is considered to have been paid to him by himself and that the executor is accountable for the amount of his debt as assets: *Freakley* v. *Fox* (15); *Ingle* v. *Richards* (16); *Carey* v. *Goodinge* (17); *Berry* v. *Usher* (18); *Tomlin* v. *Tomlin* (19) and *Administrator-General of Bengal* v. *Kristo Kamini Dassee* (20). This doctrine is of no assistance to the respondents. On this theory, the money must be deemed to have been advanced by Chandra Nath to Upendra on or before the 20th September 1857, at any rate, not later than the 1st April 1888, if we accept the statement by Harendralal Rai in his plaint in mortgage suit dated the 27th January 1859. But Upendra did not succeed as executor till the 28th July 1907. There are no materials on the record to show that as between Upendra and the estate of Raj Mohan, the debt was kept alive during all these years *Prima facie*, there was no enforceable claim against Upendra when he succeeded to the office of executor, and consequently, the principle that a debtor executor is accountable for the amount of his debt as assets cannot be applied. We are not unmindful that when an executor obtains probate, the grant operates retrospectively from the date of the death of the testator. But that principle is of no avail here, because there was an intermediate executor who created the debt, it is on his act that Upendra is sought to be made liable, and Upendra cannot by a fiction be deemed to have been an executor at a time when there was another executor lawfully in possession of the estate. The decision in *Ingle* v. *Richards* (16) is consequently distinguishable and does not assist the respondents.

(15) 9 B. & C. 130; 4 Man. & Ry. 18; 7 L. J. K. B. (o. s.) 148; 109 E. R. 49; 32 R. R. 605

(16) 28 Beav. 366; 6 Jur. (N. S.) 1178; 8 W. R. 697; 54 E. R. 406; 3 L. T. (N. S.) 116; 126 R. R. 170.

(17) (1790) 3 Bro. C. C. 110; 29 E. R. 439.

(18) 11 Ves. 87; 32 E. R. 1021.

(19) (1841) 1 Hare. 236; 66 E. R. 1019.

(20) 31 C. 519; 8 C. W. N. 500.

In the *fourth* place, it has been contended on behalf of the appellants that the true view of all the facts is that the money was advanced by Chandra Nath to Upendra Nath, not in his personal capacity but as a member of a joint Hindu family composed of himself and his sons. From this point of view, all the six sons of Chandra Nath would be responsible for the re-payment of the loan to the estate of Raj Mohan. The Subordinate Judge has held that the money was paid by Chandra Nath to Upendra to enable him to carry on a *baninanship* business; from the surrounding circumstances, there is no room for reasonable doubt that the loan was to Upendra as a member of a joint Hindu family, and that if he had been successful in his business, a share of the profits could have been rightly claimed by his brothers. From this point of view, Upendra would not be liable for the whole debt. After an anxious consideration of the possible aspects of the case, we are of opinion that the sums advanced to Upendra and secured by the mortgage of Harendralal Rai must be deemed to have been advanced to him in his character as a member of a joint Hindu family. and that in this suit he cannot be held responsible for the whole of that sum at the instance of his brothers. The question of the liability of Upendra for the sale of the Calcutta house in execution of the mortgage decree of Shib Charan Laha must consequently be decided in his favour The surplus sale-proceeds, however, shall be deemed part of the estate, as we have held that the house itself formed part of the estate of Raj Mohan, though it had been transferred by Shama Charan Ballabh ostensibly to Nishadini.

The *sixth* ground raises the question of genuineness of the transfer made by Sailendra of his interest in the estate of his grandfather to his mother Nishadini. The question was raised in the Court below by the plaintiffs, and they obtained an adjudication that the conveyance represented a *benami* transaction. In the present appeal that conclusion has been assailed by Nishadini. But the plaintiffs have taken up the position that they are not interested in the decision of this matter. Consequently the dispute reduces to a controversy between the two co-defendants. In this view the parties have agreed, and in, our opinion, very properly, that the decision of the Subordinate Judge on this point should be set aside and that the matter should be left open for determination in a subsequent suit but that in the meanwhile the decree in this suit should be made on the assumption that the appellant represents the real estate of things. We, therefore, allow the appeal on this point, set aside the decree of the Subordinate Judge, and direct that allotments be made on the footing that the conveyance of the 16th December 1896 was intended to be a genuine and operative transaction. But liberty is reserved to Sailendra to institute a separate suit for declaration against his mother that the transaction was *benami* and that he himself is beneficially interested in the allotments made to her.

The *seventh* ground raises the question of the marriage expenses of the great-grandsons and great-granddaughters of the testator. The Subordinate Judge has held, on the authority of the decisions in *Nafar Chandra Kundu* v. *Ratnamala Debi* (21 and *Dinesh Chandra Roy Chawdhury* v. *Biraj Kamini Dasi* (22), that the directions given by the testator in respect of this matter are valid in law. This view has been accepted by both sides. Consequently the Subordinate Judge will give directions, so that sums may be set apart from the annual income from time to time to be applied to meet the marriage expenses as occasion might arise. It has been suggested that the most satisfactory arrangement would be to set apart a portion of the *patni* rent, but we cannot give at this stage definite instructions on the subject.

The *eighth* ground raises the question of costs. The Subordinate Judge has directed that costs already incurred be borne by the parties and that costs subsequent be borne by the estate. The respondents contend that costs should be paid out of the estate and they rely upon the decision in *Fenton* v *Wills* (23). We are of opinion that no grounds have been established in favour of

(21) 7 Ind. Cas. 921; 13 C. L. J. 85; 15 C. W. N. 66.

(22) 11 Ind. Cas. 67; 39 C. 87; 14 C. L. J. 20; 15 C. W. N. 945;

(23) 7 Ch. D. 33; 47 L. J. Ch. 191; 37 L. T. 373; 26 W. R. 139.

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a departure from the ordinary rule and that costs in the Court below as also the costs of this Court must be paid out of the estate [*In re Lore, Hill* v. *Spurgeon* (24)].

There is one other matter which requires a brief notice. The Subordinate Judge directed that immoveable properties of the estate should be sold to satisfy the debts due therefrom. We have already held in our judgment, dated the 28th August 1914, that it would be more beneficial to the estate to grant permanent leases rather than to effect a sale of valuable properties. This order has been carried out and a *patni* has been granted. We directed at the same time that the decree of the Subordinate Judge should be modified so as to authorise the Receiver not merely to sell but also to dispose of by lease or other mode of alienation a part of the estate as might be found most advantageous. The decree of the Subordinate Judge will consequently be modified in this respect.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge modified in respect of the matters mentioned. A self-contained decree will be drawn up in this Court so as to avoid future dispute.

*Appeal partly allowed.*

(24) 29 Ch. D. 348; 54 L. J. Ch. 816; 52 L. T. 393; 33 W. R. 449.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 4164 OF 1913.

November 30, 1915.

*Present*:—Mr. Justice Roe.

SIMRICK LAL BHAKAT—DEFENDANT No. 3—APPELLANT

*versus*

RADHARAMAN KALIDAHA—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 54—Attachment, effect of, from which date—Civil Procedure Code (Act XIV of 1882), s. 276.*

An order of attachment of property under the Civil Procedure Code takes effect only from the date of its actual promulgation, and not from the date of the Court's order. [p. 278, col. 2.]

Appeal against the decree of the District Judge, Murshidabad, dated the 9th of August 1913, affirming that of the Munsif, Lallbagh, dated the 30th November 1912.

FACTS.—The plaintiff was the mortgagee of a certain property. This property was sold in execution of a decree for rent thereof and the sale-proceeds after the satisfaction of the rent-decree were in deposit in the Court to the credit of the owner of the property.

The property was attached by the defendants Nos. 2 and 3 in execution of a money-decree but before the attachment order was promulgated it had been mortgaged to the plaintiff. It was found by the Courts below that this mortgage was after the attachment order had been made by the Munsif. The plaintiff brought a suit for a mortgage-decree and claimed to have it satisfied by the sale-proceeds in deposit. The defendants Nos. 2 and 3 contested the suit on the ground that the mortgage to the plaintiff was void as it was made after they had attached the property, their case being that it was after the promulgation of the attachment order that the mortgage was effected. The lower Courts, holding that the mortgage was effected before the promulgation of the attachment order, decreed the plaintiff's suit. The defendants appealed and the main point argued in the appeal was that as the mortgage was effected after the Munsif passed the orders for attachment, the mortgage was voidable as against the defendants, the attaching decree-holders.

Babu *Brojendranath Chatterjee*, for the Appellant:—Order made by a Court of Law takes effect from the date of the orders, and not from the date when it is communicated or promulgated. It has been held that an order for stay of execution made by the High Court takes effect as soon as the order is made, and not when it is communicated, so a sale held by the lower Court in execution before the communication, but after the order for stay of execution has been made, is void. *Vide Hukum Chand Boid* v. *Kamalanand Singh* (1), *Sati Nath Sikdar* v. *Ratanmani Naskar* (2) and *Ramanathan Chetty* v. *Arunachalam Chetty* (3).

When a Court passes an order of injunction, the order is effective as soon as it is made, no matter when it is promulgated,—*vide*

(1) 33 C. 927; 3 C. L. J. 67.
(2) 14 Ind. Cas. 868; 15 C. L. J. 335.
(3) 22 Ind. Cas. 99; (1914) M. W. N. 46; 15 M. L. T. 151; 26 M. L. J. 275; 1 L. W. 22; 38 M. 766.

Kerr on Injunction, 3rd Edition, page 641, Joyce's Injunction, page 1321, Woodroffe on Injunction, pages 84 and 90.

The order attaching a property is in effect an order of injunction upon the judgment-debtor forbidding him to alienate the property. The essential time in such an order is the date when it is made, and not the date when it is proclaimed by beat of drum. The judgment-debtor might by various means induce the Court peons to delay in serving the attachment order and in the meantime might transfer the property to defraud the attaching decree-holder. In order to avoid this, the Legislature has enacted in Order XXI, rule 54, Civil Procedure Code of 1908, that an "attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property" and in section 64, it lays down that where an *attachment has been made*, any private transfer of the property attached shall be void as against all claims enforceable under the attachment. The rule of law laid down in the old Code of 1882, in section 276, has been changed. In section 276, Civil Procedure Code, 1882, the language was, "when an attachment has been made by actual seizure or written order duly intimated and made known in manner aforesaid, any private alienation, etc., shall be void, etc.," but in section 64 of the Civil Procedure Code of 1908, the language is altogether different and it distinctly says, "private alienation shall be void after *the attachment has been made*" and how an attachment is made is stated in Order XXI, rule 54, *i.e.*, by an order prohibiting the judgment-debtor from transferring or changing, and not by the promulgation of the order.

[ROE, J.—Is there anything in the statement of the objects and reasons in passing the Act to show such a change?]

The statement as to the "objects and reasons" is not relevant for the purpose of construing a section of the Act; such statement forms no part of the Act and may be misleading. The language of section 64 and Order XXI, rule 54, is clear. Why should the Legislature change the language of section 276, Civil Procedure Code of 1882, which is not ambiguous, if it did not intend to change the law? A change of language, unless made for the purpose of clearing off ambiguity, is an indication of the Legislature's intention to change the law. The English rule of law supports my contention, —*vide* Annual Practice, Order XLII, rule 3, and Halsbury's Laws of England, Volume 18, page 206.

The District Judge has not decided a point in the case which was a pure question of law, *viz.*, another decree-holder attached this property before the mortgage but he applied for rateable distribution in execution of my decree, so the mortgage being void as against his claims is also void as against mine.

[ROE, J.—This point was not raised in the lower Appellate Court and I would not allow it to be raised here.]

Babu *Ram Chandra Mozumdar*, (with him *Gouranga Nath Banerjee*), for the Respondent. —The old law still holds good: there has been no change by the new Civil Procedure Code. An attachment is completed by promulgation of the order of attachment. If the attachment becomes effective from the date of the order of attachment, then a decree-holder will be able to restrain any alienation of the attached property by the judgment-debtor for an indefinite time; for a decree-holder after getting the attachment order may not deposit process-fee for the service or promulgation of the attachment order. There are numerous decisions to the effect that attachment is only effective after its promulgation. It is not reasonable to suppose that the Legislature did not consider these decisions when enacting section 64 and Order XXI, rule 54. Order XXI, rule 54, should be read as a whole. Clauses (1) and (2) of rule 54, when taken together, show that an attachment takes effect after it has been proclaimed.

Rules 52, 53 and 55 of Order XXI all show that attachment is made by the issue of notice of the attachment order, and not by the mere order recorded by the Court in its order sheet.

An attachment order might be effective against the judgment-debtor from the date of the orders but as against *bona fide* transferees, it is not effective until it is proclaimed. Referred to Appendix E, No. 24.

Mr. *Bozendranath Chatterjee*, in reply.—I am thankful to my learned friend for referring to Appendix E, No. 24. That shows that the law

makes no distinction between the judgment-debtor and the transferees from him in regard to the effect of an attachment order. A person in purchasing a property is expected to make enquiries and it is not difficult for a purchaser to learn on inquiry that the property is under attachment. If the contention of the other side prevails, then the attaching decree-holder may very easily be defrauded. Rules 52,53 and 55 in Order XXI when compared with rule 54 support my contention; if the Legislature meant that in regard to immoveable property, attachment is to be made by promulgation of the order of attachment, it would have used appropriate language as it has done in rules 52, 53 and 55 with regard to attachment of property mentioned therein. As regards the argument that the decree-holder might, by not paying the process-fee after the attachment order, restrain alienation for an indefinite time, the obvious answer is that when the decree-holder will make such a default, his application for execution will be dismissed by Court and the attachment will thereupon cease, *vide* Order XXI, rule 57.

JUDGMENT.—The sole question of law involved in this case is, it being proved that a transfer of property was made to the prejudice of the decree-holder between the date of the order by a Munsif for an attachment of the property transferred and the date of the promulgation of that order, is that alienation void in so far as it affects the attaching decree-holder. I have no doubt that under section 276 of the old Code (and this is admitted by the learned Vakil for the appellant) an attachment is not a good attachment unless it has been "duly intimated and made known." I am asked to hold that from section 64 of the new Code of Civil Procedure, the words "duly intimated and made known" have been deliberately omitted and the law changed. I cannot believe that such a change could have been made in the law without some explanation of the change in the statement of objects and reasons. The law as it now stands is no less clear than it was in the old Code. Section 64 sets forth the effect of an attachment. In Order XXI, rule 54, Civil Procedure Code, the method of making attachment is described.

For the appellant it is urged that clause 1 of rule 54 is complete in itself and that the attachment should come into effect from the date of the making of the order. For the respondent it is urged that rule 54 should be read as a whole, and that attachment cannot be said to have taken effect until the provisions of the section as a whole have been complied with. It is settled law that unless the whole of the provisions of rule 54 have been complied with, the attachment is not effective. I cannot conceive it possible that an attachment may be effective from the date of the Court's order if that order is in due course promulgated, and ineffective altogether if subsequent to the Court's order there is a failure to lawfully promulgate the order. I hold that inasmuch as the order of attachment is not effective until it has been duly promulgated, such an order takes effect only from the date of the actual promulgation. On this point the appeal must fail. It has been further urged that the lower Court has refused to consider the effect of certain proceedings taken in respect to another decree by a person named Prosanna. There is no mention whatever of any argument before the learned District Judge or of any suggestion in that Court that the proceedings in the case of Prosanna affected in any degree the merits of the present case. The learned Judge has distinctly said that two points only were urged before him. That statement is a statement behind which the appellant cannot go. It was not in the lower Appellate Court argued that Prosanna's proceedings affected the present case. I cannot allow the point to be raised now before me.

The appeal is dismissed with costs.

*Appeal dismissed.*

SECRETARY OF STATE *v.* MAHARAJA OF BOBBILI.

MADRAS HIGH COURT.

APPEAL SUIT No. 113 OF 1910.

October 27, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF VIZAGAPATAM—DEFENDANT—APPELLANT

*versus*

*Maharajah* SIR VENKATA SWETHA CHALAPATTI RANGA RAO BAHADUR GARU, K. C. I. E. MAHARAJA OF BOBBILI—PLAINTIFF—RESPONDENT.

*Water cess—Madras Irrigation Cess Act (VII of 1865)—'River belonging to Government'—Bed and banks belonging to* zemindar—*Cess, if leviable—Forfeiture of* zemindari—Zemindar *under obligation to supply water free—Right of Government to levy water-cess.*

Where both the banks and the bed of a portion of a river belong to a *zemindar*, that portion of the river does not belong to the Government so as to warrant the levy of water-cess under Act VII of 1865. [p. 290, col. 1.]

*Bush* v. *Trowbridge Waterworks Co*, (1875) 10 Ch. App. 459; 44 L. J. Ch. 645; 33 L. T. 137; 23 W. R. 641; *Lyon* v. *Fishmongers' Company*, (1876) 1 App. Cas. 662 at p. 673; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165; *Orr-Ewing* v. *Colquhoun*, (1877) 2 App. Cas. 839, followed.

The Government succeeding to the rights and obligations of a *zemindar* on forfeiture is not precluded from levying water-cess by reason only of the fact that the *zemindar* was under an obligation to supply water free of charge. [p. 283, col. 2; p. 285, col. 2.]

Appeal against the decree of the District Court of Vizagapatam, in Original Suit No. 2 of 1908.

The Government Pleader, for the Appellant.

Messrs. *V. Ramesam* and *B. N. Sarma*, for the Respondent.

This appeal coming on for hearing on the 19th December 1912, the Court (Sir Arnold White, C. J., and Oldfield, J.) made the following

ORDER.—In the view the learned Judge took of this case it was not necessary for him to come to a finding upon the question raised in the second issue, whether the Suvarnamuki river belonged to Government. We cannot dispose of this appeal satisfactorily without a finding on that question. We accordingly send back the case to the District Judge and direct him to record a finding as to whether the Suvarnamuki river belongs to the Government.

We also ask him for findings on the following questions:—

(1) Whether the 160 acres in respect of which the Government claim the right to levy water-cess were at the time of the Permanent Settlement taken into account as wet land for the purposes of the Settlement.

(2) Whether subsequently to the Permanent Settlement there has been an engagement with the Government under which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres.

Fresh evidence may be adduced by either party. The finding will be returned within two months from the date of receipt of this order, and seven days will be allowed for filing objections to the finding.

In compliance with the above order of this Court, the District Judge of Vizagapatam submitted the following

FINDING.—The suit has been remanded for findings upon three issues *viz.*:—

The first part of issue II as originally framed:—

Whether the Suvarnamuki river belongs to Government; and 2 additional issues:—

(*i*) Whether the 160 acres in respect of which the Government claim the right to levy water-cess were at the time of the Permanent Settlement taken into account as wet land for the purposes of the Settlement; and

(*ii*) Whether subsequently to the Permanent Settlement there has been an engagement with the Government under which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres.

(2) No fresh oral evidence has been adduced as regards the first of these 3 issues. It is admitted by the Government Pleader for the defendant that the Suvarnamuki river rises in *zemindari* land and flows through *zemindari* land up to the suit village of Narainapuram The only lands abutting the river in which Government have any interest are a few unimportant service *inams* (see the list Exhibit G) in which Government claims reversionary rights. The determination of the issue has been treated as a matter of law to be decided on the undisputed facts. Plaintiff relies on the judgment of Sankaran Nair

J., in *Secretary of State* v. *Kannapalli Janakiramayya* (1) and on *Secretary of State for India* v. *Kannapalli Venkataratnammah* (2) in support of his contention that the river does not belong to Government, while the Government Pleader for the defendant relies upon the cases of *Robert Fischer* v. *Secretary of State for India* (3) *Kandukuri Mahalakshmamma garu* v. *Secretary of State* (4), *Secretary of State for India* v. *Swami Nautheswarar* (5) and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (6) in support of the opposite view.

(3) I may perhaps repeat the observation made in my judgment in this suit that plaintiff in the plaint has nowhere claimed the ownership of the Suvarnamuki river or any part of it. He did not even claim ownership of the Sekharapalli channel, as his case was that that channel was constructed by an ancient *zemindar* of Palakonda to whom plaintiff's predecessor-in-title gave up the land for the channel in accordance with an alleged custom and understanding, whereby the land for the channel was given up in exchange for the right to take water. For plaintiff it is urged that plaintiff laid no claim to the Suvarramuki river, as, in Exhibit D, the Collector's demand for water cess was based upon the ownership of the channel and not of the river, and it is contended that the facts necessary to support a claim of ownership are sufficiently stated in paragraph 5 of the plaint. It is there only stated that the river passes through villages belonging to Merangi and Bobbili Estates and nothing is said about the ownership of the bed and banks of the river. A few of plaintiff's witnesses (originally examined) were asked questions to show that the Suvarnamuki river flows through *zemindari* lands and is not tidal nor navigable, but beyond doing that plaintiff made no attempt to show that the river or any part of it belongs to him. It may be here mentioned that neither the area covered by the bed of the Suvarnamuki river nor that covered by the bed of the Sekharapalli channel is entered in the *hakikat* account of 1801 (Exhibit I). It seems reasonable to infer therefrom that at that time neither area was regarded as belonging to Narainapuram village, especially as it was thought necessary to include the areas covered by tanks in the account. The facts as to the nature of the territory through which the Suvarnamuki flows are undisputed. It only remains to be decided whether in law and on the decided cases quoted above the river must be held to be a river belonging to Government or not.

4. Section 2 of Act III of 1905 declares that "the bed of the sea.....and of rivers, streams.....and water-courses and all standing and flowing water.....save in so far as the same are the property of any *zemindar*.....or *inamdar*.....are and are hereby declared to be the property of Government,.....subject always to all the rights of way and other public rights and to the natural and easement rights of other landowners and all the customary rights legally subsisting". The Act is declaratory of the law and I think it is clear that in cases of disputed ownership, it has the effect of throwing the onus of proof upon the *zemindar*, *inamdar* or other person who claims ownership of a river, stream or channel. Applying the section to the Vamsadhara river, Miller and Munro, JJ., held in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4) that that river belongs to Government. They held that owners of land on the banks of the river do not own the water and that the river belongs to Government even though the bed may be vested in the owners of the land along the banks. It was also held that even though for a portion of its course the land owners on either bank of the Vamsadhara may have proprietary rights in the banks and bed, that would not prevent the river belonging to Government within the meaning of Act VII of 1865. The Vamsadhara river rises in this District in the Jeypore *zemindari*, runs for some considerable distance through the *zemindari*, flows for a small portion of its course through *ryotwari* land and then passes through the Urlam *zemin-*

(1) 18 Ind. Cas. 770; 24 M. L. J. 365; 13 M. L. T. 235; (1913) M. W. N. 225; 37 M. 322.

(2) 15 Ind. Cas. 594; (1912 M. W. N. 771; 23 M. L. J. 109; 37 M. 369 *note*.

(3) 2 Ind. Cas. 325; 32 M. 141; 5 M L. J 149; 19 M. L. J. 131.

(4) 8 Ind. Cas. 67; 34 M; 295; 8 M. L. J. 389, (1910) M. W. N. 595; 20 M. L. J. 823.

(5) 6 Ind. Cas. 199; 34 M. 21; 7 M. L. T. 407; 20 M. L. J. 766; (1910) M. W. N. 495.

(6) 8 Ind Cas. 357; 34 M. 366; 9 M. L. T. 47; (1910) M. W N. 119.

*dari.* In so far as the Vamsadhara rises and flows for a considerable part of its course through *zemindari* lands, the facts are exactly parallel to those of the Suvarnamuki. The latter river also flows for some miles through the Government *taluq* of Palakonda after leaving the Bobbili *zemindari.* The river then joins the Nagavalli. The cases of the two rivers are, therefore, also similar in that both pass through *ryotwari* land at one stage of their course.

5. The view taken by Miller and Munro, JJ., in the above case is adhered to by Miller, J., in *Secretary of State* v. *Kannpalli Jankiramayya* (1) and in his judgment Miller, J., mentions that that judgment has been followed in another case [*Secretary of State* v. *Ambalavana Pandara Sannidhi* (6).]

6. *Robert Fischer* v. *Secretary of State* (3) deals with the paramount right of control of Government in natural rivers and streams. And it is authority for the view that such right of control is independent of the ownerships of the beds of the rivers or streams and exists alike, whether the interest affected is that of *ryotwari* tenants or of holders of proprietary estates. It may be said to support the view taken in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4) in so far as the paramount right of control connotes ownership of the thing controlled. But I think *Robert Fischer* v. *Secretary of State* (3) is hardly in point on the question of ownership. It was not referred to in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4). The other two cases cited for the defendant also appear to me to deal rather with the right to levy cess than the question of ownership.

7. The plaintiff relies upon the judgment of Sankaran Nair, J., in *Secretary of State* v. *Kannapalli Janakiramayya* (1) as showing that the Suvarnamuki cannot be a river belonging to Government. Sankaran Nair, J., holds that rivers like the Vamsadhara (and the Suvarnamuki is entirely similar to the Vamsadhara as already pointed out), in so far as they lie in *zemindaris* when the *zemindar* own the beds and banks of the stream or rivers) cannot be called streams or rivers "belonging to Government," on the principle that the person who owns the beds, banks and water owns the river and because by the customary law of the country, water belongs to the owners of the estates through which it passes subject to the claims of owners below. His Lordship does not agree with the argument based upon Act III of 1905 at page 303 of 34 M. 295 and holds that that Act does not suppcrt the view that the waters of the Vamsadhara and consequently the river itself belong to Government: "The Act only declares that the water is Government property; but the river does not thereby become so." He is of opinion that the words "river or stream belonging to Government" in section 1 of Act VII of 1865 include only cases where Government have proprietary interest in the bed of or land adjacent to a river *i.e.*, in *ryotwari* districts where no *mirasi* or corresponding right prevails, but exclude rivers and streams in *zemindaris* and *inams* or adjacent to them. Act III of 1905 cannot, he holds, be used to interpret Act VII of 1865 and has not the effect of making the river (*i. e.*, the Vamsadhara) or the water therein Government property. The case of *Secretary of State* v *Kannapalli Venkataratnammah* (2) does not, I think, help plaintiff. As I understand the judgment, the channel then in question was found to be included in an old grant of 1767 by the brother of the then Rajah of Vizianagaram. The *inam* was recognized by Government in 1867 and the High Court held that there was no intention at any time to derogate from the grant of 1767, so that the grant of the channel also was recognized. Apparently by way of explaining the action of Government, the Honourable the Judges observe that the channel was not one which passed through any Government property before reaching the suit village, that it was not connected with any Government system of irrigation, nor controlled by Government to any appreciable extent. The channel was, therefore, one of those which fell within the saving clause of section 2 of Act III of 1905. The Urlam case is not referred to by the Honourable the Judges in their judgment.

8. Of the two views contained in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4)

and *Secretary of State* v. *Kannapalli Janakiramayya* (1) I think I must follow the former. as *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4) has been followed by another Bench of the High Court and, therefore, carries with it the balance of authority as compared with the latter pronouncement. Here, as in the case of the Vamsadhara, there is no proof that the waters of the Suvarnamuki belong to any one else except the Government. There is no evidence that the bed of the river belongs to the plaintiff or any other *zemindar* or *inamdar*, though it is not disputed that the land on either side is *zemindari* land and is plaintiff's land in so far as the Suvarnamuki lies in Narainapuram village. But adopting the argument in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State* (4) the owners of the land on the banks do not own the water or the river. And I, therefore, find that the Suvarnamuki river belongs to Government.

1*st additional issue* :— * * *

* * * *

Itfollows, therefore, that thesuit lands were not taken into account at the Permanent Settlement. And I find accordingly upon the 1st additional issue remanded to me for a finding.

13. 2*nd additional issue*:—It is evident from Exhibit C that from some time prior to 1814 the village of Narainapuram was getting a supply from the channel through 5 *punathas* (sluices). The Palakonda *zemindar* had constructed the channel and was then the owner of it. The Palakonda *Zemindari* was forfeited to Government in 1833. The estate was managed by the Collector till 1846, when it was leased to Messrs. Arbuthnot and Co., till 1892. After that the estate was again taken under Government management (District Gazetteer, page 289). No charge for water-cess was made for the whole period from 1833 up to 1907. The plaintiff has now 4 sluices and the Exhibits E series and II show that plaintiff was allowed to erect masonry sluices at his own cost in accordance with the Executive Engineer's recommendations based upon old records. A grant or agreementas between the Palakonda *zemindar* and the plaintiff's predecessor is clearly to be inferred from Exhibit C and I think the Government must be taken to have succeeded to the Palakonda *zemindar's* rights in the channel in 1833 subject to the plaintiff's right. I would, therefore, hold that subsequent to the Permanent Settlement there was an implied engagement by Government to supply the plaintiff with water from the channel as before the forfeiture of the Palakonda *Zemindari*. The Government Pleader quotes and relies upon *Raja Narpat Singh Deo* v. *Kasiram Singh Deo* (7) and *Jehan Kadr* v. *Afsar Bahu* (8) as showing that by the forfeiture all the Parakonda *zemindar's* rights were swept away. I do not think these cases have any application to the facts of this case. The Government in this case as a matter of fact continued to recognize plaintiff's right to take the water of the channel without question even after the forfeiture of the Palakonda *Zemindari* for a period of over 70 years. I am, therefore, of opinion that an engagement between plaintiff and the Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water of the channel through the existing four sluices for the purpose of irrigating the suit area free of separate charge. That will be my finding upon the 2nd additional issue.

This appeal coming on for final hearing, after the return of the finding of the lower Court on the issues referred by this Court for trial, and having stood over for consideration till the 17th April 1914, the Court (Sir Arnold White, C. J., and Oldfield, J.) delivered the following

JUDGMENT.

WHITE, C. J.—The material facts for the purposes of this appeal are stated in the judgment of my learned brother which I have had the advantage of reading. I need not repeat them.

Before disposing of the appeal we thought it desirable to ask the District Judge for findings on two additional issues. They are in these terms:

(*i*) Whether the 160 acres in respect of which the Government claim the right to levy water-cess were at the time of the Permanent Settlement taken into account as wet land for the purposes of the Settlement; and

(7) 11 C. W. N. 655.

(8) 12 C. L; 12 I. A. 124; 9 Ind. Jur. 322; 4 Sar. P. C. J. 630; Rafique & Jackson's P. C. No. 91.

(ii) Whether subsequently to the Permanent Settlement there has been an engagement with the Government under which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres.

The learned Judge gave the plaintiff a decree for the amounts paid under protest. He was of opinion that in 1833, when the Palakonda *zemindari* was forfeited to Government, the title of Government was subject to any rights already acquired.

On the 2nd additional issue the learned Judge finds: "It is evident from Exhibit C that from some time prior to 1814 the village of Narainapuram was getting a supply from the channel through five *punathas* (sluices). The Palakonda *zemindar* had constructed the channel and was then the owner of it. The Palakonda *zemindari* was forfeited to Government in 1833. The estate was managed by the Collector till 1846, when it was leased to Messrs. Arbuthnot and Co. till 1892. After that the estate was again taken under Government management (District Gazetteer, page 289). No charge for water-cess was made for the whole period from 1833 up to 1907. The plaintiff has now four sluices and the Exhibits E series and II show the plaintiff was allowed to erect masonry sluices at his own cost in accordance with the Executive Engineer's recommendations based upon old records. A grant or agreement as between the Palakonda *zemindar* and the plaintiff's predecessor is clearly to be inferred from Exhibits C and I think the Government must be taken to have succeeded to the Palakonda *zemindar's* rights in the channel in 1833 subject to the plaintiff's right. I would, therefore, hold that subsequent to the Permanent Settlement there was an implied engagement by Government to supply the plaintiff with water from the channel as before the forfeiture of the Palakonda *zemindari*. ..... I am, therefore, of opinion that an engagement between plaintiff and the Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water of the channel through the existing four sluices for the purpose of irrigating the suit area free of separate charge."

It seems to me that the right of Government with reference to the levying of a separate tax for the use of the water which irrigates these lands is independent of the question whether Government, as standing in the shoes of the Palakonda *zemindar*, are under any obligation to supply water for the lands in question, and depends upon the construction of Act VII of 1865. This Act conferred on, or recognised in, Government a right to levy a separate tax for water. Under the Act the only limitation to the right to levy the tax, if the conditions of section 1 are satisfied, is to be found in the proviso—that is, an engagement with Government by virtue of which the landholder is entitled to irrigation free of separate charge. If there is an 'engagement', no tax can be imposed for the use of water to the extent covered by the engagement. It seems to me that, if the case comes within the four corners of the Act, Government in its capacity of tax-gatherer can levy the separate tax. Assuming that Government are under an obligation to continue to supply water for the irrigation of these particular lands by reason of the fact that the Palakonda *zemindar* was under this obligation when his lands were forfeited to Government, it does not follow that Government are not entitled to levy a tax for the use of the water. This question must depend on whether there has been an engagement within the meaning of the Act.

The engagement, in my opinion, must be a subsisting engagement when the Act came into force, but acts or omissions since the Act may be evidence of such an engagement.

In my opinion it must be an engagement, express or implied, with Government. I am not prepared to infer from the fact that Government did not seek to levy a separate tax from 1865 to 1907 that there was, when the Act came into operation, a subsisting engagement between the plaintiff and Government within the meaning of the Act.

I am unable to accept the finding of the District Judge that subsequently to the Permanent Settlement there has been an engagement.

I now pass to the finding on the 1st additional issue. This issue raises the question whether there was an engagement at the time of the Permanent Settlement. The finding of the learned Judge is in the negative. I have had some doubt as to whether this

finding is right. If it is proved that the whole or any portion of these 160 acres were taken into account when the Permanent Settlement was made, this, in my opinion, would constitute an engagement at the time of the Settlement within the meaning of the Act. It is, however, for the plaintiff to establish this. One cannot expect the evidence as to what happened in 1802 to be of a very precise and circumstantial character. Although it is now admitted that the channel was constructed before the date of the Permanent Settlement, I do not think that Government were aware of this fact when they first imposed the tax in 1907. In a report dated 7th March 1907 (Exhibit X), the Deputy Tahsildar wrote: "It is presumable that the channel did not exist at the time of the Permanent Settlement but was dug some time between 1801 and 1824, unless the *zemindar* could show anything to the contrary." It is, of course, possible that Government would not have imposed this separate tax 30 years after the Act came into operation, if they had been aware that the channel was in existence at the time of the Permanent Settlement. I feel there is force in the contention that as the channel was in existence on the date of the Permanent Settlement in 1802 and as the lands in question were in fact irrigated as wet lands in 1814 (this appears to be established by Exhibit C) it is a legitimate inference, as a matter of evidence, that these lands were at the time of the Permanent Settlement taken into account as wet lands for the purposes of the Settlement On the other hand, we have the fact that the Permanent Settlement account (Exhibit 1) does not mention the channel as a source of irrigation. On the whole I am not prepared to differ from the conclusion of fact at which the District Judge and my learned brother have arrived, that these lands were not taken into account as wet lands for the purposes of the Settlement. The case will be posted for further consideration with reference to the first part of the second issue as originally framed.

OLDFIELD, J.—In this case plaintiff-respondent sued for a refund of water-tax collected from him by Government, the defendant-appellant, for *fasli* 1317 and for a declaration that the cultivation in question was entitled to free irrigation in future. The lower Court decreed in his favour and has found on remand that "an engagement between plaintiff and Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water through the existing four sluices for the purpose of irrigating the suit area free of a separate charge." This finding was reached on the second of the two additional issues remanded, "whether subsequently to the Permanent Settlement there has been an engagement with Government, under which plaintiff has become entitled to irrigate free of charge as regards these 160 acres."

The material facts on this part of the case are that the suit land is part of Narainapuram village in the plaintiff's *zemindari* of Bobbili and is irrigated by the Sekharapalli channel. The pleadings in this case are not clear as to whether this channel was constructed before or after the Permanent Settlement (1802) and in fact they indicate that they were drafted on both sides under the impression that it was constructed after it. But the lower Court refers to the channel as constructed between 1690 and 1780 on the strength of evidence in a connected suit; Exhibit IIIa indicates a date before 1801 and the learned Government Pleader is not prepared to contest the point. The channel was constructed by the Palakonda *zemindar* to irrigate Palakonda land. But Bobbili land was utilized for its course, so far as it was adjacent to the suit 160 acres. Subsequently in 1835 the Palakonda *zemindari* was forfeited to Government. In 1907 Government discovered that there were about 1,200 acres irrigated out of an actual area of about 4,250 acres in the whole village, although in the Permanent Settlement only 428 acres had been treated as irrigated out of a total of about 950 acres for the purpose of estimating the assets on which the *peshkush* had been calculated. The charge now in dispute was accordingly levied on the 160 acres irrigated by the channel on the assumption, the grounds for which will be discussed, that this area came under irrigation at a later date. The contention under consideration, on which the lower Court has found in plaintiff's favour, is that it is exempt from charge in virtue of an

engagement between Government and the *zemindar*, such as is contemplated in section 1 (*b*), Act VII of 1865. It held that such an engagement arose by implication at some time between the Permanent Settlement and the forfeiture.

This engagement is referred to in the plaint, if at all, as "the understanding and agreement between plaintiff's predecessor-in-title and the Palakonda *zemindari* and latterly between plaintiff's predecessors-in-title and plaintiff on the one hand and the Government on the other." The lower Court's finding on remand is that "a grant or agreement is clearly to be inferred from Exhibit C and that Government must be held to have succeeded to the Palakonda *zemindari* rights in the channel subject to plaintiff's right," and, therefore, that "an engagement between plaintiff and Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water of the channel for the purpose of irrigating the existing suit land free of separate charge."

This finding involves,

(1) that there was a grant or agreement as between Palakonda and plaintiff,

(2) that Government succeeded to the former's obligation. The learned District Judge relied on Exhibit C as establishing the first point. But Exhibit C is only an order by the *zemindar* of Palakonda in 1814 to one Tammana to have the channel repaired, to see to the irrigation under it and to pay himself and his assistants for doing so out of grain and money to be collected from villages under it not including Narainapuram, the suit village. There is nothing regarding the liability to or exemption from water charge of any village; and this document, therefore, contains nothing either supporting or contradicting plaintiff's case that Palakonda ever granted free irrigation to his land or undertook to provide it. It could moreover show at most that Palakonda undertook to provide irrigation under the channel, not whether that irrigation should be free or charged for by Government. Another portion of the evidence has also been referred to, though the lower Court does not deal with it in this connection, that regarding the conditions, on which land for the course of the channel was originally obtained. In paragraph 7 of the original judgment, Exhibits III and IV are relied on as showing that the land was not given by the *zemindar*, plaintiff's predecessor, but by certain *inamdars*, and that, as they received compensation for it in the shape of land in Palakonda, there is no reason for supposing that the *zemindar* received compensation (as plaintiff contends) in the shape of free supply of water. Plaintiff's answer to this is that other land besides that referred to in Exhibits III and IV was taken for the channel, part of which, as the references to the character of the holdings adjacent to it in the evidence of 14th and perhaps 8th plaintiff's witnesses show, was probably *jiroyati* and, therefore, the property of the *zemindar*; and the learned Government Pleader does not dispute the fact. But, if some land taken was the *zemindar's*, that goes very little way towards proof that he received compensation for it in the manner alleged. There would be nothing improbable in his giving up the small extent in question (the whole channel apparently occupies only about 2 acres in Narainapuram) for nothing as an act of courtesy to a neighbour. Speculation as to promises made and the balance of advantage contemplated over a hundred years back must be fruitless. Only one observation is justified. There is no reason for supposing, and it cannot be assumed, that at the remote date in question the right of Palakonda or any ultimate right of Government to charge for water was present to the minds of those concerned or was provided for in any agreement between them.

Next, even if any grant or undertaking regarding free irrigation by Palakonda had been established, it would still be impossible to follow the lower Court in the next step in its argument and infer the engagement between Government and plaintiff from the former's succession to the obligations of the latter. This inference is, of course, independent of the argument based on the general rights and liabilities of Government, to which I shall return. It must be founded solely on the fact that in 1833 Government re-entered on the Palakonda *Zemindari* on its forfeiture for rebellion

(Vizagapatam District Gazetteer, Volume I, page 178); and this is insufficient in the absence of anything to show how the *zemindar's* grant or contract could be valid beyond his tenure of the estate or that of his heirs or transferees and after the legal determination of that tenure against the authority, Government, which created it. On the assumption that plaintiff's predecessor gave his land in consideration of a promise by Palakonda, plaintiff may be entitled to relief on equitable grounds because that consideration has failed. But his present suit is not framed in that way, nor has it been shown that the relief, which could be decreed in such a suit, would be that now asked for. In these circumstances the finding on the second additional issue remanded cannot be accepted.

The appeal is argued next on the ground that the 160 acres charged for were taken into account as wet land for the purposes of the Permanent Settlement and that, therefore, an engagement has been established between plaintiff's predecessor and Government within the meaning of section 1 (*b*), Act VII of 1865. The lower Court held the contrary on the first additional issue remanded.

The plaintiff's pleading consisted in an averment in the plaint, paragraph 7, that the land was "wet even prior to the Permanent Settlement and also prior to the construction of the channel' and in paragraph 9 that the extent mentioned as wet in the Permanent Settlement accounts was only a rough estimate. It, therefore, amounted to a claim that all land actually wet at the date of the Settlement must be treated as having been included as such in it, whether it can be identified in the accounts or not. Government denied that this land was wet at the date of Settlement and contended that the accounts were final. The first point was dealt with under original issue 8 and the first additional issue on remand; the second under the original issue 7.

The lower Court's conclusion on the question whether the 160 acres were wet at the date of the Settlement is contained in paragraph 16 of its original judgment and paragraphs 9 to 12 of its finding. Plaintiff, it will be seen, has supported his case in two forms, that the land was irrigated at the time of Settlement (1) by the channel or (2) by the surplus from tanks to the north or the flow of the *desuru* or surface water from that direction, the construction or existence of the channel conferring no additional advantage. It is important that the burden of proof of both alternatives is on him. He has attempted to discharge it as regards the first by no sort of direct evidence and only by the argument that the land can be and is being irrigated by the channel and that it, therefore, could have been and was irrigated by it continuously from its construction and, therefore, must have been when the Settlement took place. As regards the second there is only oral evidence, and I agree with the lower Court that the assertions of the witnesses called, persons of no particular competence or credit, are not sufficient to prove that the water from the north ever was or could have been an adequate supply.

As regards the first of these alternatives, the lower Court has referred to a presumption as arising from the present irrigation by the channel and its existence before the Settlement. But, if it meant more than that these facts must have such weight as the circumstances give them, I cannot follow it in its conclusion or its application of authorities to support it. The argument from the existence of a particular state of things at two dates to its continuous existence between them must in this, as in other cases, depend on the circumstances and it will be found here that they render it improbable. As regards this probability and also plaintiff's second alternative case, the nature of the evidence he relied on and his failure to adduce direct documentary evidence are important, the latter greatly impairing the strength of his argument. It was the duty of plaintiff and his predecessors under section 6, Act XXIX of 1802, to appoint *karnams*, who under section 11 should have kept registers of lands and accounts of their produce, which should have been available to show whether the 160 acres in question were irrigated and from what source; and the absence of evidence of this kind is of the greatest significance. It is not merely that

there is nothing regarding the remoter years before or shortly after the Settlement, though even as regards those years something as old as, for instance, Exhibit C might be expected. For it would be natural that registers such as those referred to in section 11 (1) and (2) should be preserved as permanent records. But there is in fact evidence that some old accounts were in existence recently and have been withheld. The evidence of 11th plaintiff's witness, plaintiff's record-keeper, indicates that this is so. Second plaintiff's witness, his deputy surveyor, attempted to give secondary evidence of the contents of a *gudikhat* account for 1838, which he had seen the year before the trial; and mentioned the existence of *nila jabitas* showing the land cultivated by and the amount due from each *ryot* as available for the last fifty years and accounts relating to the 160 acres for the last twenty years, though he said he could not remember whether there were accounts showing the wet cultivation of the village. Even accounts of this age would have been important, because they would have afforded assistance on two points: (1) the extent to which irrigation under the channel has actually been continuous in the past; (2) the allocation of particular sources of supply to particular lands. The latter would have been particularly material in connection with plaintiff's second alternative contention and the lower Court's argument from the increase in the number of tanks in paragraph 7 of its judgment and paragraph 11 of its finding.

Before turning to the affirmative portion of the evidence for Government, I refer shortly to other facts relevant to the inferences regarding the continuity of the channel irrigation and the alleged improbability of Government's having failed to charge for so long, if a charge had been leviable. As regards the first point, it is worth noticing that the only early documentary references to the channel, which are in evidence, those in Exhibits A, B and C, show that in fact in 1865, 1869 and 18 4 it was in bad repair and was affording defective supply. The only description of it available, that contained in the report of the Assistant Engineer in 1879, Exhibit VIII, is entirely consistent with the oral evidence at the trial. It shows that the channel is badly situated, required the construction of a temporary head-work each year and was liable to damage from river floods and storm water. Its private ownership afforded no security for its efficient maintenance. In the circumstances there is nothing unlikely in its having been out of use from time to time or at the date of the Settlement, as the evidence to be referred to indicates that it was. And there is no special likelihood that Government had occasion to consider whether the right to charge existed, since the assumption that all sources had been taken into account at the Settlement would be natural. It is material that Government had direct control of Palakonda and of this channel only from 1833 till 1847, when the estate was leased to Arbuthnot and Co., and from 1892, when the lease was terminated. The former period was before Act VII of 1865, when the right to charge for water was at least doubtful; and it is not shown that anything occurred during the latter, which made enquiry necessary. The circumstances, in which the defendant's 1st witness was appointed Special Deputy Tahsildar in connection with Narainapuram water-cess in 1906 and made his report, Exhibit X, on which the charge was imposed, are not in evidence.

In these circumstances the affirmative probability that irrigation from the channel was continuous or was going on at the time of the Settlement is not, in my opinion, strong; and I think that it is displaced by the evidence to be considered. Exhibit I is dated 180 , the year before the Settlement, and is headed "*hakikat* of Narainapuram Village." A *hakikat* is defined in Wilson's Glossary as a statement or account. Exhibit I is signed by the *zemindars*, *kulkarnies* or *karnams* and gives the extent of *jiroyati* and *inam* land in the village, details of the latter and then the extents of various kinds of *porambokes*, including tanks. Lower down there is again a heading "tanks" followed by an enumeration of them under sub-headings, *jiroyati* and *inam*, large and small. But there is no reference to any channel, and the absence of any is directly opposed to plaintiff's case. It is no doubt true that (as he points out) the extents in Exhibit I are stated most inaccurately and that much information is omitted. But that is not, in my opinion, sufficient to explain the failure

to refer to the 2 acres occupied by the channel as *poramboke*, if it was really being maintained as such, when the figures show that smaller extents must have been taken into account; and it is difficult to see the use of the separate enumeration of tanks, unless as a list of irrigation sources. Reference has already been made to the facts that Exhibit I gives about 400 acres as irrigated by 14 tanks out of a total extent of 950 acres; and that there are now 1,200 acres irrigated by 48 tanks and the channel out of 4,250 acres. The difference in the total extent may be explained on the ground that only land under actual cultivation was brought to account. But no similar explanation is available regarding the extent of wet land, to which attention would naturally be paid. There is, therefore, foundation for the argument that the increase in it is due to the presence of additional sources of irrigation, besides those mentioned in Exhibit I and including the channel. This argument plaintiff could have rebutted by producing accounts, showing the extent under each source and thus proving that the increase is covered by the extent under the new tanks. This he has not attempted, though (as shown) in the circumstances the inference proposed by him from the existence of the channel before or after the Settlement must be held displaced by the evidence that it afforded no irrigation at its date. As the suit 160 acres are not proved to have been irrigated then, either under the channel or the water from the north, the lower Court's finding that they were not wet at the Settlement must be sustained.

This conclusion reached, I need not deal with the argument based on the contrary assumption, that even if the 160 acres had been proved to have been wet at the Settlement, plaintiff's failure to identify them as part of the area shown as wet in the accounts would be immaterial, because an engagement under section 1 (*b*), Act VII of 1 65, could be inferred from the circumstances. I, therefore, concur in the finding of the learned Chief Justice regarding this portion of the case.

This appeal again coming on for hearing and having stood over for consideration, the Court delivered on 27th October 1915, the following

JUDGMENT.

WALLIS, C. J.—This appeal was heard in the first instance by Sir Arnoid White, Chief Justice, and Mr. Justice Oldfield and after certain questions had been decided, the further hearing was adjourned to wait the decision of the Letters Patent Appeal No. 39 of 1915 [*Secretary of State* v. *Kannepalli Janakiramayya* (9)] from the decree in A. S. No. 124 of 1906 [*Secretary of State* v. *Kannepalli Janakiramayya* (1)] in which owing to a difference of opinion between Miller and Sankaran Nair, JJ., the learned Judges who heard the appeal, the decree of the lower Court was confirmed in accordance with the opinion of Sankaran Nair, J. His decision has since been reversed by Oldfield and Bakewell, JJ., *dissentiente* Sadasiva Aiyar, J., and the present appeal has now come before this Bench for further argument and disposal.

The important and difficult questions in these appeals, as to which there has been much difference of opinion, relate to the effect and construction of the Madras Water Cess Act, VII of 1865, as amended and of the Madras Land Encroachments Act, III of 1905, and have nothing to do with any right of Government to control the distribution of water for irrigation, as to which see the saving in the Easements Act and the decision in *Ecler Fischer* v. *Secretary of State* (3). With regard to the right of Government to charge separately for the supply of water the history of the question has been elaborately considered by Sankaran Nair, J., in *Secretary of State* v. *Kannapalli Janakiramayya* (1), but the restrictive construction based upon this history which he placed upon the Act has not been accepted by any of the learned Judges in the Letters Patent Appeal and it is unnecessary for me to refer to it. What seems to me perfectly

(9) 30 Ind. Cas. 609; 2 L. W. 763; 29 M. L. J. 389; 18 M. L. T. 277; (1915) M. W. N. 671.

clear from the terms of the Act itself is that it authorised the levy of statutory [water-cess on cultivation effected by means of water taken from a river belonging to Government, subject to an exception in favour of *zemindars*, etc., to the extent to which by virtue of their engagements with Government they were entitled to irrigation free of separate charge. The question whether the plaintiff in this case is entitled to exemption by virtue of an engagement with Government has been dealt with by the learned Judges in the judgments they have already pronounced, and I, therefore, refrain from discussing it and confine myself to the question whether, assuming there is no such engagement, Government are entitled to levy water-cess by virtue of the fact that the river from which this irrigation channel takes off is a river belonging to Government within the meaning of the Act. Unfortunately the Act contains no definition as to what is a river belonging to Government. Where both banks belong to Government it is hardly disputed that, as Government owns the bed, the river at such places may be treated as belonging to Government. What however if one bank belongs to Government and the other to a *zemindar*, as in the case which gave rise to *Secretary of State* v. *Kannapalli Janakiramaya*(9)? It cannot be said there was any judicial decision on this point before the passing of Act III of 1905. Though the immediate object of that Act was to provide a method of dealing with encroachments on land belonging to Government and the immediate occasion of passing it was the decision in *Madathapu Ramaya* v. *Secretary of State for India* (10) as to penal assessment, it does not, in my opinion, admit of doubt, having regard to the language and history of the measure, that those responsible for it intended the declaratory clause to deal with running as well as standing water and to remove doubts which might exist as to the extent of the rights of Government over such water. The language of section 1 was copied from the Bombay Act V of 1879 which, after in these terms declaring the ownership of Government among other things in standing and flowing waters, proceeded in section 55 to authorise Government to fix rates for water the right to which vests in Government. It was probably considered that there was no necessity to insert a clause of that kind in the Madras Act, because under Act VII of 1865 Government already had power to impose water-cess for water taken from a river belonging to Government, and it was thought sufficient to declare what running water belonged to Government. The saving clauses of the section in the Madras Act are not the same as the saving clauses in the Bombay section but more elaborate, and the new saving in favour of natural rights appears to have special reference to natural rights to the use of flowing water as defined in the illustrations to section 7 of the Easements Act closely following the English Law. I am, therefore, unable to agree with Sankaran Nair, J., that we are entitled to disregard the provisions of Act III of 1905 in construing Act VII of 1865. On the contrary, I think, the Legislature clearly intended that the declaratory section should be used in the interpretation of the words "rivers belonging to Government" in Act VII of 1865, and in any case I should feel bound to follow the unanimous decision on this point of the Full Bench in *Secretary of State* v. *Kannapalli Janakiramaya* (9) until it is reversed by higher authority. I may further mention that in 1905 the subject of the extension of irrigation and the terms on which it could be undertaken were engaging attention. 1903 was the year of the Irrigation Commission and of the Peranai Dam suit, the appeal in which was decided in 1905, and the Irrigation Bill to enable the execution of general projects which was subsequently introduced was then under consideration, and at the same time Government was asserting its claim to levy water-cess in such a way as to give rise to all those more or less connected suits. In these circumstances I can see no reason for refusing to give full effect to the statutory declaration the Act contained as to Government ownership of running water not the property of anybody else or for refusing to construe Act VII of 1865, which had left it doubtful what was meant by a river belonging to Government, in the light of its provisions as the

(10) 27 M. 386.

Courts at once proceeded to do. In *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (4), Miller and Munro, JJ., held that the effect of Act III of 1905 was to declare that all rivers are the property of Government, running water not being the property of anybody else, and Oldfield, J., would appear to have accepted this view in the Letters Patent Appeal. But in *Secretary of State for India* v. *Kannappalli Venkataratnammah* (2), Benson and Sundara Aiyar, JJ., as I read the judgment, held, applying the provision of Act III of 1905, that as the channel in that case belonged to the *inamdar* the running water in it also belonged to him and not to Government and that there was no case for levying water-cess under the Act of 1865. Sankaran Nair, J., has given his reasons at great length for putting this construction on Act III of 1905, and Sadasiva Aiyar, J. has agreed with him in the Letters Patent Appeal. So, too, Bakewell, J., observed as to the words "river belonging to Government" in Act VII of 1865 that the English authorities showed that the owner of the river-bed has a qualified ownership in the stream of water which flows over it by virtue of which the river and the stream may be said to belong to him—a proposition which was supported in the argument before us by reference to the language of James, L. J., in *Bush* v. *Trowbridge Waterworks Company* (11) and to *Lyon* v. *Fishmongers' Company* (12). He was, however, apparently of opinion that where only one bank and the bed *ad medium filum aquæ* belonged to the *zemindar*, the river must be treated as belonging to Government by virtue of Act III of 1905. In the present case, however, both banks and the whole bed at the place in question belong to the *zemindar* and not to Government, and, therefore, on this view as I understand it, the river is not the property of Government. The balance of authority appears to me to be against the extreme view taken by Miller and Munro, JJ., in *Kandukuri Mahalakshmamma Garu* v. *Secretary of State for India* (4) that the effect of Act III of 1905 was to vest all running water in the Presidency in Government on the ground that there was no other owner. Construing Act VII of 1865, I think this much is clear that at places where the whole bed belonged to Government it was a river belonging to Government, and at places where none of the bed belonged to Government as here, it was not a river belonging to Government. If this part of the river belonged to the *zemindar* before the passing of Act III of 1905, his ownership is preserved by the saving clause of the section and is unaffected by it. Admittedly Government does not own the banks or any part of the bed of this river until far below the point where the channel in question takes off. It cannot, therefore, be considered a river belonging to Government so as to warrant the levy of water-cess under Act VII of 1865. This is the only question which has been argued before this Bench and I confine myself to it. The result is that the appeal must be dismissed with costs.

(11) (1875) 10 Ch. App. 459; 44 L. J. Ch. 645; 33 L. T. 137; 23 W. R. 641.

(12) (1876) 1 App. Cas. 662 at p. 673; 46 L. J. Ch. 68; 35 L. T. 569; 25 W. R. 165.

SESHAGIRI AIYAR, J.—I agree. If the ancient doctrine that flowing water is *publici juris* is to be abandoned, proprietorship over it can only be based on the right to the bed and banks of the stream through which it runs. This was recognised by Lord Justice James in *Bush* v. *Trowbridge Waterworks Company* (11), and by the Lord Chancellor in *Lyon* v. *Fishmongers' Company* (12). Lord Blackburn in *Orr-Ewing* v. *Colquhoun* (13), stated that "The Lord Advocate admitted that he understood the law of Scotland to be that if the same person is proprietor of the ground on both sides of a river, in which there is no right of navigation, he can change its channel as he pleases, provided he restores it to its old channel before it leaves his ground." On this principle, the Government who owned neither the bed nor banks of the river in question up to the point where the diversion took place can lay no claim to the water. It was argued that this view will be inconsistent with Act III of 1905. If that Act is only declaratory of existing rights, the declaration would cover not only the substantive proposition enunciated in section 2, clause (1), but also that contained in the saving clause (*a*).

(13) (1877) 2 A. C. 839.

As no question of either part ownership of the banks or of the water belonging to Government being mixed up with water belonging to the respondent arises, no rights under Act VII of 1865 arose. I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 30 OF 1913.

June 15, 1915.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

SURAJ BAKHSH—PLAINTIFF—APPELLANT

*versus*

*Musammat* SUKHDEI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Separation—Burden of proof—Allowance out of joint funds given by sons to mother, effect of—Lease executed by all members and not by managing member alone, effect of—Evidence, quality of—Custom—Family custom—Widow succeeding to her husband's property in joint family, custom as to, proof of*—Wajib-ul-arz, *interpretation of—Maintenance to widow in joint family, decision as to—Costs—Discretion of Court—Collateral, encumbered property inherited from—Encumbrance paid out of joint family funds—Property, acquisition of, from joint funds—Mitakshara Law—Survivorship—Obstructed and unobstructed heritage, effect of—Evidence Act (I of 1872), s. 145—Discrepancies in witness's present and previous statements—Court, duty of—Ancestral property—Collateral succession, whether rule of survivorship applicable in cases of—Judgment, value of—Authority.*

Per *Stuart, A. J. C.*—Where a party admits that a certain Hindu family was joint in the first instance but pleads that it became separated subsequently, the burden of proof lies upon him to prove separation. [p. 294, col. 1.]

The mere fact that sons in a joint Hindu family gave their mother a small separate allowance out of the joint family funds for her private use, especially to be expended on religious purposes, does not show separation of the family; nor does the fact that a lease is executed by all the family members, and not by the managing member alone, establish such separation. [p. 297, col. 1.]

Very strong and cogent evidence should be produced to prove that under a family custom a widow succeeds to the property of her husband even although he is a member of a joint Hindu family. [p. 297, col. 1.]

Where a *wajib-ul-arz* stated that a widow of a co-sharer succeeds to the property of her husband:

*Held*, that the statement referred to the case of a separated co-sharer, and not to one in a joint Hindu family. [p. 297, col. 1.]

Where a plaintiff claimed as member of a joint Hindu family property of a deceased member by right of survivorship, and the defendant, the deceased's widow, pleaded separation of the family and further asked the Court to decide the amount of maintenance to which she would be entitled in case the alleged separation was not established, and the Court found that the family was joint but refused to decide the question of maintenance:

*Held*, that on the finding that the family was joint the question of fixing the defendant's maintenance did not arise, and that the Court acted rightly in refusing to decide it. [p. 298, col. 1.]

A Court has full discretion to award costs to the plaintiff against all or any of the defendants according to the circumstances of each particular case. [p. 298, col. 2.]

Where an encumbered property is inherited by a joint Hindu family from a collateral, the mere fact that the encumbrance is paid off out of the joint family funds does not show that the property is *acquired* from such funds. And the mere fact that the property is managed by the managing member of the family does not establish whether it is or is not treated as joint family property. [p. 298, col. 2.]

Where a property is not self-acquired but inherited by the members of a joint Hindu family governed by the Mitakshara Law, and is such as could have been partitioned among them at the time that it was inherited, the rule of survivorship applies *irrespective of the fact whether such property came by obstructed or unobstructed inheritance*, i. e., *whether it was inherited from a direct ancestor or from a collateral*. [p. 305, col. 2.]

*Jasoda Koer* v. *Sheo Pershad Singh*, 17 C. 33; *Katama Natchiar* v. *Rajah of Shivagunga*, 9 M. I. A. 539; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843; *Saminadha Pillai* v. *Thangathanni*, 19 M. 70; *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*, 25 M. 678; 29 I. A. 156 (P. C.); 7 C. W. N. 1; 12 M. L. J. 290; *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, 27 M. 300; 13 M. L. J. 398; *Jamna Prasad* v. *Ram Partap*, A. W. N. (1907) 211; 4 A. L. J. 582; 29 A. 667; *Gurumurthi Reddi* v. *Gurammal*, 1 Ind. Cas. 750; 32 M. 88; 5 M. L. T. 74 and *Bai Rukhmani* v. *Keshavlal Ranchhod*, 9 Bom. L. R. 1293, referred to and discussed.

Per *Kanhaiya Lal, A. J. C.* (dissenting)—Section 145 of the Evidence Act requires that where a Court finds that there are discrepancies between a witness's statement made before it and the one previously made by him before another Court, it should ask him to explain them. [p. 307, col. 1.]

*Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit*, 29 Ind. Cas. 639; 13 A. L. J. 570; 19 C. W. N. 729; 17 Bom. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 39 B. 441, referred to.

The payment of a joint liability out of joint funds does not make the property on which that debt is charged a joint acquisition. [p. 309, col. 1.]

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Although a property inherited by the members of a joint Hindu family from their maternal grandfather can be treated as ancestral or joint family property and thus governed by the rule of survivorship, yet that rule cannot be extended to *cases of collateral succession*, because the property inherited from separated collaterals cannot be treated as ancestral or joint family property, inasmuch as unless a property comes by descent from a lineal ancestor in the male line, it cannot be deemed ancestral or joint family property, there being in principle no distinction between separately acquired property and property separately inherited by two or more members of a joint family. [p. 309, cols. 1 & 2.]

*Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*, 25 M. 678; 29 I. A. 156 (P. C.); 7 C. W. N. 1; 12 M. L. J. 299; *Atar Singh* v. *Thakar Singh*, 6 Ind. Cas. 721; 18 M. L. J. 379; 12 C. W. N. 1049; 8 C. L. J. 359; 35 C. 1039; 35 I. A. 206 (P. C.); 10 Bom. L. R. 790; 4 M. L. T. 207; 128 P. W. R. 1908; 42 P. R. 1910; *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. 1 (P. C.); 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30; *Katama Natchiar* v. *Rajah of Shivagunga*, 9 M. I. A. 539; 2 W. R. 31 (P. C.); 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843; *Vithappa Kasha Heyde* v. *Savitri Ganap Bhatta*, 7 Ind. Cas. 445; 34 B. 510; 12 Bom. L. R. 487; *Bai Parson* v. *Bai Somli*, 15 Ind. Cas. 774; 36 B. 424; 14 Bom. L. R. 400; *Jamna Prasad* v. *Ram Partap*, A. W. N. (1907) 211; 4 A. L. J. 582; 29 A. 667; *Gurumurthi Reddi* v. *Gurammal*, 1 Ind. Cas. 750; 32 M. 88; 5 M. L. T. 74; *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, 27 M. 300; 13 M. L. J. 398; *Harihar Pershad* v. *Bholi Pershad*, 6 C. L. J. 383 and *Bai Rukhmani* v. *Keshavlal Ranchhod*, 9 Bom. L. R. 1293, referred to.

A judgment is an authority for what it decides, but not for what may seem logically to follow from it. [p. 310, col. 2.]

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 20th December 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Syed *Zahur Ahmad*, for the Respondents.

JUDGMENT.

STUART, A. J. C.—The parties to the suit out of which these appeals arise are Suraj Bakhsh, brother of the deceased Balbhaddar Bakhsh, Sukhdei, widow of Balbhaddar Bakhsh, and Janardan Das to whom she has transferred by lease a portion of the property in suit. Suraj Bakhsh and Balbhaddar Bakhsh were the sons of Chandi Prasad. Chandi Prasad was one of the four sons of Thakur Prasad. The names of the four sons of Thakur Prasad were Pali, Sheodarshan, Chandi and Data Ram. It appears that Thakur Prasad and Raghunath, a distant cousin of Thakur Prasad, owned originally a half-share in the three villages Mahasua, Hirupur Gutaiya, and Deokali, in the following proportions:—Thakur Prasad owned two-thirds of the half share in these three villages, that is to say, a one-third share in each village, and Raghunath owned a one-third share of the half in these villages, that is to say, a one-sixth share in each village. In addition Thakur Prasad and Raghunath owned a one-third share in the village of Mahita, Thakur Prasad owning two-thirds of that one-third share, that is to say, two-ninths, and Raghunath owning one-third of that share, that is to say, one-ninth. After the death of Raghunath, his share devolved on Thakur Prasad who thus obtained a half share in the villages of Mahasua, Hirupur Gutaiya, and Deokali, and a one-third share in Mahita. On the death of Thakur Prasad the shares devolved on his descendants. Pali was apparently then dead and his share descended to his son Shanker Prasad, and at the time Shanker Prasad, Sheodarshan, Chandi Prasad and Data Ram owned each a one-eighth share in Mahasua, Hirupur Gutaiya, and Deokali, and a one-twelfth share in Mahita. Shanker Prasad died first, then Sheodarshan died leaving a widow Gobinda, then Chandi Prasad died and then Gobinda died. After the death of Shanker Prasad his share of one-eighth or two annas in the villages of Mahasua, Hirupur Gutaiya, and Deokali, and his share of one-twelfth or one anna 4 pies in the village of Mahita were divided amongst Sheodarshan, Chandi Prasad and Data Ram. The shares of Sheodarshan, Chandi Prasad and Data Ram then became two annas eight pies each in Mahasua, Hirupur Gutaiya, and Deokali, and one anna nine one-third pies in Mahita. On the death of Sheodarshan his widow Gobinda succeeded to his share. On the death of Chandi Prasad his sons Suraj Bakhsh and Balbhaddar Bakhsh succeeded to his share. On the death of Gobinda the share which she had inherited from Sheodarshan of two annas eight pies in the three villages and one anna nine one-third pies in Mahita was divided equally between Data Ram and the sons of Chandi Prasad, Suraj Bakhsh and Balbhaddar Bakhsh. This brings us to the final division of the shares. Suraj Bakhsh and Balbhaddar Bakhsh on the one hand and Data Ram on the other hand became the owners of an extra one anna four pies share in three villages and a ten two-third pies

share in Mahita, which in addition to the shares they already possessed gave Suraj Bakhsh and Balbhaddar Bakhsh on the one hand and Data Ram on the other hand a total share of four annas or one-fourth in the villages of Mahasua, Hirupur Gutaiya, and Deokali, and of two annas eight pies or one-sixth in the village of Mahita. It is admitted that Suraj Bakhsh and Balbhaddar Bakhsh were members of a joint Hindu family governed by the Mitakshara Law at the time of the death of their father. Balbhaddar Bakhsh then died, and mutation of his share of two annas in the three villages and one anna four pies in Mahita was made in the name of his widow Sukhdei. Sukhdei gave a lease of these shares to Janardan Das, a *Brahman* of Malihabad.

Suraj Bakhsh then instituted a suit claiming to succeed to the property of his deceased brother by survivorship, on the ground that at the time of his brother's death they were members of a joint undivided Hindu family.

*Musammat* Sukhdei and her transferee set up that Balbhaddar Bakhsh had separated from Suraj Bakhsh before his death and that in consequence Sukhdei, as widow of Balbhaddar Bakhsh, had succeeded to his property. They further set up that in the family there was a custom under which if any co-sharer died childless, his widow became the owner of her deceased husband's estate, and they further pleaded that Suraj Bakhsh had previous to the institution of the suit arrived at an amicable settlement by which it was agreed that she should be permitted to retain the property.

The learned Subordinate Judge found that Balbhaddar Bakhsh and Suraj Bakhsh were members of a joint Hindu family at the time of the death of the former and that the whole of the property in dispute, with the exception of the property derived from Sheodarshan through Gobinda, was the ancestral property of the two brothers. He found that the property derived from Sheodarshan through Gobinda was not the ancestral property of the two brothers inasmuch as it was property which had not been acquired from joint family funds, which had not been treated as joint family property and which was inherited (the inheritance being obstructed) from a collateral. He found that there was no family custom as asserted by Sukhdei and that there had been no private settlement between Suraj Bakhsh and Sukhdei by which it was agreed that Sukhdei should retain possession of the property in dispute. He accordingly decreed the claim of Suraj Bakhsh with respect to a share of two annas eight pies in the villages of Mahasua, Hirupur Gutaiya, and Deokali and to a share of one anna nine one-third pies in the village of Mahita. By this decree he awarded costs against Janardan Das. Al these parties to the suit have appealed against the decision.

Sukhdei has appealed in First Civil Appeal No. 34 with regard to the points decided against her. In her appeal she again asserts that Suraj Bakhsh was separate from Balbhaddar Bakhsh at the time of the death of the latter, that it has been established that there is a family custom by which she was entitled to inherit the property of Balbhaddar Bakhsh, and that it was established that Suraj Bakhsh had made a private settlement by which he agreed that she should retain possession of the property in dispute. She further took exception to the refusal of the Subordinate Judge to decide the amount of maintenance to which she would be entitled on the hypothesis that she was the widow of a member of the joint Hindu family.

In Appeal No. 30 of 1913 Suraj Bakhsh has taken exception to the decision of the learned Subordinate Judge in so far as it refuses to award him the share which had descended from Sheodarshan through Gobinda.

In Appeal No. 36 of 1913 Janardan Das has objected to a decree for costs having been passed against him.

I shall first consider Appeal No. 34, the appeal of Sukhdei, the acceptance of which would involve the dismissal of the suit. At the time of the death of Chandi Prasad, Suraj Bakhsh and Balbhaddar Bakhsh were minors, and their mother Ram Kuar was approved their guardian by a competent Court. Suraj Bakhsh was born about 1886

or 1887 and Balbhaddar Bakhsh was born about 1891. Balbhaddar Bakhsh died on the 26th May 1911 when he was about 20 years of age, and he had not then attained majority under the Guardians and Wards Act. Suraj Bakhsh had attained majority some few years previously and from the time that he attained majority he managed the property of the family. It is admitted by the learned Counsel for Sukhdei and Janardan Das that Suraj Bakhsh remained joint with Balbhaddar Bakhsh at first. His case is that Suraj Bakhsh separated from Balbhaddar Bakhsh about the year 1909, and evidence was called to support this contention. Inasmuch as it was admitted by Sukhdei and Janardan Das that the brothers were joint in the first instance, the burden of proof was rightly laid upon them to prove separation. The evidence upon which they relied to prove separation will be found in the depositions of certain witnesses and also in certain documents.

The first of these witnesses was Sukhdei herself. Her story is that about the year 1909 Suraj Baksh brought prostitutes to the village and kept them, and wasted money upon their entertainment, that in consequence Balbhaddar Bakhsh (who was then about 18 years old) remonstrated with his elder brother and objected to the expenditure of family funds for such purposes, that the brothers quarrelled violently on the subject and finally agreed to divide the family property; that a complete partition then took place; that they divided utensils, carts, bullocks, ornaments and grain; that they separated the family house at Mahasua into two portions of which each brother retained one; but that they did not divide the landed property which continued to be managed by Suraj Bakhsh alone. In cross-examination she stated that Ram Kuar, the mother of Suraj Bakhsh and Balbhaddar Bakhsh, and the wife of Suraj Bakhsh were living in the joint family house at the time that Suraj Baksh was bringing prostitutes there and that neither of them took exception to his behaviour in introducing women of bad character to the house. The learned Subordinate Judge disbelieved the evidence of this witness. He discredited it on the ground that she was personally interested and making allegations which, if believed, would assist her materially. I agree with the learned Subordinate Judge that the evidence of this witness is worthless. But I do so not only on the ground which he has given but because on examining her evidence I find that the story she tells appears fabricated, and that she seems to have given her evidence in a most unsatisfactory manner. To take one point alone, it would have been remarkable, had Ram Kuar, the mother of Suraj Bakhsh, taken no exception, as this witness alleges, to the fact that her son, a young *Brahman* of some 22 years of age, was disgracing his family and himself by the introduction of common prostitutes into the joint family house in which his mother and wife were residing. It is unnecessary to detail my remaining reason for discrediting this witness. It is sufficient that I do discredit her.

The next witness called was a certain Lalta Prasad. This Lalta Prasad is the son of Datta Ram, the brother of Chandi Prasad. Lalta Prasad had another brother of the name of Ram Charan. Ram Charan had five sons, Bhagwant, Bhondu, Behari, Baldeo and Gajadhar. Bhagwant was convicted on the charge of murdering his father, Ram Charan, and was sentenced to transportation for life. Lalta Prasad had deposed that he was a witness to the quarrel between Suraj Bakhsh and Balbhaddar Bakhsh on account of Suraj Bakhsh's predilection for the society of prostitutes, that he endeavoured to reconcile the brothers, but that he failed to do so, and that finally the brothers separated, a partition being effected by the witness himself and his nephew Bhondu, the son of Ram Charan. It is suggested by the learned Counsel for Suraj Bakhsh that, in view of the fact that Bhagwant had murdered his father, Ram Charan, it was by no means likely that the sons of Chandi Prasad would have employed any members of the Data Ram branch to decide their disputes, as members of that branch of the family must have been shunned owing to the fact that parricide had been committed by one of their number. There is no clear evidence to support the suggestion that the members of Data Ram's branch were shunned by other members of the family, but whether it was or was

not likely that differences between Suraj Bakhsh and his brother should be referred for disposal to Lalta Prasad or Bhondu, it is clear enough that this witness Lalta Prasad had broken down absolutely under cross-examination and committed perjury. The learned Subordinate Judge rightly discredited the evidence of this witness, which is valueless.

The next witness was Bhondu. The learned Subordinate Judge found this man also to be a false witness, and after examining his evidence, I agree with the conclusion at which the learned Subordinate Judge arrived.

These are the only witnesses who were called to give direct evidence as to the separation and partition. But there was other evidence produced on behalf of Sukhdei from which it has been suggested to us that an inference should be drawn that the brothers had separated. After the death of Balbhaddar Bakhsh it became necessary for the *patwaris* of the villages in which he possessed interests to report on the question of mutation. The reports so made were to the effect that Sukhdei had succeeded to his property, and it is suggested that the fact that Suraj Bakhsh did not at first object to mutation being made in her favour, and the fact that his signatures appeared on all four reports recommending that mutation should be made in her favour, afford strong ground for supposing that Balbhaddar Bakhsh had separated from him before his death.

Lakhpat Rae, *patwari* of Mahita and Deokali, had deposed that he knew that Suraj Bakhsh and Balbhaddar Bakhsh were joint, but that he thought that the proper person to succeed Balbhaddar Bakhsh was Sukhdei. He filled up two forms accordingly, one for Mahita and the other for Deokali These forms contain a column in which the signature of the applicant for mutation can be taken, and as this *patwari* stated that he considered that Sukhdei was the proper person whose name should be entered, it was necessary for him to obtain the signatures of Sukhdei on these forms. He deposed that he took them to the house where the family resided at Kohan and handed them to Lachmi Narain, Sukhdei's brother, whom he met at the door, and that Lachmi Narain took the forms indoors and brought them back bearing what purported to be the signatures of Suraj Bakhsh, and not the marks or signatures of Sukhdei. Suraj Bakhsh has denied that the signatures on these two forms are his and the learned Subordinate Judge has found that it is not proved sufficiently that Suraj Bakhsh signed those forms. I find that it is not proved that Suraj Bakhsh signed those forms. There is nothing in the circumstances to show that Lachmi Narain or some person who was acting on behalf of Sukhdei did not write the name of Suraj Bakhsh on the forms without the latter's knowledge.

I now come to the other two forms which admittedly bear the signatures of Suraj Bakhsh. Here there is a conflict of evidence. Mendai Lal, the *naib-patwari* of Mahasua, has deposed that he was sent by Gangadin, *patwari* of Hirupur Gutaiya, and Puttu Lal, *patwari* of Mahasua, with two forms to take to Suraj Bakhsh and obtain his signatures, that he took these forms, the same being blank, and obtained the signatures of Suraj Bakhsh upon them while they were blank, and that they subsequently were filled up with entries to the effect that Sukhdei was entitld to mutation. The evidence, if believed, would go to show that Suraj Bakhsh did not assent to the applications being made in favour of Sukhdei, for if Mendai Lal is telling the truth, Suraj Bakhsh signed them as applicant for mutation.

Gangadin, the *patwari* of Hirupur Gutaiya, has deposed however that he sent Mendai Lal to obtain Sukhdei's signature on a blank form, and that Mendai Lal returned saying that Sukhdei would not sign the form, so he had got Suraj Bakhsh to sign it. If Gangadin had sent Mendai Lal to obtain Sukhdei's signature on the form, and Mendai Lal had returned with Suraj Bakhsh's signature, it would seem that the proper course for Gangadin to have adopted would have been to have sent Mendai Lal back with another form. Puttu Lal, the *patwari* of Mahasua, was not called as a witness by either party. But he happened to be in Court and the

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learned Subordinate Judge called him as a Court witness. Puttu Lal has deposed that Mendai Lal is not telling the truth, that he had filled up a form with regard to Mahasua before he sent it and that Suraj Bakhsh must have signed it after the entries were filled up.

Parmeshar Din, the brother of Suraj Bakhsh's mother, has deposed that Hirupur Gutaiya and Mahasua forms were blank when Suraj Bakhsh signed them, and that Mendai Lal had told Suraj Bakhsh that mutation was going to be made in his favour.

The learned Subordinate Judge found that Suraj Bakhsh must have signed these forms after they were filled up, because he did not give evidence on oath to explain how he came to sign them, because Gangadin and Puttu Lal had deposed at other places that Suraj Bakhsh knew that mutation was about to take place in favour of Sukhdei and took no objection, because proclamations were issued by the Tahsildar stating that Sukhdei's name would be entered and stating that objections must be filed on or before the 18th September 1911 and Suraj Bakhsh made no objection on or before the 18th September 1911.

I do not consider that the learned Subordinate Judge has arrived at a correct conclusion upon this point. He does not appear to have attached sufficient weight to the fact that, if the forms had been filled up suggesting that mutation should be effected in the name of Sukhdei, there was no place for the signatures of Suraj Bakhsh upon the forms, and that he never should have signed them. Sukhdei's brother was present, and if Sukhdei was incapable of signing the forms on her own behalf, her brother could have signed them for her. As the signatures of Suraj Bakhsh appear at a place where the signatures of the applicant for mutation should appear, the obvious inference is that Suraj Bakhsh must have signed the forms under the impression that the application was to be made in his favour, and had those forms been already filled up in favour of Sukhdei, it is difficult to see why he should have been induced to sign them. Hence it would appear to me that, as he admittedly did sign the Mahasua and Hirupur Gutaiya forms, there is more reason to suppose that he signed them when they were blank. It is to be noticed that Gangadin admits that he sent the form blank, and that Puttu Lal who states that he had filled up the forms before he sent them was not called as a witness by either party. The *patwaris* were palpably wrong in suggesting that mutation should be made in the name of Sukhdei, as they have all admitted that Suraj Bakhsh and Balbhaddar Bakhsh were joint. To justify themselves in sending up such a report, they appear to have taken refuge in the false excuse that Suraj Bakhsh had agreed to the application being made. It was most unlikely, looking at the subsequent conduct of Suraj Bakhsh, that he would have agreed to such an application being made. Thus I do not consider that either Gangadin or Puttu Lal can be believed when they state that Suraj Bakhsh agreed to the application. Gangadin said, "I told Suraj Bakhsh after I had made the report that I made it in favour of Balbhaddar Bakhsh's widow. Suraj Bakhsh said nothing." This statement appears to me to be untrue. Puttu Lal stated that he had a talk with Suraj Bakhsh and Parmeshardin about the mutation of names, and that they asked him to get the name of Sukhdei recorded. The incident of this conversation appears to me equally untrue. With regard to the last point that Suraj Bakhsh did not file objections on or before the 18th September 1911 to the entry of Sukhdei's name in place of that of her husband, it is to be noted that he did make an objection on the 5th October. It is true that he made this objection late. But the fact that he made the objection shows, in my opinion, that he intended to contest the matter. The reasons given by the learned Subordinate Judge for finding that the forms for Hirupur Gutaiya and Mahasua were not signed when blank do, therefore, not convince me in any way, and upon the evidence I find that Mendai Lal is telling the truth, and that the forms were signed by Suraj Bakhsh when blank under the impression that mutation was going to be effected in his name.

The next point urged in favour of separation is that *Musammat* Ram Kuar, the mother of the two brothers, had on her

evidence been assigned an income of Rs. 40 a year for her own private use. It is urged that if the family were joint, the mother would not have received a separate income from joint family funds. I see nothing in this circumstance from which it can be inferred that the brothers had separated. Sons in a joint Hindu family may well give their mother a small separate allowance for her private expenses, especially as, according to Ram Kuar, she received this money to be expended on religious purposes.

The next point taken is that a certain lease was executed by both brothers. This fact does not, in my opinion, show that the brothers had separated.

The last point taken is that Suraj Bakhsh did not give evidence in support of his own case. I am unable to draw any inference from this incident to the effect that he had separated from Balbhaddar.

There is further considerable evidence to show that the brothers had not separated. Ram Kuar has given evidence which, if believed, establishes conclusively that they remained joint, and I see no reason why she should not be considered a credible witness. The learned Subordinate Judge found that the brothers had not separated, and I consider that there are even stronger reasons for the view which he took than the reasons which he gives. I, therefore, find upon the *first* point that at the time that Balbhaddar Bakhsh had died, he was a member of a joint Hindu family consisting of Suraj Bakhsh and himself.

With regard to the *second* point, that under a custom of the family a widow succeeds to the property of her husband even although he is a member of a joint Hindu family it is clear that very strong and cogent evidence should have been produced to prove such an extraordinary custom. The *wajib-ul-araiz* of Mahasua and Hirupur Gutaiya were produced. They contain a statement to the effect that a widow of a co-sharer succeeds to the property of her husband. I agree with the learned Subordinate Judge that these provisions palpably refer to the case of a separated co-sharer. The oral evidence produced in favour of this custom is that of *Musammat* Sukhdei, Lalta Prasad and Bhondu, witnesses whom I have already disbelieved on other points, and whose evidence is equally valueless upon the point of custom, and admissions by two witnesses called by the plaintiff, Sadhu (P. W. No. 5) and Gangadin (P. W. No. 10), to the effect that in the case of a family in the village consisting of three brothers Ranjit, Sarabjit, and Baryar, Ranjit's widow succeeded to Ranjit's property on his death. No details are given with regard to this incident, and standing by itself. it proves absolutely nothing. Thus there is no evidence worth the name to support the existence of the alleged custom.

I next come to the question whether Suraj Bakhsh did or did not amicably settle with Sukhdei after the death of Balbhaddar Bakhsh, that she should take the landed property in dispute. The story told by Sukhdei upon this point is that, after the death of her husband, Suraj Bakhsh asked her to give him all the property of which Balbhaddar Bakhsh was in separate possession, that she declined to accede to his request, that then Parmeshardin and Suraj Bakhsh went into her house and forcibly took away Rs. 2,000 in cash and ornaments and all the grain that they could find, that she then threatened to institute proceedings against them and went with her mother and brother to Malihabad, which, we are informed, is 20 or 30 miles distant from Mahasua, and that at Malihabad on the suggestion of Janardan Das, who is a holder of some religious office in that place, a collection of Malihabad people made an amicable settlement between Suraj Bakhsh and Sukhdei, by which it was agreed that Suraj Bakhsh should retain all the moveable property which he had taken from her, and that she should retain all the landed property. With the exception of Sukhdei Lalta Prasad and Bhondu, the witnesses to this incident are Puttu Lal *Brahman*, Sita Ram *Kalwar*, Ram Lal *Thathera*, Sri Kishan *Thothera*, Ram Charan *Brahman*, Baldeo *Kayesth*, and Har Chhath *Brahman*. All the above witnesses reside in Malihabad. The story of these latter witnesses is that

they were collected together with the consent of Suraj Bakhsh to decide a dispute between a *Brahman* and his sister-in-law who resided 20 or 30 miles from their town. It is true that Sukhdei's family lives in Malihabad. But that circumstance would not have been likely to induce Suraj Bakhsh to permit decision on such a point by a body of persons hardly known to him and living at a considerable distance from his village. Further, it is to be noted that the point for decision was as to whether two *Brahmans* living in a distant village were joint or separate. In the circumstances there was no reason why persons such as *Thatheras*, a *Kayesth* and a *Kalwar* should be asked to adjudicate on the matter. Next, according to these witnesses there was no attempt made to enter into the facts as to whether the brothers were joint or separate. Finally, the decision at which they are said to have arrived could have hardly given satisfaction to anybody. If Sukhdei is telling the truth and Balbhaddar Bakhsh really separated from his brother, Suraj Bakhsh had robbed her of all her moveable property. But the decision of her own village people was to the effect that he should be allowed to retain all that stolen property provided that he gave her back the landed property which belonged to her. The evidence of these witnesses contains many discrepancies and grave improbabilities, and I consider that the learned Subordinate Judge acted very rightly in refusing to accept it. I am of opinion that the above evidence is false and fabricated and I find that no settlement was ever made between the parties.

I have now disposed of all grounds taken in appeal on behalf of Sukhdei, with the exception of the ground that the Subordinate Judge acted improperly in refusing to fix the amount of maintenance due to her. I consider that on the finding that the family was joint, the question of fixing the maintenance of Sukhdei does not arise, and that the learned Subordinate Judge acted rightly in refusing to decide it.

Appeal No. 34 thus fails upon every point, and I dismiss it accordingly. Sukhdei will pay her own costs of this appeal and those of Suraj Bakhsh.

I now come to the appeal of Janardan Das. This is simply upon the question of costs. I find that Janardan Das has been behind Sukhdei all through this matter, that he had every opportunity of knowing the real relationship between the parties, and that he was rightly ordered to pay costs. I, therefore, dismiss Appeal No. 36 of 1913. Janardan Das will pay his own costs and those of Suraj Bakhsh.

I now come to the appeal of Suraj Bakhsh. This raises three points. The *first* point I may dispose of shortly. It is to the effect that the property derived by Suraj Bakhsh and Balbhaddar Bakhsh from Sheodarshan through Gobinda was acquired from joint family funds. Even on the case set up by Suraj Bakhsh the property was not acquired from joint family funds, although evidence was produced on which the appellant attempted to show that an encumbrance upon this property had been paid off out of joint family funds. The paying off of an encumbrance out of joint family funds does not show that the property was acquired from such funds, and upon the case set up by Suraj Bakhsh, it is clear that the property in question was inherited from Sheodarshan and certainly not acquired from joint family funds.

The *next* point to be taken up is whether the property after it passed into the hands of Balbhaddar Bakhsh and Suraj Bakhsh was treated as joint family property. The circumstance that it was managed by Suraj Bakhsh does not prove anything on this point. Suraj Bakhsh was *lambardar* and as *lambardar* managed the property, and from the fact that he managed it, it cannot be inferred whether the property was or was not treated as joint family property. The incident of the paying off of the encumbrance must, however, be considered.

In the life-time of Gobinda a suit was brought by Data Ram, Suraj Baksh and Balbhaddar Bakhsh for a declaration of their reversionary interests in Sheodarshan's property. This suit was brought on the 18th February 1902. Gobinda had leased a portion of the share of Sheodarshan after

Ramasami Pillai were joint. Another point of dispute was whether such property as *F* had inherited from Kolandavelayuda Pillai would descend to his widow as his heir or to other members of the joint family by right of survivorship. The learned Judges quoted with approval the decision which has already been discussed in *Jasoda Koer* v. *Sheo Pershad Singh* (1), and finding that there was no distinction in principle between property derived from a mother's father and property derived from a male collateral, held that the rule of survivorship did not apply. They continued, "To hold otherwise would be to recognize as co-parceners with rights of survivorship a group of persons who might be descended from different parents and might at the same time belong to a larger group, having another and distinct family property of their own."

It is to be noted that the facts in the present appeal are similar to the facts in this Madras case. In both cases the property has been inherited from a male collateral.

I now come to a decision of their Lordships of the Privy Council in which the principles laid down in the above cases were discussed, dissented from, and overruled. This is the case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4). In this case a certain Venkat Rao died leaving a widow and a daughter. The daughter was married and had two sons. Venkat Rao's property was his own separate property. He was not a member of a joint Hindu family and his property was apparently self-acquired. The widow died in 1875. The daughter died in 1884. Her two sons Niladri and Appa Rao formed the members of a joint Hindu family governed by the Mitakshara Law. The question was whether the property inherited from Venkat Rao descended to Niladri and Appa Rao jointly with benefit of survivorship or jointly or in common without benefit of survivorship. At page 686 their Lordships said: "What then was the character of the property which they took? In the grandfather's hands it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance. Niladri and Appa Rao were members of a united family." This property was not property acquired through unobstructed inheritance. Property acquired from a mother's father is property acquired through an obstructed inheritance, for it is not property in which the inheritor succeeds by virtue of his birth at the time that he is born. He succeeds to it only in default of other heirs. If his mother's father had had a son, the property would descend to his mother's father's son, and it is only in default of such issue that the property may eventually be inherited by the daughter's son. It is clear then that, when their Lordships said that the property derived by Niladri and Appa Rao from the mother's father was ancestral property they did not mean by this that it was property in which Niladri and Appa Rao had a right at the time of their birth by virtue of their birth, and they clearly laid down later that the inheritance was obstructed. After the paragraph in which they described the character of the property their Lordships proceeded to quote with approval a portion of that passage out of *Katama Natchiar* v. *Rajah of Shivagunga* (2) to which I have already referred and they continued, "It is true that on acceding to their grandfather's property, Niladri and Appa Rao might have partitioned it, but they did not do so." Then follow the words, "It is the right to partition which determines the right to take by survivorship, and where there is no partition the survivor takes." Their Lordships then proceeded to discuss the correctness of the principle laid down by the learned Judges of the Madras High Court to the effect that persons who succeeded to joint family property in a joint Hindu family governed by the Mitakshara Law take as tenants-in-common in case of obstructed inheritance. They said that in previously decided cases it had not been found universally that such persons succeed as tenants-in-common to such property. They noted that members of a joint family who succeed to self-acquired property take it jointly and that widows and daughters also succeed jointly, and then they proceeded to discuss the value

(4) 25 M. 678; 29 I. A. 156 (P. C.); 7 C. W. N. 1; 12 M. L. J. 299.

of the ruling of the Calcutta High Court in *Jasoda Koer* v. *Sheo Pershad Singh* (1), and the ruling of the Madras High Court in *Saminadha Pillai* v. *Thangathanni* (3), and they said, "The Calcutta decision appears to their Lordships to have been based upon a view of Mitakshara Law which further investigation shows to be erroneous, *viz.*, upon the view that according to the Mitakshara Law the doctrine of survivorship is limited to unobstructed successions and to the succession to the joint property of reunited co-parceners." From this decision of their Lordships it follows that if the view taken in the Calcutta decision is erroneous, then according to the Mitakshara Law the doctrine of survivorship is not limited to unobstructed successions and to the succession to the joint property of reunited co-parceners. Their Lordships then continued, "It does not follow that because the reasons given for a decision are unsatisfactory the decision itself is erroneous. But in this case the decision in question appears to their Lordships to be opposed to the principles which regulate the devolution of joint family property to which the Mitakshara Law is applicable and they, therefore, cannot adopt the decision in *Jasoda Koer* v. *Sheo Pershad Singh* (1). They think it erroneous. The decision in *Saminadha Pillai* v. *Thangathanni* (3) and the decisions appealed from are both based upon it and are open to the same objections." If the decision in *Saminadha Pillai* v. *Thangathanni* (3) is open to the same objections as those given by their Lordships to the decision in *Jasoda Koer* v. *Sheo Pershad Singh* (1), it is opposed to the principles which regulate the devolution of joint family property to which the Mitakshara Law is applicable. This decision of their Lordships of the Privy Council has been considered by High Courts in subsequent cases.

The first of these is a Full Bench ruling of the Madras High Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5). In that case the point for dispute was whether the plaintiff as the heir of her husband who had died issueless was entitled to claim a third share in the property, to which share her husband would have been entitled in his liefe-time if a partition had been effected. It was argued that the estate which devolved upon the sons of a sister from the sister's brother, that is to say, from the maternal uncle, the sons being undivided when the inheritance opened, devolved as joint family property with the incident of the right of survivorship. The following question was referred for the opinion of a Full Bench:—

"Whether the estate of a male which devolves by inheritance on his sister's sons who at the time that the succession opens happen to be undivided members of one and the same joint Hindu family governed by the Mitakshara Law but possessing no joint family property, is taken by the brothers as joint family property with the incident of survivorship as generally understood under the Mitakshara Law or as co-heirs each entitled to an undivided one-third share which, on the death of one of them without male issue, devolves as his separate property on his widow."

The learned Judges of the Madras High Court considered that the decision of their Lordships of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) did not apply to the devolution of *stridhanam* property. It is not necessary for me to decide in this case whether their Lordships' decision would affect *stridhanam* property, as the distinction drawn by the learned Judges with regard to the particular case before them has no bearing on the decision of the present appeal. They pointed out at page 305 that their Lordships had abstained from laying down that, as a universal rule, a heritage which devolves upon co-heirs, who happen to be all or some of them members of an undivided family under the Mitakshara, is taken by them with benefit of survivorship, and they continued that the author of the Mitakshara does not make a distinction between "obstructed" and "unobstructed" heritage in respect of the devolution of *stridhanam* property, such distinction according to his scheme being pertinent only to the inheritance of the property of a male. Therefore, they considered the that decision of their Lordships did

(5) 27 M. 300; 13 M. L. J. 398.

not prevent them from concluding that the rule of survivorship did not apply to the case before them. They, however, went on to discuss points which were not directly before them in that case, one point being as to what their Lordships meant by the words "ancestral property" when they said at page 686 of 25 Madras, "In the hands of the grandsons it was ancestral property." They said at page 310, "In the Hindu Law the word 'ancestor' is not used in the wide sense in which it is used in English Law as merely equivalent to the *propositus* and as the correlative of heir. In Hindu Law it is used only as signifying a direct ascendant in the paternal or maternal line, and more technically as signifying the paternal grandfather and his ascendants in the male line, and in Colebrook's Translation of the Mitakshara, it is the expression 'father's father's property' that is translated into 'ancestral property.' While it may or may not be that the expression 'ancestral property' in their Lordships' judgment is used in the latter sense, in which technical sense it is used in several judgments of their Lordships of the Privy Council and also by the Indian Legislature [*Suraj Bunsi Koer* v. *Sheo Persad Singh* (6), *Parbati Kumari Debi* v. *Jagadis Chunder Dabal* (7), *Rajah Suraneni Venkata Gopala Narasimha Row* v. *Rajah Suraneni Lakshma Venkama Row* (8), *Umrithnath Chowdhry* v. *Goureenath Chowdhry* (9) and Article 126 of the second Schedule to the Indian Limitation Act (1877)] it appears to us clear that it is not used as denoting property other than that which has devolved from a direct ancestor either in the paternal or maternal line. In the case before their Lordships the property had devolved from the maternal grandfather."

I have been unable to find that the words "ancestral property" are used in the Mitakshara Law. The learned Judges in this case admitted that the words "father's father's" have been incorrectly translated as "ancestral" by Colebrook. I can find no authority for the proposition that in the Mitakshara Law there is one word which can be translated "ancestral" which includes only the two expressions, "father's father's" and "mother's father's." Where their Lordships have used the word "ancestral" in their previous judgments, the distinction has always been between self-acquired property and non-self-acquired property, and the word "ancestral" has meant simply non-self-acquired property. In the ordinary English legal meaning of the word "ancestral" the meaning would be the same. The word "ancestor" would be used as correlative of heir, and the words "ancestral property" would simply mean inherited property as opposed to self-acquired property. Whether the inheritance was obstructed heritage or unobstructed heritage in the Hindu Law, the property would equally be ancestral in this sense. According to the learned Judges who decided this case, their Lordships of the Privy Council when they used the word "ancestral" in this connection meant property inherited either through an unobstructed inheritance or through an obstructed inheritance in the particular case of inheritance from a mother's father, but no other. I do not find that there is anything in the Hindu Law to support such a meaning being given to the word "ancestral" or that there is anything in their Lordships' judgment from which it can be deduced that this peculiar meaning was intended to be applied to the word. The view that I take is that, when their Lordships used the words, "ancestral property which had devolved on them under the ordinary law of inheritance," they meant that the property was inherited property. The mother's father had acquired the property, his daughter's sons inherited it. Thus it was "ancestral" or "inherited." At page 313 the learned Judges said, "If, therefore, we are to understand the expression 'ancestral property' in their Lordships' judgment otherwise than in its technical sense, according to which it is property in which a son on his birth becomes an equal owner with his father, the result of the ruling will be that a species of joint family property unknown to the Mitakshara will be

(6) 5 C. 148 at p. 164; 4 C. L. R. 226; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242.

(7) 29 C. 433 at pp. 452, 453; 29 I. A. 82; 6 C. W. N. 490.

(8) 13 M. I. A. 113 at p. 140; 12 W. R. 40 (P. C.); 3 B. L. R. 41 (P. C.); 2 Suth. P. C. J. 265; 2 Sar. P. C. J. 496; 20 E. R. 494.

(9) 13 M. I. A. 542 at p. 546; 15 W. R. 10 (P. C.) 6 B. L. R. 232 (P. C.); 2 Suth. P. C. J. 381; 2 Sar. P. C. J. 618; 20 E. R. 653.

brought into existence." From this passage it would appear that the learned Judges considered that they might make the supposition that their Lordships used the words "ancestral property" as meaning property in which a son at his birth became an equal owner with his father. With due respect to the learned Judges, it appears that their Lordships did not mean that and could not have meant that, for the property inherited in that case by Niladri and Appa Rao was property in which their father had no share and Niladri and Appa Rao did not on their birth become entitled to the property of their mother's father. They became entitled to the property of their mother's father on the death of their mother. Niladri was born in his grandfather's life-time. He had no right in his grandfather's property on the date of his birth. Whether the result of their Lordships' ruling is or is not that a species of joint family property unknown to the Mitakshara will be brought into existence, it is clear that the word "ancestral" as used by them cannot bear the meaning assigned to it by the learned Judges.

I have finally to refer to one more passage in this judgment which occurs at page 314: "The observation of the Privy Council that *Saminadha Pillai* v. *Thangathanni* (3) case is open to the same objection as the decision of this Court in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) can be construed only as a disapproval of the general position therein maintained that survivorship cannot exist in any case in which property passes as obstructed heritage, and not as a disapproval of the actual decision in the case, even apart from the question of fact on which also it was based."

The decision in *Saminadha Pillai* v. *Thangathanni* (3) was on two points, the *first* being that the doctrine of survivorship did not apply to property inherited by members of a joint Hindu family governed by the Mitakshara Law derived from a collateral, and the *second* being that the three heirs were divided and the property devolved upon them. The second point was a point of fact, and on that alone the defendants' appeal failed. The learned Judges considered, as shown by the above quotation, that their Lordships of the Privy Council decided that property derived by the members of a joint Hindu family governed by the Mitakshara Law from a collateral was not property to which the law of survivorship applied, and that the Judges, who decided the case of *Saminadha Pillai* v. *Thangathanni* (3), were quite right in holding that in such a case the law of survivorship did not apply, although their decision was wrong because they had approved of the decision in *Jasoda Koer* v. *Sheo Pershad Singh* (1), which stated that the rule of survivorship did not apply to property derived from a mother's father. In *Saminadha Pillai* v. *Thangathanni* (3) the learned Judges found that the Calcutta High Court had rightly decided that the rule of survivorship did not apply to property inherited from a mother's father, and as they could find no distinction between the case of property inherited from a mother's father and property inherited from a collateral they found that the rule of survivorship did not apply to property inherited from a collateral. Their Lordships said that this was not a good decision. In *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5) it is suggested that what their Lordships meant was that the rule of survivorship did apply to property inherited from a mother's father, that there was a distinction between property inherited from a mother's father and property inherited from a collateral, and that thus the rule of survivorship did not apply to property inherited from a collateral. I am unable to attach such a meaning to their Lordships' decision. It would appear to me that the learned Judges who decided the case of *Saminadha Pillai* v. *Thangathanni* (3) correctly stated that in principle there was no distinction between property inherited from a mother's father and property inherited from a collateral. Thus if the rule of survivorship applies to the former case it must also apply to the latter.

The meaning of the word "ancestral" in their Lordships' judgment was considered by a Bench of the Allahabad High Court in *Jamna Prasad* v. *Ram Partap* (10). The

(10) 29 A. 667; A. W. N. (1907) 211; 4 A. L. J. 582.

learned Judges who decided that case considered the decision of *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5), and dissented from it. Their opinion was that the words "ancestral property" were used by their Lordships in a very general sense, and that they were not used in the sense of property in which the sons acquired by birth a joint interest with their father. That is the view which I take also.

In *Gurumurthi Reddi* v. *Gurammal* (11), a Bench of the Madras High Court found directly that the property inherited from a collateral relation is not taken as ancestral property and subject to the incidents of ancestral property. The decision is very short and merely states that the present case is not governed by the judgment of the Privy Council [*Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4)], but by the principle of the decision in *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5). The point which I have discussed, whether there is any distinction in principle between property derived from a mother's father and property derived from a collateral, is not touched on in *Gurumurthi Reddi* v. *Gurammal* (11).

The last case in which this decision has been discussed is *Bai Kukhmani* v. *Keshavlal Ranchhod* (12). It was there decided that in Gujerat daughters succeeding to the non-technical *stridhan* of their mother take several interests. To such a case as that the decision of their Lordships in *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5) would certainly have no application.

I have now disposed of the cases in which the High Courts have discussed the meaning of this ruling. It appears to me that the distinction sought to be drawn in *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5) is not a good distinction, and that in applying the law as laid down by their Lordships of the Privy Council the following points should be considered :—

(1) Is the family a joint Hindu family governed by the Mitakshara Law?

(2) Was the property inherited or self-acquired?

(3) When it was inherited by the members of the joint Hindu family, could it have been partitioned?

If the property has been inherited by members of a joint Hindu family, if it could have been partitioned among them at the time that it was inherited, the rule of survivorship applies.

In the present case the property was inherited by Suraj Bakhsh and Balbhaddar Bakhsh who were members of a joint Hindu family. It was not self-acquired. It was inherited by them both as members of a joint Hindu family. At the time that it was inherited it was open to either to claim a partition of his share in the property. In the circumstances, the rule of survivorship applies. It is not material whether such property came by obstructed inheritance or by unobstructed inheritance.

For the above reasons I decree Appeal No. 30, and direct that the claim of Suraj Bakhsh be decreed in full, that he receive full costs on his original plaint in the lower Court from Sukhdei and Janardan Das, and that Sukhdei and Janardan Das pay their own costs and those of Suraj Bakhsh in Appeal No. 30.

KANHAIYA LAL, A. J. C.—I regret that I am unable to agree with my learned colleague in the conclusion at which he has arrived in the case.

The dispute relates to a half share of certain property which belonged to two brothers Balbhaddar Bakhsh, the husband of *Musammat* Sukhdei, defendant No. 1, and Suraj Bakhsh, the plaintiff-appellant. Balbhaddar Bakhsh died on the 26th May 1911. The allegation of the plaintiff was that he lived jointly with Balbhaddar Bakhsh and became entitled on his death to his half share by survivorship. He further alleged that *Musammat* Sukhdei, the widow of Balbhaddar Bakhsh, had wrongfully executed a lease of the entire share in dispute in favour of Janardan Das, defendant No. 2, without any right and that the lessee had wrongfully obtained possession. He, therefore, claimed possession of the said property with future mesne profits, making *Musammat* Sukhdei and Janardan Das parties to the suit.

The defence of *Musammat* Sukhdei was that her husband, Balbhaddar Bakhsh, lived

(11) 1 Ind. Cas. 750; 32 M. 88; 5 M. L. T. 74.
(12) 9 Bom. L. R. 1293.

separately from the plaintiff, that the plaintiff consented to the entry of her name in the revenue papers and agreed to allow her to remain in possession of the share of her husband in the capacity of a Hindu widow for her life without any power of alienation, in consideration of her desisting from bringing a claim in respect of the moveable property left by her husband, of which the plaintiff had taken possession, that there was a custom in the family under which a widow was entitled to the share of her husband, whether the family was separate or joint, and that the claim was barred by section 115 of the Indian Evidence Act. The defence of Janardan Das was that the lease did not comprise anything more than a life-interest of *Musammat* Sukhdei in the estate of her husband. The Court below found that Balbhaddar Bakhsh and the plaintiff lived jointly, that no custom or settlement of the kind alleged by *Musammat* Sukhdei, defendant, was established and that the plaintiff was entitled to a decree for possession, except in regard to the portion of the property which was inherited by Suraj Bakhsh and Balbhaddar Bakhsh from their uncle, Sheo Darshan, on the death of his widow, *Musammat* Gobinda. Both the parties appeal.

It is not disputed that Thakur Prasad, through whom the parties claim to derive their title, was the owner of an 8-annas share in the villages Mahasua, Hirupur Gutaiya and Deokali and a 5-annas 4-pies share in Mauza Mahita. He left four sons, Pali, Sheo Darshan, Chandi Prasad and Data Ram, who lived separately. Pali was succeeded by his son, Shanker Prasad, who died without issue. His 1/4th share devolved on his death on his uncles, Sheo Darshan, Chandi Prasad and Data Ram. Sheo Darshan died, leaving a widow *Musammat* Gobinda, who inherited his share amounting to 2 annas 8 pies in the villages Mahasua, Hirupur Gutaiya and Deokali and a 1 anna 9 1/3 pies in the village Mahita. On the death of *Musammat* Gobinda in 1902, that share devolved on Data Ram to the extent of half and Suraj Bakhsh and Balbhaddar Bakhsh, sons of Chandi Prasad, to the extent of 1/4th each, and mutation of names was effected accordingly in the revenue papers. Balbhaddar Bakhsh thus became the owner of a 2-annas share in the villages Mahasua, Hirupur Gutaiya and Deokali out of which an 8-pies share was inherited by him from Sheo Darshan on the death of his widow, and of a 1-anna 4-pies share in Mahita, out of which 5 1/3 pies were inherited by him from Sheo Darshan on the death of his widow.

The main question for consideration in the appeal is whether the plaintiff was living jointly with Balbhaddar Bakhsh on the date of his death, and if so, whether he is entitled to claim the share inherited by Balbhaddar Bakhsh from his uncle, Sheo Darshan, on the death of his widow, in addition to his share in the ancestral estate.

Chandi Prasad, the father of Suraj Bakhsh and Balbhaddar Bakhsh, died according to the evidence about 16 or 17 years ago. His sons were then minors. On the 30th August 1895 *Musammat* Ram Kuar, the mother of the minors, obtained a certificate of guardianship in which it was stated that Suraj Bakhsh shall attain the age of 18 years in May 1905 and Balbhaddar Bakhsh in August 1909 (Exhibit I). The minors were then living jointly with their mother, who got her brother, Parmeshardin, to look after the management of the estate of the minors. *Musammat* Sukhdei was married to Balbhaddar Bakhsh in or about the year 1905. Her *gauna* took place the same year. For some time the two brothers managed to live amicably, but differences cropped up between them soon in consequence of the profligate character of Suraj Bakhsh and the debts which he had incurred on the security of the family property. It is admitted by Parmeshardin that Suraj Bakhsh is now indebted to the extent of Rs. 8,000 or thereabout, and that out of that sum Rs. 5,000 were borrowed by him before the death of Balbhaddar Bakhsh on bonds to which he alone was a party. It appears from the evidence of *Musammat* Sukhdei and Lalta Prasad that Suraj Bakhsh wanted Balbhaddar Bakhsh to join him in the execution of the said bonds, but the latter objected to his incurring any loans or spending anything except from his half share of the profits. It is admitted by Sadho, a witness for the plaintiff, that prostitutes used to come to the house of Suraj Bakhsh on the occasions of the *holi* and *diwali* festivals. Balbhaddar Bakhsh resented the expenditure of the joint funds for such purposes. It appears

from the evidence that a separation took place between the brothers in consequence sometime in 1909, at which the household goods and cattle were divided, and it was settled that the income of the villages should be divided between the brothers thereafter in equal shares. *Musammat* Sukhdei states that there was a quarrel about the prostitutes once during the time she was in the house after her *gauna* and that she saw two prostitutes coming. Whether they came for rewards given on ceremonial occasions, as stated by Parmeshardin, or for other purposes, is not clear. Lalta Prasad states that Suraj Bakhsh told Parmeshardin on the occasion of the *holi* preceding the separation that a number of prostitutes had come and that the *holi* should be very well observed; whereupon Balbhaddar Bakhsh remarked that his share should be divided and that the *holi* could then be celebrated by them in any way they liked. Lalta Prasad is married to the sister of *Musammat* Ram Kuar and is interested equally in the welfare of both the brothers. The Court below disbelieved him, because it found certain discrepancies between his present statement and that made before a Deputy Magistrate, but what those discrepancies were is not stated, and no attempt was made to ask the witness to explain them as required by section 145 of the Evidence Act and emphasized by the Judicial Committee in *Bal Gangadhar Tilak* v. *Shri Shriniwas Pandit* (13). The statement of Lalta Prasad as to the division of the household goods and cattle other than plough-oxen is corroborated by the evidence of Bhondu, a grandson of Data Ram, who is similarly related to the parties and there is no sufficient reason for disbelieving their statements.

It appears, moreover, from the evidence that *Musammat* Ram Kuar, the mother of Suraj Bakhsh and Balbhaddar Bakhsh, has been receiving the rent of 20 *bighas kham* of land in Hirupur Gutaiya for her pocket expenses since the separation. *Musammat* Sukhdei states that from the time of separation *Musammat* Ram Kuar used to dine at times with one son, at times with the other; and Parmeshardin admits that she has been realizing the rents of the said 20 *bighas* and living in the same room in which the wife of Suraj Bakhsh is living. Both Data Ram and Bhondu state that the said 20 *bighas* were allotted to *Musammat* Ram Kuar at the time of partition, and that statement is corroborated by the evidence of *Musammat* Ram Kuar herself, who admits realizing Rs. 40 per year in her own name from the tenants of Hirupur Gutaiya every year from one or two years. Parmeshardin tries to make out that she has been realizing the said rent from five or six years, but he is contradicted on that point by *Musammat* Ram Kuar herself. There was no occasion for the allotment of the said land to *Musammat* Ram Kuar, if no separation had taken place between her sons, because all her expenses in that case could have been met from the joint funds. Under the Hindu Law she could have claimed an equal share with her sons, but she evidently contented herself with a provision of 20 *bighas* of land for her contingent expenses with liberty to mess with any of her sons she chose.

The conduct of the plaintiff, in executing a lease and a power-of-attorney on his own account after the separation and in assenting to the application made by *Musammat* Sukhdei for the entry of her name in the village papers after the death of Balbhaddar Bakhsh, is also consistent with the theory of the defence. It appears that on the 4th December 1910 both Suraj Bakhsh and Balbhaddar Bakhsh executed a joint lease of their entire share in Mahita in favour of Pragdin (Exhibit A25), but subsequently Suraj Bakhsh made a mortgage on his own account in favour of Mahadin and Jagannath on the 31st August 1911 in respect of his one-anna six-pies share in Hirupur Gutaiya (Exhibit A27). He executed it to pay off a debt taken by him in 1905. If it was a joint family debt, Balbhaddar Bakhsh would have been asked to join in it but Balbhaddar Bakhsh did not join in its execution. On the 7th August 1911 the plaintiff executed a power-of-attorney, appointing Parmeshardin his general agent to look after his cases (Exhibit A43), but Balbhaddar

(13) 29 Ind. Cas. 639; 19 C. W. N. 729; 13 A. L. J. 570; 17 Bom. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 39 I. A. 441.

SURAJ BAKHSH v. SUKHDEI.

Bakhsh did not join in the execution of it, though he had joined in the execution of a lease written on the 4th December 1910.

The mutation proceedings which took place after the death of Balbhaddar Bakhsh were conducted by Lachhmi Narain, the brother af *Musammat* Sukhdei, and it appears from the evidence that Suraj Bakhsh consented to the entry of the name of *Musammat* Sukhdei and signed some applications for mutation in token of his consent. His signatures on two of the applications are proved by the evidence; and the statement of one of the *patwaris* that Suraj Bakhsh signed blank forms, cannot be believed. Suraj Bakhsh is literate and knows Urdu, and it is difficult to believe that with property worth Rs. 12,000 at stake he should have signed blank forms and taken no steps to proceed to the Tahsil and get mutation effected in his favour. The proclamations issued in connection with the applications for mutation made by *Musammat* Sukhdei were published in the villages in question in the presence of Parmeshardin, the general agent of the plaintiff, whose acknowledgment they bear (Exhibits A31 to A34). The plaintiff did not make any objection to the entry of the name of *Musammat* Sukhdei at the time. Subsequently he tried to reopen the proceeding by applying for the correction of the *khewat*, but without success (Exhibits A22 to A24).

The evidence adduced by the plaintiff to prove that he lived jointly with Balbhaddar Bakhsh, consists of witnesses who are manifestly interested in supporting the plaintiff's case. *Musammat* Ram Kuar is evidently dissatisfied with *Musammat* Sukhdei, because it is stated the latter refused to execute a power-of-attorney in favour of Parmeshardin and leased the property to a stranger. Baijnath is married to the sister of the plaintiff, and Lachhmi Narain is a *samdhi* of Baijnath. Parmeshardin is interested in upholding his own management, the disruption of which is threatened by the lease granted by *Musammat* Sukhdei to defendant No. 2. Parmeshardin had no independent means when he came to live with his sister's husband, and *Musammat* Ram Kuar admits that she got Parmeshardin married twice and that his wife lives with her. The evidence of separation adduced by the defendants, which is corroborated by the conduct of the parties, and the allotment of a separate parcel of land to *Musammat* Ram Kuar for her contingent expenses, is, therefore, more reliable and worthy of credit.

There is no satisfactory evidence to show that any custom existed of the kind set up by *Musammat* Sukhdei, entitling a widow to succeed to the property of her husband, even if the family was joint, or to establish that a settlement of the kind alleged took place between the parties at Malihabad after the mutation proceedings had ended. But the plaintiff has nevertheless no right after separation to claim the disputed property, to which *Musammat* Sukhdei is entitled under the Hindu Law.

The portion of the property inherited by Balbhaddar Bakhsh from his uncle, Sheo Darshan, on the death of his widow was, moreover, neither ancestral nor joint family property. The plaintiff's own witnesses admit that Sheo Darshan was living separately from his brothers and the share inherited by Balbhaddar Bahksh on the death of *Musammat* Gobinda was, therefore, obstructed heritage, which descended on his widow in the same manner as if it had been the separate property of Balbhaddar Bakhsh. *Musammat* Gobinda had in her life-time raised some money by a *zar-i-peshgi* lease of the property left by her husband. Data Ram, Suraj Bakhsh and Balbhaddar Bakhsh filed a suit to set aside that lease, claiming to be the nearest reversionary heirs of her husband. *Musammat* Gobinda died during the pendency of that suit. An application was then made to convert that suit into one for possession against the lessee. The suit was referred by the parties to the arbitration of Bednath out of Court. Bednath decided that Rs. 1,200 should be paid by the reversioners on account of the premium advanced by the lessee, and it is in evidence that half of that sum was paid by Data Ram, and the other half by *Musammat* Ram Kuar on behalf of Suraj Bakhsh and Balbhaddar Bakhsh,

who were then minors. The money was paid by borrowing, and no evidence is forthcoming to show how that debt was re-paid. The payment of a joint liability out of joint funds would not, however, make the property on which that debt is charged a joint acquisition. Suraj Bakhsh continued to collect the profits of the entire estate after his separation because he was the *lambardar*, and there is nothing to indicate that Balbhaddar Bakhsh did anything to merge the share inherited by him from his separated uncle in the common stock.

It is unnecessary, under the circumstances, to consider whether if the family had been joint the plaintiff would have been entitled to claim the share which devolved on Balbhaddar Bakhsh as an obstructed heritage from his uncle, but in view of the finding of my learned colleague, it might perhaps be desirable to state briefly what I consider to be the precise effect of the decision of their Lordships of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4). That was a case in which an undivided brother sought to recover by survivorship the half share inherited by his deceased brother from their common maternal grandfather. Their maternal grandfather had only one daughter, who was the mother of two boys. There was no other male member in the joint family. Their Lordships repelled the view that the doctrine of survivorship was limited to cases of unobstructed inheritance, and treating the property inherited by the two brothers from their maternal grandfather as ancestral or joint family property held that it was governed by the rule of survivorship.

That rule cannot, however, be extended to cases of collateral succession, because the property inherited from separated collaterals cannot be treated as ancestral or joint family property. The Mitakshara draws a distinction between obstructed and unobstructed heritage, that is, between the property of a father or paternal grandfather which becomes the property of his sons and grandsons by right of their being his sons and grandsons respectively and that devolving on paternal uncles, brothers and the like, upon the death of the owner and in default of male issue, the existence of a son and the survival of the owner being impediments to the succession (Mitakshara, Chapter I, section 1, paragraph 3), and as observed by their Lordships of the Privy Council in *Atar Singh* v *Thakar Singh* (14) unless the property comes by descent from a lineal ancestor in the male line, it cannot be deemed ancestral in the Hindu Law.

It cannot similarly be treated as joint family property, because according to the true notion of an undivided family in Hindu Law, as pointed out in *Appovier* v. *Rama Subba Aiyan* (15), no individual member of that family can predicate of the joint and undivided property that he has a certain definite share therein. Can it be said in regard to the property inherited from separated collaterals that none of the persons inheriting it can predicate that he has a certain definite share therein? If not, then the mere accident of two or more persons living together inheriting it in defined shares in their individual rights would not make it joint family property, any more than a purchase of a property by one or more members from separate funds would give the other members of the joint family a right to share therein. According to the Mitakshara, whatever is acquired by a member without detriment to the paternal estate is his self-acquired property, in which his co-parceners have no interest (Mitakshara, Chapter I, section 4, paragraph 1); and following that principle, their Lordships of the Privy Council have held in *Katama Natchiar* v. *Rajah of Shivagunga* (2) that even in a joint family the separate property of a member devolves on his widow, if he leaves no male issue. There is no distinction in principle between separately acquired property, and property separately inherited by two or more members of a joint family.

The writers of the Mitakshara School do not speak of any rule of survivorship independently of the doctrine of the right by birth in the paternal and grandpaternal estate [*paitrike paitamahe dravye*, loosely translated

(14) 6 Ind. Cas. 721; 35 I. A. 206 at p. 211; 18 M.L.J. 379; 12 C.W.N. 1049; 8 C.L. J. 359; 35 C. 1039 (P. C.); 10 Bom. L. R. 790; 4 M. L. T. 207; 128 P. W. R. 1908; 42 P. R. 1910

(15) 11 M. I. A. 75; 8 W. R. 1 (P. C.); 1 Suth. P. C J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

by Colebrook as paternal and ancestral estate (Mitakshara, Chapter I, section 1 paragraph 27)], and in the acquisitions made at the expense of the paternal stock, and of the right of sons to represent their fathers irrespective of the dates and order of their deaths. The term "rule of survivorship" has been invented by the writers of English text-books on Hindu Law as a convenient method of expressing the effect of the doctrines discussed in the Mitakshara. It has been applied to separate property thrown by a co-parcener into the common hotchpot, on the principle that such an act operates as a surrender of gift and makes the property accrete to the family. It has similarly been applied to the self-acquired property of a person when it devolves on his death on his sons, because as pointed out in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) property which in the hands of his grandfather was separately acquired property becomes in the hands of his father ancestral property in which his grandsons acquire an interest by birth. The rule of survivorship which is applicable to a joint family is not, however, the rule of survivorship which is applicable to co-widows and daughters, because the former is a corollary of the doctrine of the right by birth and accretion, while the latter is a corollary of what might be called the doctrine of life-estates (Mitakshara, Chapter II, section 1, clause 2) whereby male reversioners are excluded or postponed until the previous class of female heirs or intervening life-estate holders is completely exhausted. But where the daughters take an absolute estate, as in Bombay, the rule of survivorship does not apply, though the daughters may be married to brothers living jointly—*Vithappa Kasha Hegde* v. *Savitri Gavap Bhatta* (16).

In *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) what was decided by their Lordships of the Privy Council was that there was no warrant for a general rule that the doctrine of survivorship was limited to cases of unobstructed heritage. They pointed out that, although persons who succeeded to joint family property took jointly if their inheritance was unobstructed, yet the proposition that in cases of obstructed inheritance those who succeeded took as tenants-in-common and not as joint tenants was "by no means universally true." They considered that the decisions in *Jasoda Koer* v. *Sheo Pershad Singh* (1) and *Saminadha Pillai* v. *Thangathanni* (3), so far as they were based on that proposition, were open to objection. But they nowhere said that that proposition was universally untrue. They referred to the rule of partition as determining the right to take by survivorship, but the context shows that they were referring to the rule of partition which was an incident of joint family property, and not to the rule of partition which was an incident of almost every joint ownership. It is true that there is no right to take by survivorship where there is no right to partition, but to assert the converse that there is a right to take by survivorship wherever there is a right to partition would hardly be correct. A right to partition might exist as much in the case of a joint tenancy as in the case of a tenancy-in-common. In a case of obstructed inheritance, the heir inheriting has no community of interests or unity of possession with the deceased, and as pointed out in *Bai Parson* v. *Bai Somli* (17), the basic principle of a co-parcenary with the deceased is essentially absent with reference to the right to inherit. A judgment, as stated by Lord Halsbury in *Quinn* v. *Leathem* (18), is an authority for what it decides, but not for what may seem logically to follow from it. "Every judgment," said he, "must be read as applicable to the particular facts proved,.....since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case, in which such expressions are to be found." In *G. and C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (19), Haldane, L. C., in discussing the binding force of previous decisions, unless the facts were indistinguishable, observed:—"To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming

(16) 7 Ind. Cas. 445; 34 B. 510; 12 Bom. L. R. 487.

(17) 15 Ind. Cas. 774; 36 B. 424 at p. 432; 14 Bom. L. R. 400.

(18) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(19) (1914) A. C. 25 at p. 40; 58 S. J. 97; 30 T. L. R. 114; 83 L. J. Ch. 79; 109 L. T. 802.

unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in a system where the paramount authority is that of a Code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account." What is then the principle, which the decision in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) lays down? It declares that there might be cases of obstructed inheritance to which the rule of survivorship would apply, and one of such cases is that in which the sons of a daughter, living jointly, inherit the estate of their maternal grandfather. In *Katama Natchiar* v. *Rajah of Shivagunga* (2) their Lordships of the Privy Council recognised the principle that in one and the same family different rules may govern the succession to the estate of a deceased person according to the nature of the properties comprised in it, whether it be joint or separate.

The distinction between ancestral and self-acquired property on the one hand and self-acquired and separate property on the other is well marked, and the authorities in India are agreed that the property inherited from collaterals follows the incidents of self-acquired property (Jolly's Tagore Law Lectures, 1883, page 121; Mayne's Hindu Law, 8th Edition, page 350; Buhler's Hindu Law, Volume II, page 715; Siromani's Hindu Law, 2nd Edition, page 220; and Trevelyan's Hindu Law, pages 234 and 235). The effect of the decision of their Lordships of the Privy Council in *Vankayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) has been discussed by some of the writers on Hindu Law (Golap Chandra Sarkar's Hindu Law, 4th Edition, page 189, and Ghose's Hindu Law, 2nd Edition, page 375), and the trend of decisions in this country has been to treat the operation of the rule, laid down in the above decision, as confined to the circumstances of the particular case which their Lordships of the Privy Council were then considering. In *Jamna Prasad* v. *Ram Partap* (10), Banerji and Aikman, JJ., pointed out the mistake made by Colebrook in translating the word *paitamahe* as ancestral, whereas it referred to the grandpaternal estate, and in *Gurumurthi Reddi* v. *Gurammal* (11), a Full Bench of the Madras High Court held that the judgment of their Lordships of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu* (4) should not be taken to imply that the property inherited by a person from a collateral relation, such as a brother or an uncle, was subject to the incidents of ancestral property, devolving by right of survivorship on the other members of the joint family [see also *Karuppai Nachiar* v. *Sankaranarayanan Chetty* (5)]. The same view was taken by the Calcutta High Court in *Harihar Pershad* v. *Bholi Pershad* (20). In *Bai Rukhmani* v. *Keshavlal Ranchhod* (12), the observation of their Lordships of the Privy Council that it was the right to partition which determined the right to take by survivorship, was treated as an exposition of the law confined to the facts of the case in which the observation occurred, and in the absence of a clear indication that their Lordships intended to apply the rule of survivorship to each and every case of obstructed inheritance where the property was inherited by two or more members of a joint family, the distinction hitherto recognised between the methods of devolution of separate property, whether acquired by purchase or inherited from collaterals, as distinct from ancestral or joint family property, cannot be ignored.

The widow of Balbhaddar Bakhsh is, therefore, in any event entitled to the property inherited by her husband on the death of *Musammat* Gobinda.

I would, therefore, allow the appeal of *Musammat* Sukhdei and Janardan Das with costs here and below and dismiss that of the plaintiff with costs throughout.

BY THE COURT.—As the members of this Bench are unable to arrive at an agreement with regard to the decision of Appeals Nos. 34, 36 and 30, and there is no majority which concurs in a judgment varying or

(20) 6 C. L. J. 383.

reversing the decrees appealed from in those appeals, the decrees so appealed from are confirmed under the provisions of section 98 of Act V of 1908, and the appeals are dismissed.

The difference of opinion with regard to the decision of Appeals Nos. 34 and 36 is on a point of fact. One member of the Bench holds, agreeing with the learned Subordinate Judge, that the evidence justifies a finding that Suraj Bakhsh and Balbhaddar Bakhsh remained members of a joint family until the death of Balbhaddar Bakhsh. The other member of the Bench considers that the evidence justifies a finding that Balbhaddar Bakhsh had separated from Suraj Bakhsh some time before his death. With regard to the decision of these two appeals there is no difference upon a point of law and there is nothing that can be referred to a third Judge. The members of the Bench differ further on a point of law with regard to the matters raised in Appeal No. 30. One member of the Bench considers that the property inherited from Sheo Darshan by Suraj Bakhsh and Balbhaddar Bakhsh was property to which the doctrine of survivorship applies, and the other member holds a contrary opinion. The point on which they differ is a point which under the provisions of section 98 can be referred to the third Judge of the Court. But no advantage can be gained by making such a reference. If the third Judge agrees with the member of the Bench who holds that the property is not property to which the doctrine of survivorship applies, the appeal will be dismissed. But it must be dismissed in any event owing to the circumstance that the Judges composing the Bench do not concur on a point of fact in a judgment varying or reversing the decree appealed from in Appeal No. 30. The Judge who would dismiss it on a point of law would also dismiss it on a point of fact, for he holds that Balbhaddar Bakhsh separated from Suraj Bakhsh and the effect of this finding of fact would prevent the appeal being allowed in any circumstances. Thus, if the third Judge found on the point of law that the property inherited from Sheo Darshan was property to which the doctrine of survivorship applies, the appeal could not be allowed on that finding, as there would be no majority on a point of fact (on which the third Judge could not express an opinion) which would justify reversing the decree appealed from. No reference on the point of law will accordingly be made, as such reference will serve no useful purpose with regard to the decision of Appeal No. 30.

The three appeals are accordingly dismissed. In each case the appellant will pay his or her own costs and those of the contesting respondent or respondents.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1223 OF 1914.

May 10, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge.

ARJAN SINGH—PLAINTIFF—APPELLANT

*versus*

DARBARA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Adoption—Evidence—Statements in other cases, admissibility of—Admission of adoption by widow in favour of daughter's son, effect of—Admission of adoption by illiterate person, weight of.*

An Appellate Court can rely upon statements made in a separate case and admissible in evidence, although not brought on the record of the case before it, when the record containing the statements was in the original Court and was referred to in the judgment of that Court. [p. 313, col. 2.]

The use of the words 'adopted son' by an illiterate villager in statements made by him does not bind him when by his conduct and other statements it appears that he did not regard the person in respect of whom the words were used as his appointed heir. [p. 313, col. 2; p. 314, col. 1.]

Findings of fact in a case as to the factum or validity of adoption are not evidence against persons who were not parties to the case in which the findings were given. [p. 314, col. 1.]

The admission by a widow of the adoption of her daughter's son by the widow's husband is of little value to establish the adoption. [p. 314, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Gurdaspur, dated the 27th February 1914, affirming that of the Subordinate Judge, Second Class, Gurdaspur, dated the 30th April 1912, dismissing the claim.

ARJAN SINGH v. DARBARA SINGH.

Mr. *Santanam*, for the Appellant.

Mr. *Abdur Rashid*, for the Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—In this case Arjan Singh, alleging himself to be the adopted son of one Karam Singh, brought two suits against certain defendants for possession of land, on the ground that the alienations to those defendants by Karam Singh were without consideration or necessity and that he (Arjan Singh) as the adopted son had a right to contest those alienations. A large number of pleas were put in and in one suit 11 issues were drawn up and in the other 12. In the present case, however, it will be sufficient if we consider only issue No. 4, "Is plaintiff the adopted son of Karam Singh?" Both the Courts have held to the contrary, *i. e.*, they have both held that such an adoption would be invalid as being an adoption of a daughter's son and they have also held that no real adoption took place at all.

This is a second appeal and had the lower Appellate Court avoided irregularity in its proceedings, the appeal would never have been admitted at all inasmuch as the vital issue aforesaid had been decided against the plaintiff as a question of fact pure and simple; but the lower Appellate Court was guilty of irregularity as, in finding itself short of time in the course of the arguments of the defendants-respondents, it gave a fresh date and directed the respondents to put in written arguments. Then by some mistake the lower Appellate Court proceeded to judgment upon the respondents' arguments before it received the plaintiff's arguments *per contra*. It is strongly urged in the grounds of appeal to this Court that the learned Divisional Judge by acting in this way has failed to appreciate a good deal of the evidence on the record which told in favour of plaintiff; and, therefore, it is necessary for this Court to consider the whole record. It is optional for this Court to remand the appeal to the lower Appellate Court for re-decision after hearing the arguments, or itself to hear the arguments and decide the case. In my opinion the more convenient way is the latter. I, therefore, proceed to dispose of this question of fact on the merits. It is unnecessary to repeat what the lower Courts have said on the question. It will be sufficient if I note what pieces of evidence not noticed by the lower Appellate Court and supposed to be favourable to the plaintiff his Counsel has been able to point out, and then to proceed to see what the correct decision should have been.

The *first* objection taken by Mr. Santanam is that the statements of the 26th of April 1895 and the 8th of May 1895 in Ganga Singh's *lambardari* case, on which reliance has been placed by the lower Appellate Court, were never properly brought on the record of this case. It seems to me that this is incorrect. These records were in the first Court and referred to in the judgment of that Court and both the Courts were justified in looking at those statements which are, as the learned Divisional Judge has pointed out, strongly in favour of the defendants.

*Next*, Mr. Santanam attempts to argue that Karam Singh was of unsound mind and that he never executed the alienations at all. I am wholly unable to find any mention of this sort of thing in the plaint and pleadings of the first Court, nor was any issue drawn of this kind. The extreme length which plaintiff went was this that the alienation was *farzi* and *bila badal*, phrases which simply mean that the transactions were not ordinary prudent business transactions for adequate consideration.

*Again*, Mr. Santanam refers to Karam Singh's statement of 22nd of October 1895, whereby he wishes to argue that Karam Singh never intended to intimate that he had not adopted Arjan Singh but merely that he did not want mutation of the land made in Arjan Singh's favour during his life-time. But it seems to me that all arguments of this kind are rendered non-effective by the undoubted fact that more than once Karam Singh expressly said that after his own death his *widow* must have the land before Arjan Singh. He no doubt wanted his daughter's son ultimately to succeed; but it seems to me quite clear that the mention of his widow as being preferred to Arjan Singh shows that he did not in effect intend to adopt Arjan Singh. An ignorant man like Karam Singh may use the word *mutbanna* a thousand

times and yet show by a remark of this kind regarding his widow that he did not really intend to *adopt* in the proper sense of the word. Next Mr. Santanam points to the *patwari's roznamcha* of 1889 and to a statement of Karam Singh in the presence of collaterals on the 15th of August 1894 that Arjan Singh had been adopted by Karam Singh. These instances also are fully discounted by the remarks made above.

*Further*, reliance is placed by Mr. Santanam on a judgment, dated the 3rd of August 1910, by the Divisional Court, Amritsar, in Civil Appeal No. 347 of 1910, between Lachhman Singh and Arjan Singh in which there is a finding that Arjan Singh was the adopted son of Karam Singh. Lachman Singh is no party to the present case and I am wholly unable to see how that finding can have any relevancy here. When asked under what section of the Indian Evidence Act the judgment is relevant, Mr. Santanam points to section 43 coupled with section 11, but I am quite unable to see how the circumstance that the factum of the adoption of Arjan Singh was in that case found proved, makes it in the proper sense of the phrase "highly probable" that Arjan Singh really was adopted by Karam Singh. It is contrary to all the principles of evidence that a party should find held up against him in Court a decision in a case in which he had no part.

*Lastly*, Mr. Santanam says that *Musammat* Bhagbhari, widow of Karam Singh, admits the adoption of Arjan Singh and says that her own possession is permissive. No argument is necessary to show how utterly valueless an admission of this kind on her part is. Arjan Singh is her daughter's son, and, of course, she wants to defeat the collaterals or the alienees, as the case may be, and, therefore, no weight whatever can be attached to her statement.

On the whole, then, looking at the whole of the evidence as discussed in the judgments of the lower Courts and those pieces of evidence upon which special reliance is placed by Mr. Santanam, my opinion is that the adoption is not proved, in fact my strong opinion is that Karam Singh never adopted Arjan Singh at all. Therefore the appeals are dismissed with costs.

*Appeal dismissed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 428 OF 1913.

July 6, 1915.

*Present*:—Mr. Stuart, A. J. C.

MIRZA YAR ALI BEG—PLAINTIFF—APPELLANT

*versus*

*Mir* DANISH ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act* (*IX of* 1908), *Sch. I, Art.* 134, *applicability of.*

Article 134, Schedule I, of the Limitation Act has no effect where a mortgagee transfers his rights as such, but has effect only where he purports to transfer proprietary rights. [p. 314, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 30th June 1913, upholding that of the Munsif, Fatehpur, dated 28th February 1913.

Syed *Zahur Ahmed*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Bisheshwar Nath Srivastava*, for Respondents Nos. 1 to 4.

JUDGMENT.—This is a suit for redemption of certain property which, the plaintiff stated, had been mortgaged with possession by his alleged father Mirza Qurban Ali Beg. The Courts below dismissed the suit on two grounds. The *first* ground was that the property transferred by this deed of mortgage had been subsequently transferred by the mortgagee for valuable consideration on the 24th March 1888 and that the suit was thus barred by the provisions of Article 134 of the 1st Schedule, Act IX of 1908. The *second* point was that the plaintiff was not the son of the mortgagor, and that he was not his successor-in-interest.

With regard to the *first* point the learned Counsel for the appellant has pointed out rightly that Article 134 would have no effect in event of an assignment of the mortgagee's rights and would only have effect if the mortgagee had purported to transfer proprietary rights. The deed of transfer is on the record. It is a deed of sale, dated 24th March 1888, by Ramzan Ali, the mortgagee, in favour of Wajid Ali. It affects 6 *bighas kham* which was the area originally mortgaged. There has been some discussion in this Court as to the interpreta-

tion of the terms of the deed. I find that the terms of the deed are to the effect that the transferor purports to transfer proprietary rights. He asserts that he is the mortgagee of the 6 *bighas kham* in question, and that the mortgagor has given him a further right of proprietorship. He sets up a title as mortgagee and a title as transferee by gift to the right of equity of redemption. He thus sets up a title as owner, and it is the title as owner which he transferred to Wajid Ali. This is thus a transfer of proprietary rights by a mortgagee for valuable consideration, and Article 134 has force, and the suit is time-barred.

With regard to the *second* point, the decision of the Courts below to the effect that the plaintiff-appellant is not the successor-in-interest of the original mortgagor is on the face of it a decision on a point of fact. The learned Counsel for the appellant has, however, suggested that his client has been prejudiced by an improper refusal to allow him to produce evidence that he had a legal right to produce. I have gone into the proceedings and I am satisfied that the learned Munsif did not refuse to allow the plaintiff to do anything that he was legally entitled to do. The learned Munsif appears to have exercised exceptional leniency towards the plaintiff-appellant, and if his action with regard to the admission of evidence were to be criticised, it might be possible to record upon it the finding that he allowed the plaintiff-appellant to do a great deal more than he was legally entitled to do. The plaintiff-appellant so far from having a grievance appears to me to have received unmerited indulgence in his conduct of the case. Therefore, I see no reason to decide that the finding of the Courts below on this point of fact has been improperly arrived at.

One small point remains. The learned Counsel on both sides agree that a sum of Rs. 26 has been awarded to the contesting respondents as costs in excess. The amount of costs of the Munsif's Court will accordingly be reduced by Rs. 26.

Subject to this modification the appeal is dismissed. As the appellant has failed upon practically every point and has only succeeded upon a trifling and unimportant point, I direct that he pay his own costs of this appeal and those of the contesting respondents.

*Appeal dismissed.*

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## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 580 OF 1910.

May 5, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Leslie Jones.

BUDHU RAM AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MUHAMMAD DIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Custom—Alienation by father—Succession—Hindu Law—Mitakshara—Adoption of custom in some matters, effect of—Ancestral property—Property acquired as income of ancestral property—Presumption—Right to succeed with father in estate of grandfather—Special custom, proof of.*

The *Aroras* of *Mauza* Vidor, Dera Ghazi Khan District, are generally governed by Hindu Law, but they have adopted the rule observed by their agricultural neighbours which gives a father the ordinary estate for life enjoyed by an agricultural proprietor in the Province, but it is not proved that they have still further departed from Hindu Law by adopting any other agricultural custom or ideas and in particular it is not proved that a father has the power to disinherit any of his sons in respect of ancestral property. [p. 318, col. 2.]

Property acquired from the income of ancestral property is ancestral property according to Hindu Law. [p. 319, col. 1]

Where a Hindu governed by the Mitakshara system is found in possession of immoveable property, of which a part is ancestral, the presumption is that the other part is either ancestral property or was acquired from the proceeds of the ancestral property in his possession. [p. 319, col. 2.]

Among *Aroras* of *Mauza* Vidor a claim by a grandson to succeed to a share in the property of his grandfather along with his father is untenable. [p. 320, col. 1.]

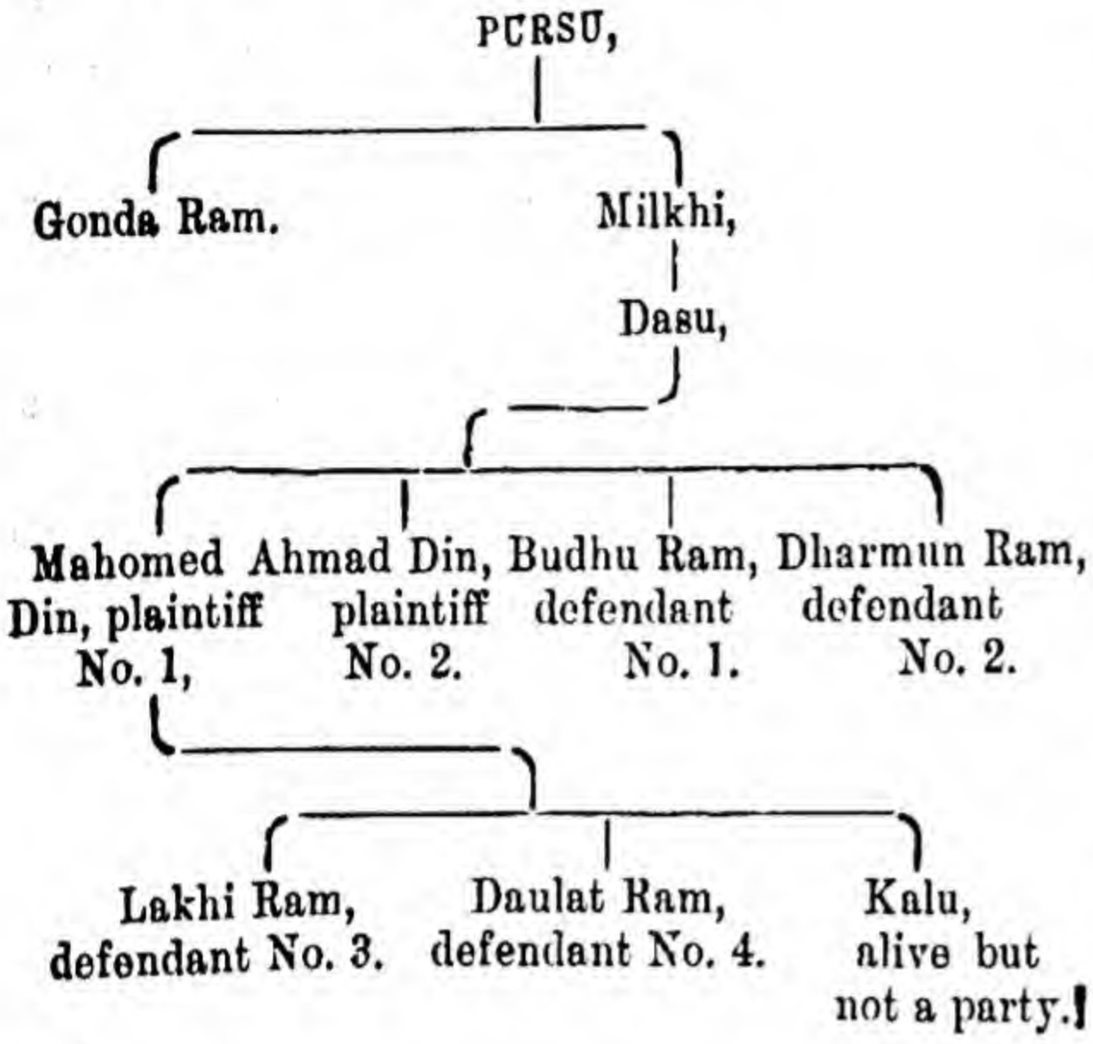
First appeal from the decree of the Court of the District Judge, Dera Ghazi Khan, dated the 26th March 1913, decreeing plaintiffs' claim.

Mehta *Bahadur Chand*, for the Hon'ble Mr. *Shadi Lal*, R. B., for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., Mr. *Badr-ud-din Kureshi*, for Mr. *Harris*, and Pir *Taj Din*, for Mr. *Jalal-ud-din*, for the Respondents.

JUDGMENT.—The parties are *Aroras* residing in *Mauza* Vidor in the Dera Ghazi

Khan District and the following table gives their relationship *inter se*.




Gonda Ram left several descendants, but in this suit we are concerned merely with the property left by Dasu, the father of the plaintiffs and defendants Nos. 1 and 2, and grandfather of defendants Nos. 3 and 4. The present suit was instituted on the 8th August 1908 and the plaint as amended runs as follows:—

"1. Dasu Ram, caste Kautror, resident of Vidor, was the father of the plaintiffs and the defendants Nos. 1 and 2 and grandfather of defendants Nos. 3 and 4. Defendants Nos. 3 and 4 are the sons of plaintiff No. 1.

2. On the 3rd September 1903 Dasu Ram died leaving his four sons, namely, the plaintiffs and defendants Nos. 1 and 2 as his successors.

3. Dasu Ram died, leaving behind him his large ancestral property consisting of houses and land, owned, mortgaged, sub-mortgaged, and free from mortgage, the debts due to him, and the moveable property.

4. More than 22 years ago plaintiff No. 2 embraced Islam in the life-time of Dasu Ram, and took his residence in a separate house from him on account of his changing religion. On the 8th February 1893 Dasu Ram, in order to avoid future disputes, executed a Will by which he maintained the rights of inheritance of plaintiff No. 2 in the entire property and agreed to construct new houses for him in lieu of the share of the house occupied by him (as shown in list No. 2) with his (plaintiff No. 2's) consent. Accordingly, Dasu Ram had the house (as entered in list No. 2, attached to the petition of plaint) constructed for him.

5. In 1895 plaintiff No. 1 also turned a Musalman. But Dasu Ram did not object even to plaintiff No. 2's (1's) right of inheritance nor could he do so, as the property was ancestral. On the other hand, he continued to give maintenance of every sort to both the plaintiffs. But the defendants were displeased with them on account of their changing religion.

6. In 1903 Dasu Ram, who was very old and was not in possession of his right senses being 95 years of age, became seriously ill and remained ill for a considerable time. The defendants attended him during his illness and exercised influence of every sort over him.

7. The defendants having taken undue advantage (of Dasu Ram's illness) and having colluded with one another, secured an unregistered fictitious Will from him (while he was senseless) by exercise of undue pressure on the 2nd September 1903, *i. e.*, one day before his death, in order to unlawfully deprive the plaintiffs of the inheritance. In fact Dasu Ram did not execute this Will, and as the property was ancestral he had no right to deprive the plaintiffs of the inheritance. Thus, for the above reasons the Will dated the 2nd September 1903 is null and void, and the plaintiffs are not bound by it.

8. After the death of Dasu Ram the defendants forcibly took possession of the house and landed property, as entered in part (*a*) of the claim, as well as the papers relating to debts due to him and cattle, as shown in part (*a*) of the claim. They do not deliver possession of half share of the said property and also deny the right of the plaintiffs to half share of the estate mentioned above, as entered in part (*b*) of the claim, as well as their right of the ownership of the houses, entered in list No. 2, held by them and built by Dasu Ram for them in lieu of the houses (entered in list No. 3) occupied by the defendants. The plaintiffs, therefore, pray that a decree for possession of half share of the estate, entered in part (*a*) of the claim and for declaration of rights, in respect of the property entered in part (*b*) of the claim and also for declaration of rights in respect of the entire houses entered in part (*c*) of

the claim may be passed in their favour. If the defendants agree to give possession of half share of the houses (as shown in list No. 3 attached) occupied by them to the plaintiffs, they can take possession of the house (as shown in list No. 2) occupied by the plaintiffs. The plaintiffs are prepared to give half share of the lands (as entered in list No. 2) occupied by them to the defendants, in case the latter (defendants) should deliver possession of one-half share of the remaining property in question to the former (plaintiffs)."

Defendants filed a joint written statement in reply to the plaint and in it raised a number of pleas that are not now material (see pages 290-293). The District Judge's summary of their pleas is given at the top of page 330 and fairly represents the gist of their answers to the plaintiffs' claim. Upon these pleadings, the following issues were framed:

1. Whether Dasu Ram executed a Will, dated 2nd September 1903, without exercise of force or fraud, in full possession of his senses?

2. Whether the property in suit was ancestral or acquired from the income of ancestral property; and, if so, to what extent?

3. Whether parties are bound by Hindu Law or by custom?

4. In either case, whether ancestral or self-acquired, whether Dasu had power to alienate it without the consent of all his sons?

5. Whether plaintiffs are estopped from suing by their conduct?

6. If (4) be proved, whether the alienation of 19th September 1902 was fictitious and whether Dasu Ram remained in possession up to his death?

The trial was somewhat protracted, but on the 26th March 1910 the District Judge delivered judgment in plaintiffs' favour and decreed their suits with costs. His findings on the issues were as follows:—

(1). *Issue No.* 1—That in executing the Will of the 2nd September 1903, the testator, Dasu, had not a disposing mind, his mental capacity being affected by reason of age, illness, and bodily disease, was not a free agent and had no intention to deprive plaintiffs, or either of them, of rights of inheritance;

(2) *Issue No.* 2—That the property left by Dasu was either ancestral or acquired from the income of ancestral property and as such ancestral for the purposes of the present suit;

(3) *Issue No.* 3—That Dasu was governed by the rules of Hindu Law and not by those of agricultural custom;

(4) *Issue No.* 4—That it was admitted that if the property was ancestral, it could not be alienated by Dasu to the prejudice of plaintiffs;

(5) *Issue No.* 5—That no estoppel had been established;

(6) *Issue No.* 6—That the gift of 19th September 1902 of $\frac{3}{4}$ths of the land in *Mauza* Vidor by Dasu in favour of defendant No. 3 was intended to be merely nominal and that Dasu continued to act as owner of the said land up to the date of his death.

Defendants have appealed to this Court from the decree of the District Judge and their grounds of appeal are set forth at page 362. In view of a very belated argument addressed to us, to which we shall presently refer, it is necessary to keep in mind the fact that defendants in those grounds do not allege that even upon the findings of the District Judge, the decree passed by the District Judge is erroneous from the point of view of strict Hindu Law. The first two questions as argued before us were (1) whether the land in suit is ancestral or acquired property; and (2) whether Dasu was governed by Hindu Law or by custom. As an afterthought, Mr. Bahadur Chand argued that even if both these questions were answered adversely to his clients, plaintiffs could not claim more than their respective shares as ascertained at the time when (some time about 1886) Ahamad Din, plaintiff No. 2, became a convert to Muhammadanism and thereby caused a disruption of the joint Hindu family as it previously existed and that in any event plaintiff No. 1 was not entitled, in the presence of his sons (defendants Nos. 3 and 4 and Kalu), to more than $\frac{1}{4}$th of the share (itself $\frac{1}{4}$th) which would have fallen to him had the family continued joint and undivided up to the date of Dasu's death.

These ingenious contentions were not urged in the Court below, nor are they covered

by any of the grounds of appeal, and on that ground alone should, we think, be ruled out of consideration at this late stage. Obviously if we had to consider them, a further lengthy inquiry would be necessary (probably entailing great expense and delay and resulting infructuously) inorder to ascertain, if possible what the exact shares of the various members of the family would have been in the year 1886 when Ahmad Din became a Mussalman. In view, however, of the way in which we look at this case, we do not find it necessary to protract still further a litigation that has been going on now for about seven years and has obviously not tended to allay embittered feelings between not only brothers but also a father and his sons. The parties, as we have remarked above, are *Aroras* and in the ordinary way would be presumed to be governed in all matters connected with alienation of land and succession to property by the principles of Hindu Law. On the other hand they have for sometime past been living in a village surrounded by members of an agricultural tribe and it may well be that in some respects they have assimilated their Hindu ideas to the customs of their neighbours. We have now to see how far it is established that they have adopted such customs and in order to decide this point, we are on safe ground when we confine ourselves to the actual and admitted facts. We start then with the hypothesis that the succession to Dasu's property will depend on the law (in which term is included custom) to which Dasu was subject. As a Hindu *Arora* he would presumably be governed by Hindu Law but it is, of course, open to defendants to show that in particular matters he and the other *Aroras* of *Mauza* Vidor had adopted customary rules obtaining among their neighbours, and if this is established, it is to the latter rules and not to the Hindu Law that we must look when a question relating to any such particular matter has to be decided. On the other hand, we must take it that if it is not proved that Dasu and members of his tribe living in the village (or possibly even in other villages in the district) observed a rule of customary law in respect of a particular matter, that as regards that particular matter he and they must be held bound by the principles of their personal law, in their case Hindu Law [See *Daya Ram* v. *Sohel Singh* (1)]. Now keeping these principles in mind, we find that the position of Dasu, as the present owner in possession of property, was very far from being that of the strict Hindu governed by the Mitakshara Law. It is admitted now, and has been fully proved, that a considerable part of the property in Dasu's possession was ancestral, and, therefore, to the extent of this property, at all events, defendants (if not plaintiffs) would have been co-sharers with Dasu and have had vested interest in it. But judging by the pleadings of both plaintiffs and defendants, it is common ground that Dasu during his life-time was in sole ownership of the property as a whole, including that part of it that is admittedly ancestral and it is nowhere suggested by either party that Dasu was merely the managing member of the family or that any of his sons or grandsons had vested interests in the property. In these circumstances we are fairly entitled to assume that the parties' family has so far departed from the tenets of Hindu Law as to adopt the customary rule that a father in his life-time is the owner of the property, with such limits to his rights of ownership as custom may prescribe. To this extent we accept defendants' contentions. But they ask us to go still further and to hold that the family has not only adopted that rule of customary law, a rule which is of almost universal prevalence among agricultural tribes, but has also adopted the very unusual rule which sometimes, though rarely, obtains among agricultural tribes and gives a father the right either to disinherit a son from succession to ancestral property or, at all events, to distribute such property unequally among his sons. As to this we are unable to agree with Mr. Bahadur Chand that defendants have proved their case. The *riwaj-i-am* upon which they rely (see pages 221-223) fails to carry conviction to our minds. Propositions of a startling character are propounded in the most general terms and no details are given as to the persons responsible for the questions put to them, while the instances adduced in support of the propositions are open to the objection that, material particulars by which their value could be tested are wholly wanting. For,

(1) 110 P. R. 1906; 31 P. L. R. 1907 (F. B.); 59 P. W. R. 1907.

example, at page 221, we are not told whether Hardas Mal was an *Arora*, nor do we know whether he or Lalu Mal had any sons or whether the gifts in question were made with or without their consent. So again, at page 222, the nature of the property left by Raman Mal is not stated, and if it was acquired property, the instance is irrelevant. The like remark applies to the instance at page 223. Furthermore, had there been really relevant instances, it is hardly possible that they would have been unknown to the five witnesses called by defendants to support their cases (see pages 308-309). These witnesses practically admit that the case of a father excluding a son from a share in ancestral property is unknown, and the only instance some of them can cite (that of Paira Ram) occurred many years ago and no details are given, or apparently are known, about it.

So, again, as regards the contention that the parties have adopted the customary rule which (differing from the Hindu law) regards a property bought with the profits or income of ancestral property as acquired property [see *Haidar Khan* v. *Jahan Khan* (2); *Musammat Ishar Kuar* v. *Raja Singh* (3).]

According to the personal law of the parties such property would be ancestral property [see *Lal Bahadur* v. *Kanhaiya Lal* (4)], a proposition which is not contested. As defendants have entirely failed to prove that their family observes the rule of customary law in this particular, we must assume that the rule of Hindu Law applies and that all property purchased by Dasu from the profits or income of his ancestral property became ancestral property in his hands.

Defendants at first strictly denied that any part of the property in Dasu's hands was ancestral, but their position was hopelessly untenable and it is now conceded that all the land in *Mauza* Gadai and the two *bands* in *Mauza* Vidor Taibwala and Sanghewala are unquestionably ancestral. The question of the nature of the property is discussed at some length by the District Judge in his judgment (pages 331-332) and he gives good reasons for his conclusions that Dasu must have inherited a large landed estate; and that his entire "property was either ancestral" or acquired from the income of "ancestral property." There is the highest authority for the proposition that where a Hindu, governed by the Mitakshara system, is found in possession of immoveable property, of which a part at all events is ancestral, the presumption is that the other part either is ancestral property or was acquired from the proceeds of the nucleus of the ancestral property in his possession. As observed by their Lordships of the Privy Council in *Lal Bahadur's* case (4), "It is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was, therefore, on the respondent to prove that his subsequently acquired property was his separate estate." In the present case, as the District Judge points out, defendants have failed to prove that Dasu had sources of income apart from his ancestral property. He was a *lambardar*, but we do not know what income he derived from that office and it could not have been large, while defendants have not attempted to show that he made any considerable profit out of the business which he is alleged to have done as *Mukhtar* for one Miran Bakhsh *Machhi*. In the circumstances we do not consider that defendants have succeeded in discharging the onus that was upon them and we must accordingly hold that whatever landed property Dasu acquired (if indeed he acquired any at all), was so acquired from the proceeds of ancestral property. As such it would itself admittedly be ancestral property for the purposes and in the eye of Hindu Law and inalienable without the consent of Dasu's sons, if Dasu and his family are governed (as we hold they are) in such matters by Hindu Law. The result then of our findings is as follows:—Dasu and his family being *Aroras* are generally governed by Hindu law, but they have adopted the rule observed by their agricultural neighbours which gave the father the ordinary estate for life enjoyed by an agricultural proprietor in this province; Dasu undoubtedly so held

(2) 65 P. L. R. 1902; 50 P. R. 1902.

(3) 9 Ind. Cas. 608; 94 P. L. R. 1911; 29 P. R. 1911; 124 P. W. R. 1911.

(4) 29 A. 244 at p. 246; 9 Bom. L. R. 597; 4 A. L. J. 227; 11 C. W. N. 417; 5 C. L. J. 340; 34 I. A. 65 (P. C.); 2 M. L. T. 147; 17 M. L. J. 228.

the property and his conduct as well as that of plaintiffs and defendants prove conclusively that to this extent the principles of Hindu Law have been departed from; but defendants have not shown that their family or their tribe has still further departed from Hindu Law by adopting any other agricultural custom or ideas and in particular, they have failed to prove that Dasu had, by well-recognised custom obtaining among them, the power to disinherit any of his sons in respect of ancestral property, the entire property left by Dasu must be regarded as ancestral, and as it is not contended and could not be contended that plaintiffs by their conversion to Muhammadanism forfeited their rights in ancestral property plaintiffs are entitled to succeed thereto equally with defendants Nos. 2 and 3. As regards the claims of defendants Nos. 3 and 4, the sons of plaintiff No. 1, to succeed with their father to a $\frac{1}{4}$th share, we need say no more than that the claim fails once it is established that the family have adopted the customary rule which gives the succession to the father for his life. Just as Dasu held the property for his life though he had four sons living, so plaintiff No. 1 would be entitled to hold his share of the ancestral property for life despite the presence of his sons. As we hold that Dasu was not competent to alienate the property, we do not find it necessary to discuss the genuineness or validity of the Will or of the gift of the 19th September 1902.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 204 OF 1915.

November 2, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri.

*Sri* SRINGERI MUTT SRI JAGATHGURU CHANDRA SEKHARA BHARATHI SWAMIGAL, BY AGENT, SUBRAMANIA JOSHIER—PLAINTIFF—PETITIONER

*versus*

KOMARASAMI GOUNDAN AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 10, O. XXII, r. 4,—Application to bring on record legal representative of deceased defendant in his individual capacity, maintainability of.*

An application made to implead as parties to a suit the legal representatives of a deceased defendant (wrongly impleaded as such) in their individual capacity and not as such legal representatives is within the purview of Order I, rule 10, of the Code of Civil Procedure. The fact that such application was once made under Order XXII, rule 4, and rejected, does not bar an application made under Order I, rule 10.

*Veerappa Chetty* v. *Tindal Ponnen*, 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12, referred to.

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the District Munsif of Erode, in Interlocutory Appeal No. 1939 of 1914, in Original Suit No. 845 of 1914.

Mr. *T. M. Krishnaswami Aiyar*, for the Petitioner.

Mr. *K. S. Ganapathi Aiyar*, for the Respondents.

JUDGMENT.—The District Munsif was wrong in holding that the application, under Order I, rule 10 of the Code of Civil Procedure, is not maintainable because a previous application under Order XXII, rule 4, was rejected. It is unnecessary to decide in this petition whether the principle enunciated in *Veerappa Chetty* v. *Tindal Ponnen* (1) applies where there are more than one defendants. There is nothing to prevent the petitioner to seek to add as parties persons who claim a derivative title from a defendant already on record, where such persons are in possession and claim hostilely to the plaintiff, I do not see any grounds for refusing to add them as parties. Order I, rule 10, applies to such cases and the mere fact that they are the legal representatives of a person who died before the institution of the suit and who was wrongly impleaded as defendant does not affect the question, where they are sought to be impleaded in their individual capacity and not as legal representatives. I allow the petition and setting aside the order of the District Munsif direct that the parties named in the petition be added as defendants. They will, of course, be entitled to raise any pleas as to limitation.

The respondents will pay the petitioner's costs.

*Petition allowed.*

(1) 31 M. 86; 17 M. L. J. 551; 3 M. L. T. 12.

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 167 OF 1915.

June 21, 1915.

*Present*:—Mr. Lindsay, J. C., and Mr. Kanhaiya Lal, A. J. C.

EMPEROR—PROSECUTOR—APPELLANT

*versus*

TILAK—ACCUSED—RESPONDENT.

*Evidence Act* (*I of* 1872), *ss.* 24, 27—*Information given by accused to Police officer on threat, admissibility of—Confession, retracted, disagreeing with other evidence in case, effect of.*

The fact that a Police officer got by means of a threat an information from a prisoner as to a circumstance incriminating the latter, does not render that information inadmissible in evidence. [p. 325, col. 2.]

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. [p. 326, col. 1.]

Appeal against the order of the Sessions Judge, Sitapur, dated the 12th March 1915.

The Government Pleader, for the Crown.

Pandit *Harkaran Nath Misra*, for the Accused.

JUDGMENT.—This is an appeal by the Local Government against an order of the Sessions Judge of Sitapur by which he directed the acquittal of the respondent Tilak, a carpenter youth aged about 20 years, who was tried on a charge of having murdered a little boy, Maiku *Chamar*, on the 12th January 1915.

The deceased lad whose age was about eleven years lived in the village of Ushrafnagar with his maternal uncle Moti *Chamar*. On the day of the boy's disappearance, a Tuesday, Moti had gone off on business to another village. He returned in the afternoon and ascertained that the boy was missing. He began a search for him and went in the first instance to Niraipurwa about six miles away, where the boy's father Bhawani lives. He thought, naturally, that the child might have gone to see his father, but he found that this was not so and came back to his village in the same night. He resumed the search next day (13th January) and in the evening learnt from some *Chamar* women that they had noticed jackals and vultures coming out of an *arhar* field. The women took Moti in the field. They went in and found the corpse of the boy Maiku, which had been partly devoured by wild animals. There was a jacket on the body and an *angauchha* round the waist and near by were found the boy's cap and *pichhaura*. A *khurpa* and a basket, in which was some cut grass, were also found.

The body was identified as that of the boy Maiku and his uncle identified the basket and *khurpa* as his own property, and there can be no doubt whatever that just before the boy was put to death he had been gathering grass. The child was in the habit of wearing a pair of bangles. These articles were missing from the body when it was discovered.

After the body had been found, Moti left it in charge of some of the village people and went off to the Police station to make a report. Before he went there he had ascertained that on the day he disappeared Maiku had been in the company of two little boys, Madari *Chamar* (age 12) and Jailal or Jialal *Pasi* (age 11), and this fact was mentioned in the report which Moti made at the Police station at midnight on the 13th January. In the concluding portion of the report Moti stated that he had a strong suspicion that Maiku had been murdered by Tilak carpenter; and as a reason for that suspicion he gave the fact that he and Tilak were at enmity.

The *thanadar* being away at the time the report was received, the Head *moharrir*, Kashi Prasad, went to the scene of the crime where he arrived at four in the morning. He inspected the body and found a mark of blood on the ground at a distance of a few paces. Kashi Prasad held an inquest and sent the body away for *post mortem* examination. After this he searched the accused's house and found nothing except two *dhoties*, of which he took possession. Kashi Prasad states in his evidence that there were no bangles on the body, when he found it. The Sub-Inspector, Akbar Husain, arrived at 2 in the afternoon of the 14th January and within a couple of hours of his arrival the bangles of the deceased boy Maiku

were recovered. They were found in consequence of information given by the accused himself, who took the Police officer and a number of witnesses into a cow-house on his premises. The accused dug up the floor (with his fingers according to the statement of one witness) and produced a small box (*dibiya*). Inside this box were the bangles. As to the identity of these ornaments we have upon record the statement of a *sonar* named Chaudhri (P. W. No. 16). He swears that he had made the ornaments to the order of Puran *Chamar*, the boy's maternal grandfather, and that they were made for the boy Maiku.

The accused was taken into the custody and next day he appeared before a First Class Magistrate, P. Sri Nath Deo, to whom he made a statement. Before the statement was recorded, the Magistrate cautioned the prisoner and advised him to say nothing unless he chose to do so of his own free will. The accused then said that he had killed the boy Maiku. He said he had murdered him out of enmity on account of a quarrel he had with the boy's uncle, who had refused to pay him the full price of a plough he made. He described the manner of the murder, which he said he committed before noon. He had found the boy scraping grass and the latter had asked him to go with him. The accused explained that he was going to cut grass too. He says he refused to let the boy come, whereupon the latter gave him abuse. Accused said he then struck the boy four blows with *khurpa*. The first two he struck on the lad's chest. He gave him two more after he fell to the ground. He stated that he remained on the spot till the boy died and then he went home.

With regard to the cause of death we have the evidence of the Medical officer who made the *post mortem* examination. The body had been consumed by animals to a large extent and the witness was not able to give any definite opinion as to the cause of death. But there was an extensive fracture of the skull, five inches in length, an injury sufficient to cause death, and there can be little doubt that the boy was struck on the skull and died of the injury so received. To come now to an examination of the important evidence in the case, we shall first consider the statements of the witnesses, who were called to prove that the prisoner was with the deceased boy on the day he disappeared. Those witnesses are the two little boys, Madari and Jailal, and they both tell the same story. They say that they and the lad Madari were all grabbling grass together on the edge of a field when the accused Tilak passed by. This was in the afternoon; one of the boys says it was not long before sunset. They say that Tilak called to Maiku and asked him to come along, saying that he would find good grass for him. Maiku got up and went off with the accused and that is the last they saw of him. Both these lads admit that they said nothing about this, until after the dead body had been found. Madari says he then told Moti of this incident. Jailal says he told nobody until the *thanadar* came to the village. A woman named Jaikora was also called as a witness in this connection; but she went back on the statement she had made to the Committing Magistrate, and although she subsequently reverted to her earlier story, the Judge was of opinion, and we think rightly, that she was an unreliable witness. Her statement may be left out of account.

Some corroboration of the boys' story was given in the statement of *Musammat* Makko, the grandmother of Maiku, though her story has an uncertain note about it. She deposed first that Maiku had gone out with the two other boys to cut grass. In cross-examination she modified this statement by saying that she had not actually seen the boys start together, but that having gone out to the fields she had seen the three boys with each other.

The next lot of evidence to be considered is that relating to the recovery of the bangles in the house of the accused. In this connection we have the statement of the Sub-Inspector, a man named Sheoratan Singh, and two *ziladars*, Abdul Hai and Bashir Ahmad. These last three persons were called in by the Police to assist at the search. They all say that the accused conducted them to the spot where the

box containing the bangles was found and they all say that the accused dug up the ground with his own hands and produced the box from holes in the ground.

There is upon the record a sketch plan of the accused's house, which shows the location of the cattle-shed in which the box had been buried. The plan shows that the door of the accused's house faces north-west. The door gives access to a *sahen* or courtyard, and on the east side of this courtyard at the north-east angle of the house is this cattle-shed. Access to the shed could only be had by entering through the main door of the house crossing the courtyard. There is no other communication from outside with the cattle-shed.

With regard to the statement of the four search witnesses, it may be observed that there are certain discrepancies. They were cross-examined as to who were present at the search and upon this matter their stories do not all agree. It seems, however, quite certain that Sheoratan, Abdul Hai and Bashir Ahmad were all there: the Sub-Inspector's evidence shows that they were recorded in the Police diary as having assisted at the search.

Here it may be noticed that Bashir Ahmad deposed to the way in which the information which led to the finding of bangles was obtained. He said that the *thanadar* told the accused that there were blood stains on the *dhoti* which had already been found in the house and that Tilak had better told the truth. It was then that Tilak said the bangles were buried in the cow-shed and it was after this that accused took them to that spot and dug up the box. The evidence which we have referred to, coupled with the accused's confession which he subsequently retracted, constitute the case against the prisoner and we have now to examine the reasons which led the Judge to hold that the evidence was unreliable.

He rejects the evidence of the two little boys Madari and Jailal, on the ground that they never spoke to Moti about the accused's having called Maiku away until after the body had been found. The learned Judge was of opinion that had these children actually seen what they described in Court, they would have told Moti as soon as they began to know that Moti was searching for Maiku. We are unable to accept this criticism of the evidence of these children, whose conduct he seems to have been judging by a standard which could hardly apply. After all, their ages are twelve and eleven years respectively and they could not be expected to be like grown up men. It is hardly likely that they suspected that anything serious had happened to Maiku and so they would not realise the importance of disclosing what they knew. Or it may be, perhaps, that they may have imagined that they would in some way be blamed in connection with Maiku's disappearance and so refrained from speaking. We are unable to agree with the Judge when he says that the fact that they never spoke till after the recovery of the body is proof that their evidence was concocted.

With regard to the statement of *Musammat* Makko to the effect that she had seen the three boys together, it certainly may be said that she, at any rate, might be expected to have informed her son Moti of this fact. Makko, however, was not questioned about this when she was in the witness-box. Possibly she might have been able to explain why she did not tell Moti. She might, on the other hand, have said that she did tell Moti. We have no direct information on this point. Or, again, it may be that she did not see these boys together at all and invented the story to add weight to what was said by Madari and Jailal—a theory which is by no means remote in view of the manner in which she contradicted herself in cross-examination.

But whatever defects may be found in her statement, they cannot affect the value of the testimony of the two boys, and in this connection we may say that we are unable to find any room for the theory of concoction. The names of the lads are given in the first report which was made at midnight at the *thana* 7 miles away. The body was found on the evening of 13th January only seven or eight hours before the report was made, and it does not seem possible that in the interval between the finding of the body and the time when Moti must have left the village to give the report, a

cut and dried story could have been invented to put into the mouths of these two boys for the purpose of incriminating the prisoner. Children of such tender age are not the persons who would be selected as witnesses to support a fabricated charge of murder. We have no doubt, therefore, that Moti is telling the truth when he says that after the body had been found and before he went to the *thana*, Madari and Jailal came forward and said that they had seen Tilak take Maiku away on the previous day. And, further, we can discover no reason why the simple and straightforward story told by these boys should not be believed.

Next with regard to the evidence concerning the recovery of the bangles, we find it impossible to accept the conclusion of the Judge who seems to have formed the theory that this story was not a *bona fide* one. Apart from the statement of the Sub-Inspector, it is difficult to conceive any reason why Sheoratan, Abdul Hai and Bashir Ahmad should all conspire to give false evidence in a matter of this kind. Sheoratan appears to be a respectable man and the other two witnesses are *zilaldars* employed by the State in which Ushrafnagar is situated. To condemn their story because of unimportant discrepancies in what they say regarding the presence of other parties or as to where those other parties were at a particular moment, is manifestly absurd. People who are called in to witness a search of this kind may reasonably be supposed to have their attention concentrated upon the matter in hand. They are not likely to be staring all round them to see who is beside them or what other people are doing. Their eyes would naturally be following the movements of the accused and of nobody else.

As for the evidence of the Sub-Inspector, if tripped up in the matter of naming the search witnesses correctly or of giving the number of them, that is surely no reason for concluding that there must have been something crooked about the search proceedings. How is it possible for any Police officer to carry in his mind petty incidents of every case he has been engaged in?

Then again, the learned Judge's suspicions appear to have been roused by the fact that only four out of the eight or nine search witnesses were called, as if there were any necessity to accumulate evidence regarding this particular part of the case. And if the learned Judge desired to further investigate this matter, it was open to him to call the other witnesses who had not been produced in the Court. The conclusion arrived at by the Judge was that the circumstances attending the recovery of these bangles were so suspicious as to suggest the notion that they had been planted in the house for the purpose of implicating the prisoner. He says in his judgment that the mere fact of the finding of the bangles was not enough to incriminate the accused, but that was not suggested. The recovery of these ornaments was only one link in the chain of circumstantial evidence tendered in proof of the accused's guilt.

Let us examine the theory that the ornaments had been deposited in the accused's house by some third person.

We begin with the fact that the bangles belonged to the murdered child; there can, we think, be no doubt as to this. Then we have the fact that these ornaments were found in a box buried some six inches of the surface below the ground in a cattle-shed in the accused's house to which, as has been said, access could be had only by entry through the main door of the accused's house.

How could these ornaments have come there? We know that the boy was wearing them before his death and we also have what we believe to be reliable evidence that they were not on the body when it was found. It seems impossible that they should have been lying in the *arhar* field where the corpse was discovered, otherwise they would have been picked up along with the cap and other articles which the lad had been wearing or carrying and the only conclusion appears to be that the person who murdered the child removed the bangles and kept them in his possession.

If that person were some one other than the accused, he must have entered

the accused's house through the main door and gone into the cattle-shed to bury the bangles, not an easy thing to do, if it is remembered that the accused lives in this house with his two brothers, and why again should such a person select such a place of concealment? A pair of bangles could easily have been hidden in a field or in some other place in the village where the act of concealment would entail no risk whatever of detection. There appears then to be no foundation for the theory that a person, not the murderer of the boy, came into accused's home and deposited the bangles there. The only remaining theory other than that the accused hid the article there himself is that they were brought into the house in the course of the Police investigation, but this theory seems to be equally untenable. We have said already that we can find no reason for supposing that Sheoratan and the two *ziladars* are perjured witnesses: we must accept their statements that it was accused himself who went to the spot and dug up the box in which they were contained. This fact is altogether inconsistent with the notion that the bangles were planted surreptitiously during the Police investigation. And, again, how could any person attending the investigation get possession of these very bangles which the boy had been wearing up to the time of his death? There is absolutely nothing to show, and there is absolutely no ground for believing, that these bangles could have been picked up anywhere in the village between the time at which the body was discovered and the time they were handed over in the accused's cattle-shed. Indeed every piece of evidence we have goes to negative any such hypothesis. We are left then what seems to us the only possible conclusion, namely, that the accused himself concealed the bangles in the cow-shed and that fact we hold to be established beyond any reasonable doubt.

The learned Judge has commented on that part of the evidence which shows that the Sub-Inspector told the accused that it would be better for him to tell the truth, as the *dhoti* or *dhoties* which had been found in his house were stained with blood. And he treats this conduct on the part of the Police officer as amounting to threat, adding that the statement regarding the blood stains was untrue. Even if it be assumed that what the Police officer said to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of the bangles. Further, assuming that the Sub-Inspector did make such a statement to the accused (he was not cross-examined on this point), we are unable to agree with the Judge that what was said regarding the blood stains was a consciously false statement. The Chemical Examiner reported that the *dhoti* or *dhoties* which were sent to him showed no traces of blood, but there are many marks which might easily be taken for blood stains by an ordinary witness and a Police officer may very well have thought, in perfect good faith, that the stains he saw were stains of blood.

There remains the confession made by the accused on the 15th of January, which the learned Judge has denounced to be unreliable because it is not corroborated by the other evidence in the case and because it contains false statements regarding the manner in which the crime was committed. The confession was retracted by the prisoner when he was examined by the Committing Magistrate on the 23rd January and he declared that the Police had used threats and inducements to make him confess.

As against this story may be set the fact that when the accused was placed before the Magistrate on the 15th January, he was cautioned in language which ought to have conveyed to him in the clearest possible manner that he was running a grave risk in making a statement which would incriminate himself. He was told not to make any statement unless he were prepared to do so of his own free will. And in spite of this admonition the accused did make a statement, the very first words of which contain the unqualified admission that he took the boy's life.

We agree with the Court below that the narrative given by the accused regarding the time, place and manner of the crime is to a certain extent untrue. It is clear that the murder was committed in the *arhar* field, where the boy could not

have been scraping grass, whereas the accused's story would show that the boy was killed at the very spot where he was so engaged. And the story of the prisoner that the boy asked leave to go with him and abused him when that leave was refused appears to be quite incredible. It is pointed out too that the accused's story as to how he killed the boy does not square with the Medical evidence, but here it is to be noticed that this latter evidence was necessarily of somewhat less value by reason of the condition in which the body was found. However, although the narrative given by the accused cannot be accepted as a correct version of what took place, there still remains the admission that he murdered the boy. The confession cannot be pressed as strong evidence against the prisoner, and indeed if the other evidence is accepted as reliable, there appears to be no need to resort to the confession to establish the guilt of the accused.

And as we find that this evidence is reliable and should be accepted, we come to the conclusion that it was the accused who murdered the boy Maiku. When we have it that he was the last person seen in the boy's company and that the boy's bangles were found in the accused's house within forty-eight hours of the time of the murder in a place where no one but the accused himself could have put them, it seems to us impossible to doubt that the accused is guilty.

We have said nothing hitherto regarding the question of motive. The accused has admitted the existence of ill-feeling between him and the deceased boy's uncle arising out of a dispute which must have left the prisoner with a sense that he had been wronged: and this feeling may have prompted him to murder the boy by way of revenge. It is by no means certain that the crime was committed purely out of avarice; it may very well be that it was done out of revenge and that the accused may have taken the child's ornaments by way of compensation for the money which the uncle owed him for the making of a plough.

We allow this appeal, and finding Tilak guilty of murder, we order that he be hanged by the neck until he is dead (section 302, Indian Penal Code).

*Appeal allowed.*

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MADRAS HIGH COURT.

**FULL BENCH.**

REFERRED CASE No. 7 OF 1915.

December 2, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice,
Mr. Justice Coutts-Trotter and
Mr. Justice Seshagiri Aiyar.

THE DISTRICT JUDGE OF KISTNA—PETITIONER

*versus*

C. HANUMANULU—RESPONDENT.

*Legal Practitioners Act (XVIII of* 1879), *ss.* 13 (*f*), 14—"*Other reasonable cause*," *meaning of*—*Scope of inquiry under s.* 14.

Section 13, clause (*f*), of the Legal Practitioners Act, 1879, is not confined to cases of misconduct *ejusdem generis*, as those referred to in the preceding clauses, but includes other cases of misconduct as well. [p. 327, col. 2.]

Section 14 of the Act covers all clauses of section 13 and a subordinate Court is not precluded from taking proceedings against a legal practitioner for conduct alleged to come within clause (*f*) of section 13. [p. 327, col. 2.]

*In the matter of the petition of Golab Khan*, 7 B. L. R. 179; 16 W. R. 15 Cr., *In the matter of Purna Chunder Pal*, 27 C. 1023; 4 C. W. N. 389, distinguished.

*In the matter of Southekal Krishna Rao*, 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 11; 5 Sar. P. C. J. 96; *In the matter of the Second-Grade Pleaders*, 6 Ind Cas. 313; (1910) M. W. N. 163; 8 M. L. T. 22; 20 M. L. J. 500; 34 M. 29 at p. 34; 11 Cr. L. J. 310; *In the matter of the petition of Muhammad Abdul Hai*, 29 A. 61; A. W. N. (1906) 268; 3 A. L. J. 811; 4 Cr. L. J. 401, followed.

Case referred for the orders of the High Court under section 14 of the Legal Practitioners Act, XVIII of 1879, by the District Judge of Kistna, in his letter dated the 15th March 1915.

Mr. *C. Sidney Smith*, for Petitioner on behalf of the Pleadership Examination Board.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—In this case the District Munsif of Bezwada has taken proceedings under section 14 of the Legal Practitioners Act of 1879 against a second grade Pleader practising in his Court. The charge as framed is for contempt of Court covered by section 13 (*f*) of the Legal Practitioners Act, and a preliminary objection has been

taken that a subordinate Court is not authorized to take proceedings, under section 14 in cases which come under clause (*f*) of section 13 "for any other reasonable cause," and is confined to cases falling under clauses (*a*) and (*b*). There was some ground for this view under the corresponding sections 15 and 16 of Act XX of 1865, as the former section gave a power of suspension or dismissal for "fraudulent or other grossly improper conduct in the discharge of his professional duty or for any other reasonable cause," while the subordinate Court was only empowered to investigate charges of "such conduct as aforesaid," and accordingly it was held in *In the matter of the petition of Golab Khan* (1) that cases which did not come under "fraudulent or other grossly improper conduct in the exercise of professional duty" but under "any other reasonable cause" were not covered by section 16 of that Act. Following this decision, Hill, J., in *In the matter of Purna Chunder Pal* (2) expressed the opinion that the words in section 14 "taking instructions except as aforesaid" referred to clause (*a*) of section 13, and the words "any such misconduct as aforesaid" referred to clause (*b*) "fraudulent or grossly improper conduct in the discharge of his professional duty," and that a subordinate Court had no power to take action in cases falling within clauses (*c*), (*d*), (*e*) or (*f*) of that section. This restrictive construction is not supported by the judgment of their Lordships of the Judicial Committee in *In the matter of Southekal Krishna Rao* (3) to which Hill, J., referred, and in that case no question as to clause (*f*) of section 13 arose or was considered; and it was apparently doubted by Krishnaswami Aiyar, J., in *In the matter of the Second-Grade Pleaders* (4). Further as pointed out by Knox, J., in *In the matter of the petition of Muhammad Abdul Hai* (5), it ignores the fact that clauses (*c*), (*d*) and (*e*) were introduced into section 13 by Act XI of 1896. There is no good reason why charges under these clauses should not be investigated in the first instance by the subordinate Court and it would be very inconvenient if they could not. Their introduction into section 13 of the Act without any amendment of section 14 goes rather to show as observed by Ghose, J., in *In the matter of Purna Chunder Pal* (2) that section 14, as it stood, was deemed wide enough to cover them, and on the whole, we agree with the view of Knox, J., that section 14 covers all the clauses of section 13. We think, therefore, that the objection that the District Munsif had no jurisdiction to take proceedings against the practitioner in respect of conduct alleged to come within clause (*f*) of section 13 must be overruled.

In this view, it is not very material whether the charges should have been under clause (*b*) for "grossly improper conduct in the discharge of professional duty" rather than under clause (*f*) "for any other reasonable cause" as the facts are fully set out in the charge, and the respondent was in no way prejudiced.

Further, it is now well settled that clause (*f*) is not confined to cases of misconduct *ejusdem generis* as those referred to in the preceding clauses but includes other cases of misconduct as well, and may, therefore, well be considered to include the present case in which the alleged misconduct consisted in the Pleader's conduct towards the Court and not to the parties in the case. See *In the matter of Purna Chunder Pal* (2) and *In the matter of a Pleader* (6).

Coming now to the facts, the case arose out of a suit on a promissory note against a *zemindar*, in which the District Munsif gave the plaintiff a decree and sanctioned the prosecution of the defendant for perjury. The sanction was revoked by the District Court and the *zemindar* then sued the Pleader who had appeared for him at the hearing of the suit for damages, and also instituted proceedings against him under section 13 (*b*) of the Legal Practitioners Act for alleged grossly improper conduct in the course of his professional duty and in these proceedings the *zemindar* was represented by the respondent. On 11th December 1913 in the course of the proceedings the District Munsif insisted on putting certain questions to the respondent as the Pleader in the case, with a view of satisfying himself apparently that the proceedings were really authorised by the *zemin-*

(1) 7 B. L. R. 179; 16 W. R. 15 Cr.

(2) 27 C. 1023; 4 C. W. N. 389.

(3) 14 I. A. 154; 15 C. 152; 12 Ind. Jur. 11; 5 Sar. P. C. J. 96

(4) 6 Ind. Cas. 313; 34 M. 29 at p. 34; (1910) M. W. N. 163; 8 M. L. T. 22; 20 M. L. J. 500: 11 Cr. L. J. 310.

(5) 29 A 61; A. W. N. (1906) 268; 4 Cr. L. J. 401; 3 A. L. J. 811.

(6) 26 M. 448: 13 M. L. J. 65.

*dar*; and on the following day the respondent filed in Court the affidavit which is the subject of this reference. It fills no less than 25 folio pages of print and concludes with the statement that, as everything looked inominous (ignominious) (*sic*) for the respondent he was obliged to file it for the perusal of the High Court and that it was necessary in the interests of justice that the District Munsif should be requested not to adjudicate in the proceedings then before him against the other Pleader. It is unnecessary to say much about the contents of the affidavit, as Mr. Prakasam who appears for the respondent has very properly not attempted to justify it, and has contented himself with urging in mitigation the respondent's state of mind at the time. It refers at great length to numerous proceedings in which the respondent had appeared before the District Munsif as a litigant or a Pleader and is full of aspersions, imputations and insinuations couched in insulting language, charging the District Munsif with rancour and prejudice against the respondent and with a desire to injure him and to make common cause with political opponents in the Bezwada Municipal Council. It has not been contended before us that there was anything in the District Munsif's conduct on the Bench which could, in any way, excuse or palliate the respondent's conduct in filing the affidavit, but it was urged, in effect, that in the case of the respondent ordinary professional rivalries had been aggravated by bitter quarrels with other members of the Local Bar arising out of Municipal politics, which preyed on his mind and affected his judgment. It is bad enough that disputes of this kind should be allowed to destroy the good relations which ought to exist between members of the Bar, but it would be far worse if they were recognised as an excuse for outrageous attacks upon the Court in the exercise of its functions. Given the fullest consideration to what has been urged by Mr. Prakasam and to respondent's long standing at the Bar, we feel bound to mark our sense of his misconduct by suspending him for four months from this date from the exercise of his profession.

*Pleader suspended from practice for four months.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 52 OF 1915.

May 10, 1915.

*Present*:—Mr. Lindsay, J. C.

AJUDHIA SARAN SINGH—ACCUSED—APPLICANT

*versus*

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 476—Offence committed before one Magistrate—Succeeding Magistrate, if can order prosecution—Jurisdiction—Penal Code (Act XLV of 1860), s. 193.*

A Deputy Magistrate being of opinion that a Police officer appearing as a witness in a case before him had not told the truth, left him to the mercy of the Superintendent of Police and of the District Magistrate. The District Magistrate remarked that the Magistrate should take proceedings under section 476 of the Criminal Procedure Code. The Deputy Magistrate having been transferred the succeeding Deputy Magistrate ordered the prosecution of the Police Officer under section 193, Indian Penal Code

*Held*, that the succeeding Deputy Magistrate had no jurisdiction to initiate the proceedings under section 476 of the Criminal Procedure Code inasmuch as the offence under section 193, Indian Penal Code, was neither committed before him nor was brought to his notice in the course of any judicial proceeding. [p. 329, col. 2.]

Application against the order of the Sessions Judge, Fyzabad, dated the 3rd April 1915, upholding that of the Magistrate, Sultanpur, dated the 10th March 1915.

Mr. *A. P. Sen*, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—This application raises a question of jurisdiction in connection with certain proceedings taken under section 476 of Criminal Procedure Code in the Court of a First Class Magistrate of Sultanpur District. The facts of the case are as follows. One Raghunath Singh was put on his trial in the Court of a Magistrate named Thakur Sardar Singh on a charge under section 243 of the Indian Penal Code. Judgment in this case was delivered by Thakur Sardar Singh on the 14th of December 1914. One of the witnesses in the case was the present applicant Ajudhia Saran Singh who, it appears, is a Sub-Inspector of Police. The Magistrate seems to have been of opinion that Ajudhia Saran Singh had not told the truth or the whole of the truth in the evidence he gave in the Court, and in the concluding portion of his judgment, referring to a *chaukidar* who had behaved dishonestly in

In my opinion it was not. The matter he made the following remarks,—"Merzi *chaukidar* requires to be dismissed while I leave Babu Ajudhia Saran Singh, since he is transferred to the Railway Department, to the mercy of the Superintendent of Police and of the District Magistrate." Having made these remarks the Magistrate passed an order of acquittal. The Magistrate's record seems to have been sent to the Superintendent of Police with reference to the remarks which have just been quoted and I find that on 7th of January 1915 the Superintendent of Police sent the record to the Deputy Commissioner inquiring what action was to be taken with respect to Sub-Inspector Ajudhia Saran Singh. The District Magistrate after examining the papers returned the record to the Superintendent of Police with a note in which he stated that Ajudhia Saran Singh appeared to have been convicted of making false statements in his evidence. He added that it seemed to him to be a case in which the Magistrate should take proceedings under section 476 against Ajudhia Saran Singh. Having received this note from the District Magistrate, the Superintendent of Police on the 16th of January 1915 recorded an order directing the record to be sent to the Sub-Divisional Magistrate for information regarding Sub-Inspector Ajudhia Saran Singh. Meantime Thakur Sardar Singh who tried the case under section 243, Indian Penal Code, had been transferred and been succeeded in the office of the Sub-Divisional Magistrate by another gentleman named Saiyed Mohammad Mustafa. On the 25th of January 1915 Saiyed Mohammad Mustafa issued a notice under section 476 of the Code of Criminal Procedure upon Ajudhia Saran Singh to show cause why he should not be prosecuted for an offence under section 193 of the Indian Penal Code. In the notice which was issued it was stated that the proceedings under section 476 were being taken in compliance with an order issued by the District Magistrate. By the time fixed for the appearance of the accused Saiyed Mohammad Mustafa had ceased to exercise jurisdiction in the sub-division in question and had been succeeded by another first Class Magistrate Babu Bir Narayan Singh. Babu Bir Narayan Singh after making an inquiry passed an order on the 10th of March 1915, in which he ordered the prosecution of Ajudhia Saran Singh under section 193 of the Indian Penal Code. The applicant went to the Sessions Judge of Fyzabad complaining of this order and stated that it had been made without jurisdiction. The learned Sessions Judge dismissed the application. He thought that the Magistrate who had ordered the prosecution had jurisdiction under section 476. He was of the opinion that the mere fact that proceedings had been taken in consequence of the order or advice of the District Magistrate was immaterial inasmuch as the Magistrate before whom the offence was alleged to have been committed, that is to say, Thakur Sardar Singh had formed the opinion that the offence had been committed and would probably himself have taken action under section 476, had it not been the fact that Ajudhia Saran Singh had meanwhile been transferred to the Railway Police. As regards these last remarks of the Sessions Judge, I am unable to agree with the interpretation which he has put upon the language of Thakur Sardar Singh in the judgment by which he acquitted Raghunath of the offence under section 243 of the Indian Penal Code. On the contrary it appears to me that what Thakur Sardar Singh intended was that departmental action should be taken against the Sub-Inspector in the same way as against the *chaukidar* whose dismissal he recommended. However, the question which I have to consider here is whether these proceedings, which were initiated by the order passed by Saiyed Mohammad Mustafa on the 25th of January 1915, were or were not invalid for want of jurisdiction. Section 476 of the Code of Criminal Procedure lays down that the offence in respect of which the proceedings are to be taken under that section must have been committed before the Court or brought to the Court's notice in the course of a judicial proceeding. It would, I think, be difficult in the circumstances above described to hold that the offence under section 193 of the Indian Penal Code had been committed before Saiyed Mohammad Mustafa. The question then is whether the commission of this offence was brought to the notice of Saiyed Mohammad Mustafa in the course of any judicial proceeding.

*In re* KARRI VENKANNA PATRUDU.

the matter and also to Ajudhia Saran Singh, first came to the notice of the Deputy Magistrate in consequence of an order which was passed by the District Magistrate, who had perused the record of the case after it had been submitted to him by the Superintendent of Police. These proceedings were in no sense judicial proceedings and it is impossible, therefore, to hold in my opinion that Saiyed Mohammad Mustafa had the offence under section 193 brought to his notice in the course of a judicial proceeding. If that be so, it necessarily follows that there was no jurisdiction in Saiyed Mohammad Mustafa to initiate these proceedings. I must hold, therefore, that the proceedings were void for want of jurisdiction and the order complained of must be discharged. It will be open to the District Magistrate or the Superintendent of Police, if either of them thinks fit, to take proceedings against Ajudhia Saran Singh under the provisions of section 195 of the Code of Criminal Procedure.

*Application accepted.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 466 OF 1915.

November 30, 1915.

*Present*: Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*In re* KARRI VENKANNA PATRUDU—PLAINTIFF No. 1—PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 476—Order for prosecution of plaintiff in course of trial, whether justifiable—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 & 25 Vict., C. 104), s. 15—Difference of opinion among Division Bench Judges exercising powers of revision—Letters Patent (Mad.), s. 36.*

Where in the course of the trial of a suit, a Court ordered the prosecution of a plaintiff for perjury on the basis of a statement which he made while negotiations were going on for a compromise but which he contradicted when, the negotiations having fallen through, the case was taken up and he was put in the witness-box:

*Held* (per *Abdur Rahim, J.*)—(*i*) that the proceedings of the Court were highly irregular and a High Court had jurisdiction to interfere under section 115, Civil Procedure Code, as also under section 15 of the High Courts Act, as the action of the Court amounted to an abuse of the powers vested in it by law; [p. 332, col. 1.]

(*ii*) that if the prosecution was for making two contradictory and inconsistent statements, it could not be sustained as the first statement was not made on oath. [p. 332, col. 1.]

Per *Ayling, J.* (*dissenting*)—(*i*) That though the order of the Court was passed with insufficient regard to the possible indirect prejudice resulting from it, it was neither illegal nor irregular, nor passed in the exercise of a jurisdiction not vested in it by law and a High Court was not justified in setting it aside under section 115, Civil Procedure Code; [p. 333, col. 1.]

(*ii*) that it was desirable to defer the passing of an order under section 476 of the Criminal Procedure Code till the conclusion of the trial; [p. 333, col. 2.]

(*iii*) that the power of superintendence vested in a High Court by section 15 of the Charter Act was of the most general character and was not restricted by anything in the section, but as regards interference with the orders of subordinate Courts, it should be exercised most sparingly and only under very exceptional circumstances; [p. 333, col. 1.]

(*iv*) that in the exercise of the powers under section 15 of the Charter Act, it was not the business of a High Court to gauge the probability of a conviction. [p. 333, col. 1.]

BY THE COURT.—Where the Judges constituting a Division Bench differ in opinion in a matter in which their powers of revision are involved, the proceedings are regulated according to section 36 of the Letters Patent and not section 98 of the Civil Procedure Code. [p. 333, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Peddapur in his proceedings in Original Suit No. 96 of 1914.

Mr. *P. Chenchiah*, for the Petitioner.

The Public Prosecutor, for the Government.

### JUDGMENT.

ABDUR RAHIM, J.—The order of the District Munsif, dated 18th March 1915, directing under section 476, Criminal Procedure Code, the prosecution of the petitioner, who was the 2nd plaintiff in Original Suit No. 96 of 1914, should, in my opinion, be set aside, on the ground that in exercising his jurisdiction he has acted with material irregularity. By the suit in question the plaintiffs sought to establish their exclusive right to derive water from a tank called Isukakattu through a particular channel for the purpose of irrigating their lands; while the defendants denied such exclusive right in the plaintiffs, claiming that their lands as well were

irrigated with the water of that tank. It appears that on the 15th or 16th March, when the case of the plaintiffs was opened, there was a talk among the Pleaders on both sides as to the desirability of a compromise and in the course of such conversations or negotiations, which apparently took place in Court in the presence of the District Munsif, the second plaintiff stated that his land was known as Munnurivani Cheruvu "Istuva" and even pointed out a place in the plan where a tank called 'Munnurivani Cheruvu' used to exist at one time. He was not then under examination, and had not been sworn. What the relevancy or importance of this fact is, is not made clear upon the record; but so far as can be gathered from paragraph 7 of the District Munsif's judgment, which embodies his reasons for dismissing the plaintiffs' suit, it was not in any way a decisive factor in his decision. Nor did it form the subject of an issue. All the same I am prepared to assume that the fact of plaintiff's land being known as 'Munnurivani Cheruvu Istuva' had as a piece of evidence some sort of bearing on the question for determination. The negotiations for compromise apparently failed and the case was finally taken up for trial on the 18th March, when the second plaintiff went into the witness-box and deposed in support of his case. In cross-examination on being asked if his land was called 'Munnurivani Cheruvu Istuva', he answered in the negative and denied the existence of any tank there. Thereupon the District Munsif examined the Pleaders of both sides as to what was stated during conversation for compromise. The 2nd plaintiff was again put upon oath and questioned as to what he had stated to Court on the previous occasion.

The second plaintiff denied having made the statement imputed to him; but the Pleaders for the defendants deposed that he did in fact make the statement. On the other hand, the Pleader for the plaintiffs was unable to say that the second plaintiff made such a statement though he admitted that somebody during the conversation said so. The District Munsif accepted the version of the conversations as given by the Pleaders for the defendants apparently as it agreed with his own recollection and straightway drew up proceedings against the second plaintiff under section 476, Criminal Procedure Code, and sent him in custody to the nearest Magistrate.

When the above case was called on the next day, the plaintiffs' Pleader applied for time as his client had been committed to the Magistrate and there was no one to give him instructions. The District Munsif refused to grant any time, holding that the Pleader should have been instructed once for all and not piecemeal and also because there were three other plaintiffs in the suit who could give him full instructions, if necessary. So far as it appears, it was the second plaintiff who was looking after the suit and the District Munsif was undoubtedly quite wrong in thinking that the Pleader of a party should ordinarily be expected to conduct his client's case, more especially at the stage when evidence is taken, without the help either of the client or some competent person on his behalf who may be cognisant of the facts relating to the action. Rejecting the plaintiffs' Pleader's application the District Munsif proceeded to pronounce judgment against the plaintiffs.

It is suggested by Mr. Sydney Smith who appeared for the Public Prosecutor in support of the order under section 476, Criminal Procedure Code, that there was no material irregularity in the proceedings of the District Munsif which would justify our interfering in the exercise of our powers of revision under section 115, Civil Procedure Code. Under the ruling of this Court, that section of the Civil Procedure Code and not section 439 of the Criminal Procedure Code enables us to revise the order of a Civil Court passed under section 476, Criminal Procedure Code. [See *In re Chennanagoud* (1).] It is difficult for me to conceive of proceedings more irregular than those of the District Munsif in this case. It is the duty of a Judge trying a civil or criminal action and engaged in investigating issues of fact to hear all the evidence, which the parties may have to adduce, before coming to a final decision and to refrain from any action which would be calculated to hamper any party in proving his case. If a Judge on the other hand prematurely takes criminal proceedings for perjury or for a like offence against a party or his witnesses giving evidence before him,

(1) 26 M. 139; 2 Weir 197.

*In re* KARRI VENKANNA PATRULU.

the inevitable result would be to keep away other witnesses who might be in a position to give valuable evidence and in other ways impede a fair trial of the cause. How disastrous has been the effect of the Munsif's proceedings on the plaintiffs' case is obvious from the facts I have already stated. Not only were these proceedings highly irregular bringing the case within the scope of section 115, Civil Procedure Code, but I am also of opinion that the action of the District Munsif amounted to an abuse of the powers which the law has vested in him. Apart, therefore, from section 115, Civil Procedure Code, it is also a fit case for interference by virtue of our general powers of superintendence under clause 15 of the High Courts Act.

I may also mention that I am very doubtful whether statements made during negotiations for compromise could be properly used against a party in the way they have been used in this case against the second plaintiff. Further, the assignment of perjury in the order in question is by no means very clear or definite. If the prosecution be for making two contradictory and inconsistent statements, then it could not be sustained as the first statement was not made on oath. If it be alleged that the second plaintiff's statement that the plaintiff's land is not called 'Munnurivani Cheruvu Istuva' is false, I doubt if there was sufficient evidence before the District Munsif raising a good *prima facie* case for prosecution.

The order under section 476, Criminal Procedure Code, should, in my opinion, be set aside.

AYLING, J.—I have had the advantage of perusing the judgment of my learned brother and much regret that after careful consideration I feel constrained to arrive at a different conclusion.

The provision of law under which our interference is invoked is section 115 of the Code of Civil Procedure: it is clear that sections 435 and 439 of the Code of Criminal Procedure have no application to an order of a Civil Court passed under section 476 of the Code of Criminal Procedure. We have, therefore, to read section 115 of the Code of Civil Procedure along with section 476 of the Code of Criminal Procedure and the facts of the case as they appear in the Munsif's order, and see whether the case falls within the strictly defined limits of interference prescribed by section 115 of the Code of Civil Procedure.

I find it impossible to say that the Munsif either exercised a jurisdiction not vested in him by law, or acted "illegally or with material irregularity." Section 476 of the Code of Criminal Procedure empowers him if he "is of opinion that there is ground for enquiring into any offence referred to in section 195" and committed before him to send the case for enquiry or trial to the nearest First Class Magistrate after himself making any preliminary enquiry that may be necessary—the latter being apparently an entirely discretionary procedure. That is to say, the only condition requisite to give him jurisdiction is that he should be of opinion that there is ground for enquiring into the offence in question. No doubt this opinion must be formed *bona fide*, *i.e.*, with due care and caution, and if we were in a position to say that the Munsif's view were perverse, or even based on nothing more than suspicion or surmise, there might be ground for interference. But in view of the facts set out in his order, as to what occurred in open Court, it cannot be said that his opinion was not formed in good faith. I can find no ground for holding that it must be based on any particular kind of evidence.

If then the Munsif had jurisdiction to pass the order, can it be said that he acted "illegally or with material irregularity?" I do not think this can be said either. I take it "illegally" means contrary to law and "material irregularity" means "same material irregularity *in procedure* which may possibly have produced error or defect in the decision of the case upon the merits," *vide Badami Kuar* v. *Dinu Rai* (2). What provision of law, either substantive or relating to procedure, does this order contravene? The section lays down nothing as to procedure beyond empowering the Court to make such preliminary enquiry as may be necessary, and even if this preliminary enquiry were obligatory and not discretionary, the requirement is satisfied by the preliminary examination of the Pleaders.

(2) 8 A. 111; A. W. N. (1886) 28.

*In re* KARRI VENKANNA PATRUDU.

I can find no illegality or material irregularity which would bring the case within the scope of section 115 of the Code of Civil Procedure.

In fact, if we are to interfere at all, it must (as it seems to me) be in exercise of the general power of superintendence vested in the High Court by section 15 of the Charter Act. This section was barely referred to, if at all, in the course of argument, but I may briefly consider its applicability.

This power of superintendence is, of course, of the most general character, and is not restricted by anything in the section: but as regards interference with the orders of subordinate Courts it should surely be exercised most sparingly, and only under very exceptional circumstances, otherwise the limitations contained in section 115 of the Code of Civil Procedure (for instance) would be practically nullified.

I may refer to the judgment in *Hem Chandra Ray* v. *Atal Behari Ray* (3), in which the learned Judges seem to have felt considerable doubt as to whether section 15 gave them any power at all to interfere with an order under section 476 of the Code of Criminal Procedure, but no doubt at all that the exercise of such a power would be justifiable.

In the present case, the District Munsif has come to the conclusion in view of the petitioner's conduct in open Court, as observed by himself, and testified to by respectable Vakils examined on affirmation, that the petitioner has been guilty as a witness of a very daring piece of perjury. It is not to be assumed that no other evidence than that of these Vakils will be forthcoming against him if the case of perjury proceeds to trial: and I think it is certainly not for us in exercise of our powers under section 15 of the Charter Act to gauge the probability of a conviction. In fact if the same order had been passed at the end of the case (or, to put it another way, if the petitioner had been the last witness to be examined), I do not think the applicability of the section would have been even suggested. There only remains to consider the stage at which the order was passed Unquestionably it is usual, and in most cases desirable, to defer the passing of an order under section 476 of the Code of Criminal Procedure till the conclusion of the trial: and it may well be that the premature action of the District Munsif has prejudiced the plaintiffs in Original Suit No. 96 of 1914 so seriously as to justify a reversal of the decree on appeal. But this injustice can, if necessary, be set right in the ordinary course of law, if it has not already been rectified. I do not think it is a sufficient reason for our now setting aside the order under section 476 of the Code of Criminal Procedure, or relieving the petitioner from criminal prosecution for what the Munsif has held to be a daring piece of perjury.

The Munsif's order may have been premature, and passed with insufficient regard to the possible indirect prejudice resulting from it. But it was neither illegal, nor irregular and, in my opinion, we should not be justified in setting it aside.

I would dismiss the petition.

BY THE COURT.—We think section 36 of the Letters Patent applies to this case, and not section 98, clause (2), of the Civil Procedure Code. It has been suggested that section 141 of the Code makes section 98 applicable to a case like this, where there has been difference of opinion in a matter in which our powers of revision are involved. But section 141 says that "the procedure provided in the Code in regard to suits shall be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." Here no doubt the proceedings, that is to say, the order under section 476 was passed by a Court of civil jurisdiction. But it seems to us when the section speaks of "the procedure provided in this Code in regard to suits," it does not include the procedure prescribed for appeals. We find the Legislature has dealt with the procedure relating to suits separately from the procedure relating to appeals. The procedure relating to appeals is to be found in part VII, and the procedure relating to suits in parts I and IV. Therefore, under section 36 of the Letters Patent, the order under section 476 will be set aside.

*Order set aside.*

(3) 35 C. 909; 8 Cr. L. J. 435.

## PUNJAB CHIEF COURT.

CRIMINAL REVISION CASE No. 1644 OF 1915.

December 20, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge.

THE MUNICIPAL COMMITTEE OF LAHORE—COMPLAINANT

*versus*

*Musammat* RADHA RANI—ACCUSED.

*Punjab Municipal Act (III of 1911), s. 153—House used as brothel—Magistrate, powers of—Order, proper.*

A Magistrate passed an order upon a charge under section 153 of the Punjab Municipal Act, 1911, to the effect that if the accused vacated the house by a certain date mentioned therein, well and good, otherwise, she would be fined Rs. 20:

*Held*, that the order of the Magistrate was bad as it contravened the provisions of section 153 of the Municipal Act. [p. 335, col. 1.]

Case reported by the Sessions Judge, Lahore, with his No. 1145 of the 11th of October 1915.

FACTS.—It is alleged by the complainant that the accused *Musammat* Radha Rani, who lives in lane Mehtan, is of immoral character and that she is using her house as a brothel. As a result of this, men and women of all sorts come for immoral purposes and are a source of great annoyance to the neighbours.

The accused, on conviction by Mr. Sohan Lal exercising the power of a Magistrate of the First Class in the Lahore District, was ordered on the 30th August 1915 to discontinue the use of her house as brothel under section 153 of the Municipal Act.

The proceedings are forwarded for revision on the following

GROUNDS.—This is a petition for revision of the order of the City Magistrate, Lahore, dated the 30th of August 1915, under section 153 of the Municipal Act holding that the petitioner *Musammat* Radha Rani, keeps a brothel, and ordering her to discontinue the use of her house as such.

I have been through the whole of the evidence and I entirely disagree with the City Magistrate's view of the case. As is shown by the previous proceedings, on my own report to the Chief Court a re-trial of the case was directed by the Chief Court's order dated the 12th March 1915. Evidence on both sides has now been taken. It is admitted that the principal witness, P. W. Gujar Mal, for some years past has been taking proceedings against the petitioner about the house in which she lives, which according to him she purchased in 1905 from the wife of Gujar Mal's cousin, and according to Gujar Mal she has lived in that house *since* 1905. It is only comparatively recently, and after a quantity of other proceedings, that it has been sought to show that the petitioner is making use of the house as a brothel. I have been carefully through the statements of all the prosecution witnesses, and they quite fail to convince me. Not one of them is able to give the names of any of the bad characters who are said to visit the petitioner's house for immoral purposes, and we have only vague allegations that a gramaphone is played there, that a number of people visit the house, and that singing goes on sometimes there. In short, the evidence as to the house being used as a brothel is of the vaguest possible kind. The prosecution witnesses are not prepared to really deny that the petitioner has her son living with her in the house, and in my opinion, there is very good reason for supposing that the present proceedings have been got up by Gujar Mal and (probably) Balwant Rai, the former of whom is, no doubt, anxious to get possession of the house himself. In my opinion, it is only necessary to read the statements of the prosecution witnesses in order to see how extremely unconvincing they are.

I accordingly accept the petition for revision and forward the proceedings to the Chief Court with the recommendation that the order of the City Magistrate, dated the 30th of August 1915, be set aside.

Lala *Bhagwan Das*, for the Complainant;

Mr. *Dina Nath Mehra*, for the Accused.

ORDER.—In this case on the 11th July 1914 the City Magistrate of Lahore passed the following order:—

"The parties are present. If the accused vacates the house by the 1st August 1914, well and good; otherwise she will be fined Rs. 20. No reply has been received from her husband."

This order was passed upon a charge under section 153 of the Punjab Municipal Act (III of 1911). This order was forwarded to the Chief Court for revision and on the 12th March 1915 this Court, finding that the learned Counsel for the Municipality admitted that the case had not been properly tried, set aside the order of the Magistrate and ordered a re-trial according to law. The order of the

GOBIND SAHAI *v.* EMPEROR.

Magistrate thus set aside was bad not only because there had not been sufficient trial, but because section 153 aforesaid did not authorise a Magistrate to direct an accused person to vacate a house, but merely authorises him to order the occupant to discontinue the objectionable use of it. Further, the penalty is not under the section a single fine, but a continuing fine not exceeding Rs. 25 for every day thereafter that the house shall be so used.

Upon the remand the case was re-tried and certain evidence was taken by the new City Magistrate, Lala Sohan Lal, and the finding he arrived at after hearing evidence on both sides was that the accused keeps a brothel to the annoyance of the respectable residents of the locality, and an order was passed that she should discontinue such use of her house and that if she fails to do so, she will be dealt with under the last portion of the section, *i. e.*, will be fined.

The accused woman applied to the Sessions Judge for revision, and the learned Sessions Judge, after reading the evidence, has come to the conclusion that there is no proof that the house is being used as a brothel or as a disorderly house, and he suggests that the order of the City Magistrate should be set aside.

I have heard arguments and have read the evidence in the case, and I am not impressed with the reasons given by the learned Sessions Judge. I do not think that there is any ground for refusing to believe the evidence of respectable neighbours because they are unable to name the disorderly persons who frequent the accused's house. It is quite possible that the class of persons who frequent disorderly houses belong to a totally different section of society from the respectable residents, and, therefore, it is quite natural that these residents should not know their names. It is probably impossible to get direct evidence that the house is used as a brothel, but the law is not confined to houses which are positively proved to be used in that way. The words are "is used as a brothel or *by disorderly persons of any description.*" It seems to me that on the evidence for the prosecution there is ample ground for holding that this house is used by disorderly people, and, of course, there is a very strong suspicion, when the owner of a house of this kind is a woman without husband, that as a matter of fact it is used for immoral purposes. It is quite possible that Gujar Mal would like to see the house vacated, but there are a good many other respectable witnesses who have no personal interest in seeing the house vacated beyond this that the assembling of noisy people there affects their comfort. After all, the accused can always protect herself against the consequences of the order passed by the Magistrate by preventing disorderly persons from coming to her house, and if she is in the habit of giving musical parties—it is said that a gramaphone is played and singing goes on at her house,—she ought to regulate these proceedings in such a way as not to cause annoyance to her neighbours.

I, therefore, decline to interfere with the order passed by the Magistrate and return the papers.

*Petition rejected.*

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1136 OF 1915.

December 8, 1915.

*Present*:—Mr. Justice Tudball and Mr. Justice Walsh.

GOBIND SAHAI—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 369—*Rejection of application for revision—Review—Power of High Court—Order, if required to be sealed—Allahabad High Court Rules, Ch. VII, rr.* 5, 8.

A High Court has no power under section 369 of the Code of Criminal Procedure to review an order dismissing an application for revision made by an accused person. [p. 336, col. 1.]

*Queen-Empress* v. *Durga Charan*, 7 A. 672, followed.

An order of a High Court dismissing an application for revision requires under the rules of the Allahabad High Court to be sealed. [p. 336, col. 2.]

*Queen-Empress* v. *Lalit Tiwari*, 21 A. 177; A. W. N. (1899) 15; *Emperor* v. *Kallu*, 27 A. 92, A. W. N. (1904) 195; 1 A. L. J. 495; 1 Cr. L. J. 710, followed.

Application to revise an order of a Magistrate of the 1st Class of Muradabad.

Mr. *Sailanath Mukerjee*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The facts before us are as follows:—

The applicant Gobind Sahai was called upon by a Magistrate of the First Class to show cause why he should not be bound over to be

of good behaviour. An order was passed against him and he was directed to furnish security. He appealed to the District Magistrate, but his appeal was dismissed. He then applied in revision to this Court on the 26th of June 1915. On the 22nd of July 1915 Mr. Justice Banerji, sitting singly after hearing Counsel on his behalf, passed an order rejecting the application. That order was signed by Mr. Justice Banerji but was not sealed. On the 6th of September 1915 the applicant presented an application to the learned Chief Justice on which the following order was passed: "Lay before Mr. Justice Banerji and let this man be informed of the date fixed for hearing." On the 10th of November 1915 Mr. Justice Banerji passed an order referring the question to this Court as to whether or not an application for review can lie in the circumstances of the case. He appears to have been in doubt as to the exact nature of this application, as he remarks in the course of his order that "it is difficult to say whether this last application is a fresh one for revision or an application for review of judgment". He referred the case, however, to a Bench of two Judges with a view to a decision on the question we have mentioned above, pointing out that a Full Bench of the Calcutta High Court had in *In the matter of the petition of F. W. Gibbons* (1) held that no review could lie. Apparently it was not brought to Mr. Justice Banerji's notice that the point is one which is already covered by a decision of two Judges of this Court. In the case of *Queen-Empress* v. *Durga Charan* (2) a Division Bench of this Court held that the High Court has no power under section 369 of the Code of Criminal Procedure to review an order dismissing an application for revision made by an accused person and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government. The Code of Criminal Procedure of 1882 was then in force and in this respect does not differ from the present Code. It is, moreover, in full agreement with the decision mentioned above reported as *In the matter of the petition of F. W. Gibbons* (1). No dissent has ever been expressed from this decision in this Court and we can see no reason whatsoever, when the Legislature has not in express terms given this Court statutory power to review its judgment in criminal cases, to differ from the above-mentioned ruling. We, therefore, are clearly of opinion that an application for review in the present matter cannot lie. But we have also been pressed with the decisions of this Court in the cases of *Queen-Empress* v. *Lalit Tiwari* (3) and of *Emperor* v. *Kallu* (4) and it is urged before us that the order of Mr. Justice Banerji not having been sealed, it is still open to the applicant to come to this Court with the present application. On behalf of the Crown it was urged that the order did not require sealing in view of the language of the Rules 5 and 8 of Chapter VII of the Rules of this Court. It is clear from the office report that such orders are not usually sealed; but in our opinion the rules mentioned above clearly direct that such orders should be sealed. This being so, the two rulings mentioned above do apply to the circumstances of the present case. But in acccrdance with those two rulings it is only the Judge concerned who can deal with this matter. It will be open, therefore, to the present applicant to make any such application as he deems fit to Mr. Justice Banerji in view of those two rulings. It is not possible for us to deal with this matter. In so far as it is an appiication for review, the present application must fail and we reject it. In so far as it is an application contemplated by the rulings mentioned above, it must be dealt with by Mr. Justice Banerji. For this purpose it must be sent back to Mr. Justice Banerji and it will be open to him to pass any such order which he may deem fit to pass.

On the case coming up before Mr. Justice Banerji, His Lordship passed the following

ORDER.—A Bench of this Court has held that as the order passed by me on the 22nd July 1915 was not sealed, this application for revision must be deemed to be still pending. I have heard the learned Vakil who has now appeared for the applicant and who has addressed the Court at considerable length. I see no reason, in view of the findings of the Courts below, to admit this application. I accordingly reject it.

*Application rejected.*

(1) 14 C. 42.
(2) 7 A. 672.
(3) 21 A. 177; A. W. N. (1899) 15.
(4) 27 A. 92; A. W. N. (1904) 195; 1 A. L. J. 435; 1 Cr. L. J. 710.

GAURI SHANKAR SINGH *v.* BHAGWAN DIN.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 45 OF 1913.

June 15, 1915.

*Present*:—Mr. Stuart, A. J. C.

*Thakur* GAURI SHANKAR SINGH—PLAINTIFF—APPELLANT

*versus*

BHAGWAN DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, *interpretation of*—'Farar', *meaning of*—*Construction of document.*

Where a clause in a *wajib-ul-arz* ran, "when an owner of the grove '*gaon se farar ho jata hai*' his grove becomes '*nazul*' ":

*Held*, that the word '*farar*' could not apply to a man who left the village *openly, and not in a clandestine or irregular manner*, in order to take up his residence in an adjoining village, but to an absconder or a deserter. [p. 337, col. 2.]

*Chandi Singh* v. *Syed Arjumand Ali*, 2 O. C. 281 at p. 285, referred to.

Appeal from the decree of the District Judge, Rai Bareli, dated the 24th June 1913, upholding that of the Munsif, Dalmau, dated the 19th April 1913.

Syed *Ali Muhammad*, for the Appellant.

Mr. *P. N. Rozdon*, for the Respondents.

JUDGMENT.—The grove in suit belonged to a certain Bhikia, who died leaving four sons, Debi Din, Bakhtawar, Bhawani and Bachchu. Debi Din, Bhawani and Bachchu left Karauli Dama, the village in which the grove is situated, and took up their residence in a village a few miles away in the same district. Bakhtawar retained possession of the grove. On his death his widow, *Musammat* Radhia, succeeded him in its possession. The question for decision is whether the grove has now escheated to the *zemindar* or whether it belongs to a nephew of Bakhtawar. The *zemindar* assailed the nephew's title on two grounds, the *first* being that he had not established that he was the heir of Radhia, and the *second* being that in any circumstances the grove had escheated to the *zemindar* because the nephew and his father had abandoned the village and had thereby lost all claims to succeed as grove-holder under the provisions of the *wajib-ul-arz*.

The learned Counsel for the appellant has conceded in the course of his argument that the nephew Bhagwan Din is the heir of Radhia. But he argues that he cannot succeed to the grove under the provisions of the following clause of the *wajib-ul-arz*, "When an owner of the grove '*gaon se farar ho jata hai*,' his grove becomes '*nazul*.'" His argument is that Bhagwan Din having left the village and taken up his residence in another village, "*gaon se farar ho jata hai*." The meaning of an almost exactly similar clause in a *wajib-ul-arz* was interpreted in *Chandi Singh* v. *Syed Arjumand Ali* (1). In that decision a Bench arrived at the conclusion that the verb "*farar hona*" meant "to run away." The learned Counsel for the appellant has argued that a man who leaves a village of his own free will and has thrown up his land without being ejected from his cultivatory holding is "*farar*", and that there is nothing in the Bench decision to a contrary effect. In *Chandi Singh* v. *Syed Arjumand Ali* (1) a tenant was ejected from his cultivatory holding in the village by a decree of a Revenue Court. Thus it was not within his choice whether he left the village or not. In the present case the facts are not so strong. It does not appear that the father of Bhagwan Din was ejected. He seems to have left the village of his own choice. But, nevertheless, I consider that the word "*farar*" cannot apply to a man who leaves a village openly in order to take up his residence in an adjoining village. I understand the word to mean an absconder. There must be something clandestine or irregular about the departure. As is remarked in the decision in question, a tenant who flees from a village, or who departs from it clandestinely, or who forsakes it, because "he owes his landlord rent; may be a 'runaway' man or a 'deserter' or an 'absconder'." I do not think that a man can be called "*farar*" simply because he has abandoned his cultivatory holding. It would be necessary, in order that the term "*farar*" should be applicable to his case, for him also to have abandoned the holding in a clandestine or irregular manner. The word "absconder" appears a sufficiently accurate translation of the word "*farar*." I, therefore, do not consider that Bhagwan Din's action in residing out of the village comes within the contemplation of the clause of the *wajib-ul-arz* in ques-

(1) 2 O. C. 281 at p. 285.

tion. The grove has not escheated to the *zemindar* and Bhagwan Din, as the heir of his aunt, has established his right to succeed her as grove-holder.

I, therefore, dismiss this appeal. The appellant will pay his own costs and those of the respondents.

*Appeal dismissed.*

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 426 OF 1913.

December 16, 1915.

*Present*:—Justice Sir P. C. Banerjee, KT., and Mr. Justice Piggott.

*Musammat* RAM DEI—PLAINTIFF—APPELLANT

*versus*

*Musammat* KISHEN DEI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Widows' Re-marriage Act (XV of* 1856), *s.* 2, *applicability of*—Grihast Goshains—**Karao** *marriage*—*Unchastity after inheritance, effect of.*

If a widow can validly re-marry according to the custom of her caste, her re-marriage does not deprive her of her right to the estate of her deceased husband. [p. 339, col. 1.]

*Har Saran Das* v. *Nandi*, 11 A. 330; A. W. N. (1889) 77; *Gajadhar* v. *Kaunsilla*, 1 Ind. Cas. 761; 6 A. L. J. 107; 31 A. 161; *Mula* v. *Partab*, 6 Ind. Cas. 116; 7 A. L. J. 417; 32 A. 489, followed.

If a widow becomes unchaste after inheriting the property of her husband, she does not by reason of such unchastity forfeit the interests which have become vested in her by right of inheritance. [p. 339, col. 2.]

*Moniram Kolita* v. *Keri Kolitani*, 5 C. 76 (P. C.); 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shomo L. R. 198, followed.

First appeal from the decision of the Subordinate Judge of Moradabad, dated the 5th August 1913.

The Hon'ble Dr. *Sunder Lal*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of a suit brought by the appellant for possession of certain property which admittedly belonged to one Mahant Prabhuban. He was an ascetic of the class called *Grihast Goshain*, that is, a sect who had not renounced the world and held property. He married two wives, namely the plaintiff *Musammat* Ram Dei and the 1st defendant *Musammat* Kishan Dei and died leaving them surviving. Upon his death, which took place on the 8th of January 1906, the two widows took possession of the property. Before his death Prabhuban made two Wills, the last of which is dated the 22nd December 1905. There was some litigation in regard to his property after his death, but it is not necessary for the purpose of this case to refer to it. The plaintiff states in her plaint that she and the first defendant inherited the property of Prabhuban and were in possession. She further alleges that the first defendant *Musammat* Kishen Dei had become unchaste and was living with the second defendant, the brother of the deceased, as his concubine; and that for this reason she forfeited her rights in the property of her deceased husband. In the 10th paragraph of her plaint she states that the defendant No. 1 contracted a *karao* marriage with the second defendant against the custom of the family of the father and husband of the plaintiff and defendant No. 1, and that such *karao* marriage was illegal under the Hindu Law. In the 11th paragraph of the plaint it was stated that this act of the first defendant, namely, the contracting of the *karao* marriage, was contrary to the practice and custom of the family and was illegal under the Hindu Law and that, therefore, the first defendant was liable to be dispossessed of the property left by Prabhuban, her first husband, "under the Will executed by the deceased *Mahant* and according to the custom in vogue among the *Goshains*." On behalf of the defendants it was admitted that a *karao* marriage had been contracted by the first defendant with the second defendant, but it was urged that such marriage was valid according to the custom of the caste and the family; that by reason of such marriage the first defendant did not forfeit her share in her first husband's estate, and that the plaintiff's suit was, therefore, not maintainable. The Court below found that a custom prevailed among *Goshains* of the class to which the parties belong under which a *karao* marriage can be validly contracted; that such marriage did not entail a forfeiture of the interest of the widow, who contracted the *karao* marriage, in the pro-

perty of her first husband, and that the plaintiff was not entitled to recover from the defendant the property taken by her. That Court dismissed the suit. The plaintiff has preferred this appeal and three contentions have been put forward on her behalf. The *first* is that assuming that a valid *karao* marriage has been contracted by the first defendant with the second defendant, such marriage dissolved the connection of the first defendant with the family of Prabhuban and must be treated as civil death in consequence of which she ceased to have any interest in the property of her first husband. It is urged that this would be so irrespective of the provisions of Act XV of 1856. The *next* contention is that according to the custom of the caste a *karao* marriage cannot be validly contracted; and it is *lastly* urged that if such a custom prevails it is also the custom of the caste that upon a *karao* marriage being contracted, the woman contracting such marriage forfeits her interest in her first husband's estate. As regards the *first* point, the matter is concluded by the rulings of this Court in a series of decisions commencing with *Har Saran Das* v. *Nandi* (1) and ending with *Mula* v. *Partab* (2). It has been held in these cases that if a widow can validly re-marry according to the custom of her caste, such a re-marriage does not deprive her of her right to the estate of her deceased husband. It was pointed out in the case of *Gajadhar* v. *Kaunsilla* (3) that the effect of the rulings of this Court was that not only is Act XV of 1856 inapplicable in the case of a widow who is permitted by the custom of her caste to re-marry, but she does not forfeit the property inherited by her from her first husband, and the relationship with the family of her first husband does not come to an end. We feel ourselves bound by the rulings of this Court and see no reason to depart from the view adopted in these rulings. It is true that other High Courts have, in the cases referred to in the judgment of the Court below, held a contrary view, but as I have said above, we ought to follow the rulings of our own Court unless we are prepared to refer the matter to a larger Bench and we are agreed that that course need not be followed. The first contention, therefore, raised on behalf of the appellant must be overruled. If, as is contended, *Musammat* Kishen Dei has become unchaste, since it is alleged that such unchastity has taken place subsequently to her inheriting the property of her first husband, she does not by reason of such unchastity forfeit, according to the decision of their Lordships of the Privy Council in the case of *Moniram Kolita* v. *Keri Kolitani* (4), the interests which vested in her by right of inheritance to her husband. We have, therefore, to consider whether any custom prevails among the caste to which the parties belong under which a *karao* marriage may be validly contracted. On this point there is overwhelming evidence on the part of the defendants. The learned Subordinate Judge has referred to it at length. The witnesses who were examined cited no less than 189 instances in which such marriage was contracted and was recognised as a valid marriage. We have not been referred to anything which would induce us to differ from the conclusion of the Court below on this point. It is urged on behalf of the appellant that even if a *karao* marriage prevails, the plaintiff has proved that in the case of such marriage the woman who re-marries forfeits her rights to the estate of her first husband. Some *wajib-ul-arziz* have been relied upon as establishing this custom. It is not disputed that these *wajib-ul-arziz* would not by themselves be sufficient to establish the custom contended for. The oral evidence on the point is very meagre. The *wajib-ul-arziz* do not relate to the particular village in which the parties reside. On the other hand there is a mass of oral evidence proving that a widow who re-marries in the *karao* form does not thereby forfeit her rights in her first husband's estate. I may also observe that according to the pleadings as set forth in the plaint and according to the issues framed in the Court below, it was not the case of the plaintiff that in the case of a valid *karao* marriage the woman

(1) 11 A. 230; A. W. N. (1889) 77.
(2) 6 Ind. Cas. 116; 32 A. 489; 7 A. L. J. 417.
(3) 1 Ind. Cas. 761; 31 A. 161 6 A. L. J. 107.
(4) 5 C. 776; 6 C. L. R. 322; 7 I. A. 115 (P. C.) Sar. P. C. J. 103; 3 Suth. P.C. J. 765; 4 Ind. Jur. 363, 3 Shome L. R. 198.

contracting such marriage forfeited by custom the interests acquired by her in the estate of her deceased husband. It is true that some evidence was adduced on the point, but as I have already said, this evidence on behalf of the plaintiff was of the vaguest description. On the other hand, the evidence which the defendants put forward and to which the Court below refers at some length, rebuts the correctness of the allegations made on behalf of the plaintiff. In this view it is not necessary to decide whether the agreement executed by the parties on the 8th of October 1910 precludes the plaintiff from maintaining the suit. If I had to express an opinion on the point, it seems to me that the last clause of that agreement leaves untouched the rights of the parties under the Hindu Law in respect of the property which they agreed to hold separately and in defined shares. It is stated in that document that "this partition has been made simply for the sake of facility in the management of the estate and in the obtaining of separate proprietary possession and for the purpose of having entries made in the Revenue Court. No passage of this document, whether in whole or in part, will affect the legal rights and powers of any party in respect of the property, the subject of the partition." However, as I have said above, it is not necessary to decide this point as upon the other issues raised in the case, the plaintiff's suit must, in my opinion, fail. I would dismiss the appeal with costs.

PIGGOTT, J.—I agree in the judgment delivered by my learned colleague, both as regards the decision and the reasoning on which it is based. I desire to add a few words with respect to the pleadings. Dr. Sunder Lal, who has laid the case for the appellant before us in the only possible form in which it could be argued, has endeavoured to rest that case entirely upon the question of law, as to which this High Court has differed from other High Courts, in respect of the operation of section 2 of the Hindu Widows' Re-marriage Act, XV of 1856. If I thought that this question arose in the present case in a pure form, I should almost have felt disposed to support the suggestion addressed to us on behalf of the appellant for a reference to a larger Bench. On the pleadings, however, it seems to me exceedingly difficult to rest the case upon this basis now. The plaintiff might no doubt have come into Court treating the *karao* union between the first and second defendants as a valid re-marriage. She would then have been in a position, *firstly*, to appeal to the opinion expressed by other High Courts in India with regard to the section of the Statute above referred to and to ask for a reconsideration of the opposite view which has so long prevailed in this Court. *Secondly*, she might have directed her evidence expressly towards proving that amongst *Goshains*, that is to say, amongst the class to which these parties belong, a widow when contracting a marriage in the *karao* form with a second husband is universally regarded as forfeiting any property which may be in her possession by right of inheritance from her first husband. It seems to me, however, that the plaintiff has made it exceedingly difficult for herself to take up this position now in appeal. The pleadings embodied in paragraphs 10 and 11 of her plaint are not really open to any alternative interpretation. They deny the validity of the *karao* union, and describe the relationship existing between the first and second defendants subsequent to that union as unchastity pure and simple. The plaintiff was no doubt aware that, on these pleadings alone, she could not claim the estate; but she does claim it, on the ground that the unchastity in this particular case entails forfeiture of the property, *firstly*, by reason of the Will left by Mahant Prabhuban, the first husband of defendant No. 1, and *secondly*, "according to the custom in vogue among the *Goshains*." The plea with regard to the Will is almost completely answered by the simple remark that, according to the plaintiff herself, *vide* paragraph 2 of the plaint, the first defendant did not take this property under the Will, but as an heir under the ordinary Hindu Law. If any further answer be required, it might be added that whatever view the Court might take as to the validity of a *karao* union amongst these *Goshains*, it is certain that the testator himself did not regard it as amounting to un-

chastity, there being documentary evidence that he had on a former occasion recommended both his widows to contract this very union. With regard to the custom of the *Goshains*, the plaintiff is in this difficulty, that she did not direct her evidence specifically towards proving that a *Goshain* widow who has become possessed of property by the death of her husband forfeits the same by an act of unchastity. She confined herself to an attempt to meet the defendants' case with regard to *karao* marriages in particular. The defendants having set out to prove that *karao* marriages were generally recognised as valid among the *Goshains*, the plaintiff endeavoured to counter this by adducing evidence to show that this custom was subject to a qualification, namely, that a widow so re-marrying forfeits any property inherited by her from her first husband. Now the evidence directly bearing on this point is not voluminous and it would be surprising if it were so. It is only in exceptional cases that a widow inherits property from her husband and obtains possession of the same. It is rarer still for a widow, possessed of property sufficient for her maintenance, to contract a second marriage. The instances which the parties have been able to prove are consequently not numerous; but it seems to me on an examination of the record that there is a great preponderance of evidence on this point in favour of the defendants. I doubt whether the plaintiff can be said to have made out a single clear instance in which a widow who had obtained possession of her first husband's property was divested of the same and dispossessed upon her contracting a *karao* marriage with another man. On the other hand, the defendants produced witnesses who were able to speak to a certain limited number of specific instances in which a widow so re-marrying retained possession not merely over moveables, but in some cases even over immoveable property, which she had inherited on the death of her first husband. Under these circumstances I think that the plaintiff's case must fail and that it is useless to ask this Court in a case thus complicated by the pleadings and by its own particular evidence to enter upon a reconsideration of the pure question of law with regard to the effect of section 2 of Act XV of 1856.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs including fees on the higher scale.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 64 OF 1913.

June 24, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

*Musammat* HUSAINI *alias* HUSHMAT—DEFENDANT—APPELLANT

*versus*

RAM CHARAN—PLAINTIFF—RESPONDENT.

*Mortgage—Consideration-money, only portion of, payment of, effect of—Usufructuary mortgagee, right of—Default of puisne mortgagee in redeeming prior mortgages, effect of—Possession, suit for, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 135—Possession, right of.*

Where a mortgagor receives only a portion of the consideration-money, the mortgage holds good to the extent of that portion. [p. 342, cols. 1 & 2.]

*Rashik Lal* v. *Ram Narain*, 13 Ind. Cas. 573; 9 A. L. J. 198; 34 A. 273 and *Rani Raghubans Kuar* v. *Raunak Ali*, 10 O. C. 69, referred to.

A usufructuary mortgagee with whom money is left for the redemption of certain prior mortgages to enable him to obtain possession of the mortgaged property cannot, after making default in paying that money, be allowed to sue the mortgagor for the possession of that property when the latter pays the money due to the prior mortgagees and obtains possession. [p. 342, col. 2.]

Under Article 135, Schedule I, of the Limitation Act, it is immaterial whether possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by a prior mortgagee, and as between the mortgagor and the mortgagee entitled to possession the former's right to possession ceases when he makes a fresh mortgage. [p. 342, col. 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 6th January 1913, modifying that of the Subordinate Judge, Hardoi, dated the 23rd April 1912.

Chaudhri *Ram Bharose Lal*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is whether a usufructuary mortgagee with whom money is left for the redemption of certain prior mortgages to enable him to obtain possession of the mortgaged property can, after making

default in paying that money, be allowed to sue the mortgagor for the possession of that property when the latter pays the money due to the prior mortgagees and obtains possession.

The mortgage in this case was made by *Musammat* Husaini and others in favour of the plaintiff-respondent in lieu of Rs. 1,300 on the 10th June 1891. A 5-*biswas* share was mortgaged therein. The mortgagors received Rs. 600 and gave possession over one-third of 5 *biswas* which was in their possession, and left Rs. 700 with the plaintiff for payment to the prior mortgagees who were in possession of the remaining two-thirds. It is not disputed that the money left with the plaintiff was sufficient to cover the amount due on the prior mortgages. The plaintiff, however, took no steps for twenty years to redeem the prior mortgages, being evidently contented with the position that he would get interest at the rate stipulated in the mortgage-deed on the portion of the consideration-money actually advanced by him, and be liable to account for the profits of only such portion of the mortgaged property over which he got possession. On the 31st July 1911, the mortgagors paid Rs. 960 to the prior mortgagees and obtained possession over the remainder of the mortgaged property. The plaintiff then turned round and sued the mortgagors for possession, offering to pay to the mortgagors Rs. 700 or any other sum that may be adjudged by the Court.

The Courts below decreed the claim, conditioned on the payment of Rs. 960 by the plaintiff to the defendants.

It is contended on behalf of the defendant-appellant that she rescinded the contract of the mortgage under section 39 of the Indian Contract Act when the plaintiff-respondent did not pay the money due to the prior mortgagees and that the claim was barred by Article 135 of the Indian Limitation Act.

No rescission is, however, alleged or set up in the written statement. On the other hand, a suit for the redemption of the mortgage filed by *Musammat* Husaini is still pending. A portion of the consideration was admittedly received by the mortgagors and as held in *Rashik Lal* v. *Ram Narain* (1) and *Rani Raghubans Kuar* v. *Raunak Ali* (2) the mortgage is a good mortgage to the extent of the money actually advanced.

The effect of the failure of the plaintiff to pay the money due to the prior mortgagees, however, is that the mortgagors cannot be compelled to perform their part of the contract to deliver possession. Under section 54 of the Indian Contract Act, where a contract consists of reciprocal promises, the performance of one of which cannot be claimed till the other has been performed, and when the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract. The plaintiff practically seeks to enforce the contract made by the mortgagors to deliver possession without having performed his part of the contract. The non-payment of a portion of the consideration-money does not affect the validity of the security or transfer to the extent of the money paid, but affects the plaintiff's right to obtain possession.

The claim is, moreover, barred by limitation as the defendant's right to possession determined on the date of the mortgage. Article 135 of the Indian Limitation Act allows to the mortgagee suing for possession a period of twelve years from the date when the mortgagor's right to possession determines. It is immaterial whether the possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by prior mortgagee. As between the mortgagor and the mortgagee the right of the mortgagor to possession ceases when he makes a fresh mortgage.

The appeal is, therefore, allowed and the plaintiff's claim dismissed, the defendant-appellant getting her costs in all the Courts.

*Appeal allowed.*

(1) 13 Ind. Cas. 573; 34 A. 273; 9 A. L. J. 198.

(2) 10 O. C. 69.

MUSAHAR SAHU *v.* HAKIM LAL.

## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 22, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

MUSAHAR SAHU AND ANOTHER—APPELLANTS

*versus*

*Lala* HAKIM LAL AND ANOTHER—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 53—Transfer with intent to defeat or delay creditors—Preference of one creditor over another, when valid—Bankruptcy, consideration of—Conveyance, when valid.*

In a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. [p. 344, col. 2.]

*Moroney, In re*, 21 Irish 27, referred to.

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. [p. 344, col. 2.]

Where a transfer was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, and where there was no question of bankruptcy of the debtor:

*Held*, that there was no ground for impeaching the transaction under section 53 of the Transfer of Property Act for the fact that a creditor was a loser by payment being made to a preferred creditor. [p. 344, col. 2.]

*Middleton* v. *Pollock, Elliott, Ex parte*, (1876) 2 Ch. D. 104; 45 L. J. Ch. 293, approved.

Appeal from a judgment and decree of the Calcutta High Court, dated April 3, 1907, reversing those of the Court of the Subordinate Judge of Mozaffarpore, dated July 30, 1904.

FACTS.—The material facts of the case are sufficiently set forth in their Lordships' judgment.

There were two different suits instituted in the lower Court, but at the instance of the plaintiffs-appellants were set down for hearing together. Then they themselves raised objections to that mode of trial. The Judge, however, gave only one judgment. The appellants at the Privy Council endeavoured to make use of evidence given in one suit in the other.

Mr. *Dube*, for the Appellants.—On December 14, 1900, the appellants instituted a suit against one Kishun Benode Upadhya for the recovery of Rs. 12,695. The appellants became aware of the intention of Kishun Benode to dispose of his properties in order to defeat or delay the execution of the decree to be passed. An application was accordingly made under section 483 of Code of Civil Procedure of 1882 to call upon the said Kishun Benode to furnish security to satisfy the decree that might be passed against him. The application was rejected on the said Kishun Benode filing an affidavit to the effect that he did not have such an intention. During the pendency of the proceedings in the suit the respondents were busy conspiring with the said Kishun Benode as to devising a scheme in order to delay or defeat the execution of the decree to be passed. The fraudulent scheme adopted was the execution of two documents by the said Kishun Benode on September 2, 1901, whereby he conveyed practically all his immoveable properties to the respondents and their near relations. The first was a mortgage bond executed in the name of Kamta Prashad who was the nephew and a ward of the respondent Ram Aotar Lal, while the second was executed in favour of the respondent Hakim Lal. The transaction was not *bona fide* and, therefore, paying a valuable consideration would not take the case out of the provision of section 53 of the Transfer of Property Act. The transaction was to defeat the creditors and must fall. Nothing could be done to favour one creditor as against other creditors.

Reference was made to *Cadogan* v. *Kennett* (1), *Middleton* v. *Pollock, Elliott, Ex parte* (2), and *Narayana Pattar* v. *Viraraghava Pattar* (3).

Mr. *Dunne* appeared for the Respondents, but was not called upon.

### JUDGMENT.

LORD WRENBURY.—On the 2nd September 1901 Kishun Benode executed two *kobalas* or conveyances, the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

(1) 2 Cowper 432; 98 E. R. 1171.
(2) (1876) 2 Ch. D. 104; 45 L. J. Ch. 293.
(3) 23 M. 184.

MUSAHAR SAHU *v.* HAKIM LA .

The plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th December 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901 Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901 the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10-0 and costs. The defendant did not appear at the trial. On the 21st December 1901 Kishun Benode applied for a re-hearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, *viz.*, on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas*, on the ground that within section 53 of the Transfer of Property Act, IV of 1882, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles, C. B., in *Moroney, In re* (4), where he says :—

"The right of the creditors taken as a whole is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. It follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the Statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them, and as the Statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid [*Middleton* v. *Pollock* (2)]. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction: that (1) Kamta Prashad, the nephew, the minor and ward, and (2) Hakim Lal, the

uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for this purpose not distinguishable as independent transferees, that from the 11th February 1901, until after the 11th June 1902, Kishun Benode was playing for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent finding that the consideration for the deed was real, reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it uuder the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the appeal should stand dismissed with costs.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Watkins & Hunter.*

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 71 OF 1915.

June 23, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

ABDUL KARIM AND ANOTHER—DEFENDANTS —APPLICANTS

*versus*

MUHAMMAD HUSAIN—PLAINTIFF— OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), Sch. II, para. 15—Award, setting aside of—Date for making of award not fixed by order of reference, effect of—Notice of filing of award not given, effect of—Material irregularity—Opinion, mere, unsupported by reasons—Decision, insufficient.*

A Court set aside an award on the ground that no date had been fixed by the order of reference for the making of the award and that no notice of its filing was given to the plaintiff. An objection to the filing of the award had, however, been made within time:

*Held*, that in setting aside the award the Court acted illegally and with material irregularity. [p. 345, col. 2.]

*Mahant Gur Das* v. *Garul Dhuj*, 9 Ind. Cas. 241 and *Bhagwan Din Singh* v. *Fakir Singh*, 20 Ind. Cas. 773; 16 O. C. 233, referred to.

A mere expression of opinion one way or the other as regards any point, without any reasons being set forth in support of that opinion, cannot be regarded as a sufficient decision of that point. [p. 345, col. 2; p. 346, col. 1.]

Application against an order of the Munsif, South Lucknow, dated the 15th April 1915.

Pandit *Gokaran Nath Misra* and Babu *Probhat Chandra Gupta*, for the Applicants.

Babu *Bisheshwar Nath Srivastava* and *Pandit Brij Narzin Chakbast*, for the Opposite Party.

JUDGMENT.—In this case a suit for partition was referred to arbitration. The share claimed by the plaintiff was disputed by the defendants. The arbitrators made an award, allowing the plaintiff a one-third share in the disputed property. To that award certain objections were taken by the plaintiff, which were accepted by the Court below in so far that the award was set aside on the ground that no date had been fixed by the order of reference for the making of the award and that no notice of its filing was given to the plaintiff.

The Court below relied on the decision in *Mahant Gur Das* v. *Garul Dhuj* (1). But that decision was explained in a latter decision of this Court in *Bhagwan Din Singh* v. *Fakir Singh* (2). The question of giving notice of the filing of the award was immaterial because an objection to its filing was made within time. The lower Court has, therefore, set aside the award on very inadequate grounds. It has acted in the exercise of its jurisdiction illegally and with material irregularity.

The Court below in setting aside the award observed that the other grounds, alleging misconduct on the part of the arbitrators and setting up other irregularities, had not been established, but went on to say that, as the award was set aside on other grounds, it was not necessary to deal with them. Apparently there was no final decision of the other objections raised by the plaintiff to the validity of the award, and a mere expression of opinion one way or the other without any reasons being set forth in support of that opinion cannot

(1) 9 Ind. Cas. 241.
(2) 20 Ind. Cas. 773; 16 O. C. 233.

be regarded as a sufficient decision of the objections raised.

The application is, therefore, allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to dispose of the objections filed by the plaintiff in accordance with law. The costs will abide the event.

*Application accepted; Suit remanded.*

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1323 OF 1914.

December 20, 1915.

*Present:*—Mr. Justice Tudball and Mr. Justice Walsh.

BASDEO RAI—DEFENDANT—APPELLANT

*versus*

DWARKA RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Transfer of Property Act (IV of* 1882), *s.* 107—*Permission to build—Lease not executed—Dispossession—Suit for possession—Injunction—License—Licensee, position of—Easements Act* (*V of* 1882), *ss.* 52 *to* 64.

The father of the defendant gave the plaintiffs permission to build a *gola* or a market place on a certain plot of land on the latter agreeing to pay him annually ground-rent for the same. No lease was executed. The plaintiffs built the *gola*, but being subsequently dispossessed sued for possession and injunction:

*Held*, (1) that the plaintiffs could not claim as lessees inasmuch as no lease in law was executed in the manner laid down in section 107 of the Transfer of Property Act; [p. 346, col. 2; p. 347, col. 1.]

(2) that even if the plaintiffs were mere licensees whose license had been improperly revoked, their remedy lay in a suit for damages and not for possession. [p. 346, col. 2; p. 347, col. 1.]

A licensee is a person without any title and has no interest in the land. [p. 347, col. 1.]

*Mahomed Musa* v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 17 Bom. L. R. 420; (1915) M. W. N. 621; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 17 M. L. T. 143; 2 L. W. 258 (P. C.); 13 A. L. J. 229; 42 C. 801, distinguished.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 10th July 1914.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *M. Bajpai*, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal has arisen are briefly as follows. The father of the defendant-appellant Basdeo Rai, who is now a minor, gave the plaintiffs permission to build a *gola* or a market place on a certain plot of land on the latter agreeing to pay him Rs. 6 annually as ground-rent for the same. The plaintiffs thereupon built the *gola*, but very shortly afterwards a dispute arose between the parties. The defendant's father interfered with the collection of the income of the *gola* and finally the plaintiffs were dispossessed towards the end of April 1913. They brought the present suit for possession and injunction to restrain the defendant from interfering with the construction of the *gola* and collection of the income thereof. It is evident from the plaint itself that the construction of the *gola* had not been finished when the dispute arose. The Courts below have decreed the plaintiffs' suit for possession and injunction. The defendant comes here on second appeal, and the point taken on his behalf is that the plaintiffs have failed to establish any title in that no document was executed, much less registered, and that a lease can only be created in the manner laid down in section 107 of the Transfer of Property Act. That section runs as follows:—

"A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument."

It is urged, therefore, that the plaintiffs having no title ought not to have a decree for possession and that the suit should be dismissed. This contention appears to us to be well founded. On behalf of the respondents it is urged that this plea was not taken in the Court of first instance and only in the lower Appellate Court at a fairly late stage, but the plea was accepted and discussed in the Court below. There is nothing to prevent the appellant from taking the point in this Court. It is further urged that they are not lessees but licensees, that no lease was given to them, that they have erected a building of a permanent nature on the land, that their license is irrevocable and that, therefore, they are entitled to possession. In the alternative it is pleaded that the defendant-appellant is estopped from denying the plaintiffs' right of possession as lessees over the land. It seems to us fairly clear from the language of sections 52 to 64 of the Indian Easements Act that even if the plaintiffs-respondents be mere licensees

whose license has been improperly revoked their remedy lies not in a suit for possession, but in a suit for damages as laid down in section 64, as a licensee is a person without any title and has no interest in the land. It is impossible to separate the building from the land and his remedy as a licensee is clearly to recover damages for the wrongful act of the licensor. In regard to the question of estoppel, reliance is placed on the decision of *Mahomed Musa* v. *Aghore Kumar Ganguli* (1). The facts and circumstances of that case are totally different from those of the present case and it is impossible to apply that ruling to the circumstances of the case which is now before us. Moreover, on the plaintiffs' own showing no term whatsoever was fixed in the agreement between the parties. It is impossible to say for what term we should have to hold that there was a binding agreement between the parties. If the defendant-appellant be estopped from denying the existence of the lease, at least the term of that lease should be before us. Apparently the parties went about the transaction in a careless manner. They were probably friendly at the time and the dispute arose subsequently. An agreement was made to pay an annual rent but no attempt was made to fix the period. It seems to us fairly clear that the plaintiffs have misconceived their remedy and that they ought to have brought a suit to recover damages for the wrongful revocation of the license. They cannot claim as lessees, for the simple reason that no lease in law was created.

We must allow this appeal and set aside the decrees of the Courts below. The plaintiffs' suit will stand dismissed with costs in all Courts, including in this Court fees on the higher scale.

*Appeal allowed.*

(1) 28 Ind. Cas. 930; 13 A. L. J. 229; 17 Bom. L. R. 420; (1915) M. W. N. 621; 42 C. 801; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 17 M. L. T. 143; 2 L. W. 258 (P. C.).

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 70 OF 1915.

June 23, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

ABDUL KARIM AND ANOTHER—DEFENDANTS —APPLICANTS

*versus*

MUHAMMAD HUSAIN—PLAINTIFF— OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, Sch. II, para. 3 (2)—Withdrawal of suit—Award, valid, effect of—Jurisdiction of Courts.*

Where a suit is referred to arbitration and the award is made and found to be valid, the Court has no jurisdiction to permit withdrawal of the suit with leave to file a fresh one. [p. 347, col. 2.]

Application against the order of the Munsif, South Lucknow, dated the 28th April 1915.

Pandit *Gokaran Nath Misra* and Babu *Probhat Chandra Gupta*, for the Applicants.

Babu *Bisheshwar Nath Srivastava* and Pandit *Brij Narain Chakbast*, for the Opposite Party.

JUDGMENT.—In this case the plaintiff has been allowed to withdraw a suit after it was referred to arbitration and an award made, to which certain objections were taken by him. The Court below set aside the award and permitted the suit to be withdrawn with leave to file a fresh suit, on the ground that the plaintiff had omitted by mistake to have his claim as regards the share of one of his deceased brothers by right of inheritance in addition to purchase included in his suit. It has, however, been found by this Court in the connected case [*Abdul Karim* v. *Muhammad Husain* (1)] decided to-day that the award was set aside on inadequate grounds and the case has been remitted to the Court below for considering the other objections to the award and determining whether having regard to the other objections raised the award can be maintained. If the award is a valid award, the further jurisdiction of the Court to permit the withdrawal of the suit with leave to file a fresh one would be an abuse of the power of the Court and contravene the provisions contained in paragraph 3, clause (2), of the Second Schedule attached to the Code of Civil Procedure. The application is, therefore,

(1) 32 Ind. Cas. 347; 2 O. L. J. 495.

allowed and the order of the Court below set aside. This will not, however, prevent the Court below from re-considering such an application if the award is set aside after taking into consideration the objection filed to it on the merits. Parties will bear their own costs of this proceeding.

*Application accepted.*

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ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 129 OF 1915.

December 14, 1915.

*Present*:—Mr. Justice Tudball and Mr. Justice Walsh.

WASI-UL-ZAMAN KHAN—DEFENDANT—APPELLANT

*versus*

*Musammat* FAIZA BIBI—PLAINTIFF—RESPONDENT.

*Oaths Act* (X *of* 1873), *ss.* 8, 9, 10—*Attorney of a party, power of.*

A special attorney of a party to a suit, who has full power to conduct the case as he deems fit and in particular has power to compromise or withdraw it, can take steps contemplated by sections 8, 9, 10 of Act X of 1873. [p. 348, col. 2; p. 349, col. 1.]

*Sadashiv Rayaji* v. *Maruti Vithal*, 14 B. 455, not approved of.

First appeal from an order of the Officiating District Judge, Ghazipur, dated the 7th June 1915.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Mr. *Iqbal Ahmed*, for the Respondent.

JUDGMENT.

TUDBALL, J.—This is an appeal from an order of remand and arises out of the following circumstances. The plaintiff respondent Faiza Bibi brought a suit against the defendant-appellant Wasi-ul-Zaman Khan, pleading that the latter had widened a certain ditch which existed between two plots owned by the parties at the expense of the plaintiff, that is, he had taken earth from her side of the ditch and thus reduced the area of her plot and damaged her trees. The suit was contested by the defendant. For the proper conduct of the suit the plaintiff executed a special power-of-attorney in favour of her husband. She gave him full powers to conduct the case as he should deem fit and in the deed she also set out that he had power to compromise the suit, to withdraw the suit, to refer the point in dispute to arbitration, to nominate and appoint arbitrators, and concluded by saying that every step that he might take in the conduct of the case was to be considered as having been taken by her herself. In the course of the suit the husband stated to the Court that if the defendant would take his oath on the Qoran and state that no damage whatsoever had been done to the plaintiff or earth removed from her side of the ditch, the plaintiff would abide by that oath and the case should be decided accordingly. The defendant took oath and he testified that he had not removed earth from the plaintiff's side of the ditch nor had in any way damaged her plot or trees. Thereupon the Court of first instance dismissed the suit. The plaintiff appealed. The Court below, relying on the decision in *Sadashiv Rayaji* v. *Maruti Vithal* (1) and also on the ground that the power of attorney in favour of the husband did not authorize him to take the step he had taken, allowed the appeal, set aside the decree of the first Court and remanded the suit to that Court for decision on the merits. It is contended before us on behalf of the defendant-appellant that the special power-of-attorney in favour of the plaintiff's husband gave him full power to take the step which he did take. It is urged that the decision mentioned above is not correct and should not be followed. It has been pointed out that in certain cases the guardian of a minor has been allowed to take the step contemplated by sections 8, 9 and 10 of Act X of 1873. The latter cases do not help us in any way. In so far as the special power-of-attorney in the present case is concerned, I have examined the terms of it carefully and find that the plaintiff gave very extensive powers to her husband, for instance, to abandon the suit as well as to compromise it. I have not the slightest doubt whatsoever that the husband as agent of the lady had full power to take the step which he did take. Sections 8, 9 and 10 of Act X of 1873 clearly contemplate that the

(1) 14 B. 455.

action mentioned therein can be taken by a party to a suit. In the Act itself there is no language which goes to show that the word "party" can be used only in its restricted sense and not in the wider sense. The considerations which are to be found in *Faki Abdulla* v. *Babaji Gungaji* (2) are considerations which really apply more to a person who takes the oath than to a person who makes the offer. I can see no good reason why a "duly" authorized agent of a party should not make the offer contemplated in section 9. In the present case I am satisfied that the plaintiff's husband had full power to take this step in view of the language of the power-of-attorney on the record. In my opinion the decision of the first Court is correct and the order of the Court below should be set aside.

WALSH, J.—I agree. My only reason for desiring to say anything is that I think it important that people should understand the extent to which they are bound by the acts of persons whom they employ with general authority to do acts on their behalf, and that it is equally important that persons who deal with such agents should understand the extent of the authority given to the latter and also because we are differing from the reported decision of two Judges of the High Court of Bombay which is now of fifteen years' standing. That decision is one which I am unable to follow. Under such authority as was given in that case, which in substance resembles the authority given in the present case, if indeed it is not stronger, the agent could do any act which he deemed proper for the purpose of the conduct of the suit. Acts of the agent are acts of the parties. Act X of 1873 enables a party to make the offer which was made in the case before us. That is a step in a suit which, however rare in its occurrence, may arise as an incident in a suit. I see no reason why an agent authorized to conduct a suit is not authorized to take the step provided by Act X of 1873. The reasons given by the Bombay High Court, as my learned brother has pointed out, appear to be directed to questions relating to the person who takes the oath and not to the person who makes the offer. It is for this reason that I feel less hesitation in differing from the Bombay High Court. In my opinion the offer made here is contemplated by and included in the authority given by the plaintiff to her husband, by whose acts in the suit the plaintiff is bound.

BY THE COURT.—The appeal is allowed. The order of the Court below is set aside and the decree of the first Court is restored with costs in all Courts.

*Appeal allowed.*

(2) 14 B. 458.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 510 OF 1913.

June 17, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

JAGAN NATH—PLAINTIFF—APPELLANT

*versus*

KAMTA SINGH—DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 114—Money due on bond, suit for—Bond lost—Payment pleaded—Burden of proof.*

Where a plaintiff sues for money due upon a bond but alleges its loss, and the defendant admits its execution but pleads payment, the onus lies on the defendant to prove payment either by the production of the bond or by other evidence or both. And if the defendant does not produce the bond, the question of its loss is only material in so far as it may raise a presumption one way or the other under section 114 of the Evidence Act. [p. 350, col. 1.]

*Chuni Kuar* v. *Udai Ram*, 6 A. 73; A. W. N. (1883) 221 and *Chaudhri Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das*, 17 Ind. Cas. 396; 12 M. L. T. 392; (1912) M. W. N. 1052; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 17 C. W. N. 49; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68 (P. C.); 15 O. C. 278, referred to.

Appeal from the decree of the District Judge, Rae Bareli, dated the 16th August 1913, reversing that of the Munsif, Partabgarh, dated the 28th April 1913.

Babu *Lachhman Prasad Varma*, for the Appellant.

Babu *Rudra Dutt Singh*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued in this case for the recovery of money due on a registered mortgage-bond executed by the defendant in his favour on the 29th June 1900. The defendant pleaded payment. The plaintiff did not produce the original bond but filed a certified copy of it, alleging that his house was destroyed by fire about

five years ago and that the original bond was burnt at the time. He produced some evidence in support of his statement, which was believed by the Court of first instance, but disbelieved by the lower Appellate Court. The lower Appellate Court, however, did not express any opinion on the merits of that evidence.

In a case where the execution of a mortgage-bond is admitted, the question of loss is not of much importance except as rendering improbable or probable the correctness of a plea of payment, which the debtor may set up. Section 65 of the Indian Evidence Act requires proof of the loss where the execution of the document is not admitted by the person who is sought to be made liable on it. Secondary evidence can be given of the contents of a document when the existence, condition or contents of the original are proved to be admitted in writing by the person against whom it is sought to be proved or by his representative-in-interest. The execution of the bond having been admitted, the onus lay on the defendant, as pointed out in *Chuni Kuar* v. *Udai Ram* (1), to prove payment either by the production of the bond or by other evidence or both. The defendant did not produce the bond and the question of the loss of the original is only material in so far as it may raise a presumption one way or the other under section 114 of the Indian Evidence Act, *Chaudhri Muhammad Mehdi Hasan Khan* v. *Sri Mandir Das* (2).

The appeal is, therefore, allowed and the case remanded to the lower Appellate Court with a direction to reinstate the appeal under its original number and to dispose of it in accordance with law. The costs will abide the result.

*Appeal allowed.*

(1) 6 A. 73; A. W. N. (1883) 221.

(2) 17 Ind. Cas. 396; 15 O. C. 278; 12 M. L. T. 392; (1912) M. W. N. 1052; 34 A. 511; 14 Bom. L. R. 1073; 10 A. L. J. 373; 17 C. W. N. 49; 16 C. L. J. 629; 23 M. L. J. 741; 39 I. A. 68 (P. C.).

## MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 71 OF 1914.

September 29, 1915.

*Present*:—Mr. Justice Bakewell.

V. RAMASWAMI IYER—PLAINTIFF

*versus*

THE MADRAS TIMES PRINTING AND PUBLISHING COMPANY, LTD.—DEFENDANTS.

*Company—Director, duty of—Personal interest—Taking part in meeting in which personal matter discussed, effect of—Meeting of Directors, validity of.*

No one who has a duty to perform can place himself in a situation in which his interest conflicts with his duty and he must not make profit by a trust. [p. 351, col. 1.]

A Director of a Company cannot, as a rule, enter into a contract with the Company for profit to himself as the Directors of a Company are agents of the Company and trustees for the share-holders of the powers committed to them. [p. 351, col. 1.]

The articles of an association provided that the Company shall only be bound if two of the Directors exercise authority, consider its interests and act on its behalf. At a meeting in which only two Directors were present, one of the Directors present was appointed as Managing Director and co-editor of the paper run by the Company:

*Held*, that the appointment was not made with the authority of the Company and was invalid, inasmuch as there was, in law and in fact, only one Director acting on behalf of the Company, the other being incapacitated by his interest from acting in the particular matters that were discussed. [p. 352, col. 1.]

Messrs. *C. P. Ramaswami Aiyar*, *C. K. Mahadeva Aiyar*, *V. V. Srinivasa Aiyangar* and *A. Duraiswami Aiyar*, for the Plaintiff.

Messrs. *E. R. Osborne* and *R. N. Aiyangar*, for Defendant No. 1.

Mr. *A. Suryanarayanaiya*, for Defendant No. 2.

Mr. *T. Narasimha Aiyangar*, for Defendant No. 3.

JUDGMENT.—In December 1912, the plaintiff and two other persons were Directors of the defendant Company, which carries on the business of a newspaper called the "Madras Times." The plaintiff had been appointed Managing Director of the Company at a meeting of himself and another Director, on the 7th January 1912. At a meeting of the same two Directors, on the 31st December 1912, it was resolved that the plaintiff in addition to his duties as Managing Director should be co-editor of the "Madras Times." At a subsequent meeting of the same two Directors held on the 28th February 1913, it was resolved that the plaintiff should

receive, with effect from the 31st December 1912, a sum of Rs. 250 per mensem, for his duties as co-editor of the "Madras Times," and that the above resolution should be in operation for a period of ten years. On the 19th October 1913 a resolution was passed by the same two Directors and the third Director of the Company that the plaintiff should be given, with effect from the 15th October 1913, a carriage allowance of Rs. 100 as Managing Director and co-editor. The last resolution was not passed at a meeting, but, under a special power in the articles of association, was circulated to the Directors and signed by them.

It has been argued that this last resolution is a confirmation and ratification of the previous resolutions passed by only two Directors, but the resolution does not refer to the terms of the previous resolutions, and it does not appear that they were before the three Directors at the time when the last resolution was passed; and the resolution of October 1913 might as well have reference to the resolution of the 31st December 1912, whereby apparently the plaintiff was appointed co-editor without remuneration, as to that of the 28th February 1913. Article 89 of the articles of association declares that a Director may hold any other office under the Company in conjunction with the office of Director and on such terms as to remuneration and otherwise as the Directors may arrange; and Article 90 declares that no Director shall be disqualified by his office from contracting with the company either as vendor, editor, purchaser or contributor to the paper or otherwise. These articles constitute an exception to the general rule of law that "a Director cannot enter into a contract with the Company for profit to himself. The Directors of a Company are agents of the Company and trustees for the share-holders of the powers committed to them" (see Buckley on Companies and Limited Partnerships, 9th Edition, page 626); and as such trustees the general rule applies that "no one who has a duty to perform shall place himself in a situation in which his interest conflicts with his duty, and he must not make profit by the trust" (see Lewin on Trusts, 12th Edition, page 310). The Company is entitled to the unbiassed advice of every Director upon matters which are brought before the Board for consideration, and a contract made by a Director with the Company for profit to himself is generally invalid (see Buckley, pages 640, 641). The members of a Company may have such confidence in their Directors as to exempt them from this salutary rule, but any such exemption is an exception from the general law, and a Director who claims a special authority must show that any particular arrangement falls precisely within it. This principle is well exemplified by three English cases. In *Greymouth Point Elizabeth Railway and Coal Company, Limited, In re, Yuill* v. *Greymouth Point Elizabeth Railway and Coal Company, Limited* (1), the facts were very similar to those in this case, but the articles provided that the Directors interested should not vote on any matter relating to his contract, and it was held that, as one of the Directors did vote, his vote should not be counted, there was no quorum and consequently there was no valid contract for the issue of debentures. Mr. Justice Farwell in that case says, "I think the other Directors would have been justified in asking them to retire while the question of giving security was discussed, because they were interested against the Company. Certainly it is a case in which the Company is entitled to have the benefit of all the protection it can get from the independent Directors." In *Toms* v. *Cinema Trust Company Limited* (2), Mr. Justice Scrutton held that a contract was invalid on the ground that the articles of association had not been strictly followed. In another case *In re Alexander's Timber Company* (3) before Mr. Justice Wright, it was held that the contract was invalid, because the articles of association having directed that the Directors in making any such contract should take into consideration the interests of the Company, there was no evidence that this had been done. It appears to me that the provisions of the articles in those cases merely enunciate the general law that a Director is bound to take into consideration the interests of the Company

(1) (1904) 1 Ch. D. 32; 73 L. J. Ch. 92; 11 Manson, 85.

(2) (1915) W. N. 29.

(3) (1901) 70 L. J. Ch. 767; 8 Manson, 392.

and to give the Company the benefit of his independent advice. If he is engaged in a transaction with the Company and is thereby incapable of giving to the Company the advice which it is his duty to give, it appears to me that it is his duty to refrain from taking any action in the particular arrangement. It is possible, of course, that a person may be so altruistic that in coming to an arrangement in which his interest is concerned, he will give better terms to the other contracting parties than if he had no interest at all; but persons of such disposition are not usually found among the Directors of a Company, and it must, I think, be assumed that in the making of an arrangement a man will consider his own interests rather than the interests of the other contracting party. The position, therefore, at the meetings of the two Directors in December 1912, and February 1913, was that the Company had the advantage of the disinterested advice of only one Director, and that Director was liable to be influenced, in considering the interests of the Company, by the presence of his co-Director.

Articles 101 to 107 deal with the proceedings of the Directors. Article 101 deals with their meetings and provides that, until otherwise determined, two Directors shall be a quorum. Article 104 provides that a meeting of the Directors at which a quorum is present shall be competent to exercise all or any of the authorities, powers and discretions vested in or exercisable by the directors generally. Therefore, the agents by whom the company can act are first the Directors, or, if all the Directors are not available, at least two. I think that the intention of the articles is that the Company shall only be bound if two of the Directors exercise authority, consider its interests and act on its behalf. For the reasons which I have given, I hold that at the meetings in question there was, in law and in fact, only one Director acting on behalf of the Company, the plaintiff being incapacitated by his interest from acting in the particular matters that were discussed. It follows that the appointment of the plaintiff as Managing Director and co-editor was not made with the authority of the Company and is, therefore, invalid.

The *second* issue in the case is as to whether the plaintiff was wrongfully dismissed. In the original plaint he joined two other persons as defendants, and it contained allegations that one of these persons, the second defendant, purported to be the only other Director with the third defendant and that these defendants had not been validly appointed. A question arose as to the joinder of these persons with the defendant Company and the plaint was amended by striking out these allegations. The plaintiff at the trial desired to call evidence to show that these persons had not been validly appointed as Directors of the Company, that they were not authorised to act on behalf of the Company and, in particular, that he was not bound by their orders. I think that the allegations as to the position of the Directors were withdrawn by the amendment of the plaint, and that the plaintiff cannot in these proceedings raise any question either as to their appointment or as to their acts. It appears that the two persons mentioned became Directors of the Company in December 1913 and that one of them, Mr. Ormerod, was appointed Managing Director and that the plaintiff was requested to hand over charge of his position to him, and, after some delay, it appears that this was done and the plaintiff acquiesced in Mr. Ormerod assuming his position as Managing Director. Shortly afterwards, Mr. Ormerod gave directions to the plaintiff as to the manner in which he should carry out his duties as co-editor of the Company. The plaintiff now alleges that his duties were to exercise a general supervision over the policy of the Company. I intimated to the learned Vakil for the plaintiff that I had extreme difficulty in understanding what the claim was; and I asked Mr. Ormerod what, in general, the duties of an editor are, and I understand that an editor has to put forth or publish the papers and to exercise a general supervision over the matter which is written for the paper or which is extracted as news. It is obvious that, for duties of this kind, certain literary and business qualifications are necessary. It is possible, of course, that the plaintiff may have been retained simply as a gentleman of eminence in the political, scientific or literary world, to keep the paper in touch

with current opinion. He has not gone into the witness-box to prove that this was the purpose for which he was retained, and the only thing before the Court is the resolution appointing him as co-editor of the Company. As such officer he should have been possessed of at least some literary and business qualifications. His own evidence apparently is that he possesses no qualifications whatever. It has not been explained how the plaintiff remained as Managing Director of the Company for a considerable period and also acted as co-editor without qualifications, but I cannot accept the argument that the Company in any way condoned the absence of these qualifications or ratified his appointment in those offices. The plaintiff has not gone into the witness-box to explain what took place during the period he held those offices or who, in fact, performed the work. The evidence that has been put in shows that Mr. Ormerod, as Managing Director, endeavoured to persuade the plaintiff to perform the duties of his office and that his endeavours failed, and they failed, I think, because the plaintiff was absolutely incapable of performing the duties which the Company had a right to expect of him. On the second issue I hold that the plaintiff was rightly dismissed.

The plaintiff appears, in the view I take, to have obtained his position under the Company in a manner which is unexplained and extremely suspicious. I think that he has no shadow of claim against the Company and this litigation is ill-advised. For these reasons, I direct the suit to be dismissed with costs on the higher scale.

I certify for two Counsel.

*Suit dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 372 OF 1913.

June 10, 1915.

*Present*:—Mr. Stuart, A. J. C.

RAGHUNATH PRASAD—PLAINTIFF—APPELLANT

*versus*

*Musammat* KETKI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Decree, interpretation of—Charge or mortgage—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 136, 144, 148.

Where a decree directed that *A* should obtain possession of the house in suit from *B* if he paid *B* a certain sum and subsequently *A* sold such interests as he had in the house to *C*, and after that *C* brought a suit against *B*, who was never paid and thus retained possession of the house, for possession on payment of the said sum:

*Held*, that the decree did not create a mortgage or a charge and that the suit was governed by Article 136, and not by Article 144 or 148, Schedule I, of the Limitation Act. [p. 354, col. 1.]

*Karim Bakhsh Khan* v. *Mehdi Hasan Khan*, 10 O. C. 17, referred to.

Appeal from the decree of the District Judge, Hardoi, dated the 25th May 1913, upholding that of the Munsif, Sandila, dated the 10th March 1913.

Babu *Ishwari Prasad*, for the Appellant.

Pandit *Bansi Dhar Misra*, for Respondent No. 2.

JUDGMENT.—The facts, so far as it is necessary to state them for the decision of this appeal, are as follows:—

On the 7th June 1865 a certain Mulchand executed a deed of simple mortgage in favour of Ram Din by which half of a certain house was hypothecated. Mulchand died and was succeeded by Shanker. After Mulchand's death Ram Din brought a suit against Shanker on the foot of this mortgage. A certain Murli interposed, saying that the house belonged to him and that neither Mulchand nor Shanker had any right in it. The decision of the suit was referred to arbitration. The arbitrators made an award which was embodied in a decree of the Court in 1871. The effect of this award was that Shanker should pay Ram Din Rs. 84-10 and that Shanker should obtain possession of half the house if he paid Murli Rs. 27-8. The mortgaged property was in no way secured by this decree. On the 20th January 1873, Shanker sold such interests as he had in the house to Ram Din. The sum of Rs. 27-8 had apparently never been paid. Shanker never at any time obtained possession of the house. This suit was brought by Ram Din to obtain possession of half the house on payment of Rs. 27-8.

The decree of 1871 does not profess to create a mortgage. I find that it further does not even profess to create a charge. I do not see that thereby half the house

was made security for the payment of Rs. 27-8 by Shanker to Murli. There had been no claim made by Murli against Shanker for the payment of anything. Article 148 of the First Schedule, Act IX of 1908, clearly has no application. If a charge was considered to be created by the decree of 1871, Article 144 might have had application according to the decision in *Karim Bakhsh Khan* v. *Mehdi Hasan Khan* (1). But as I find that no charge was created, the Article of limitation applicable to the present suit is Article 135. Ram Din was a purchaser at a private sale of Shanker's interests in the house and Shanker was out of possession at the date of the sale. This suit for possession of Shanker's interests in the house had to be brought within twelve years from the date of the sale, and the suit has been rightly held to be time-barred.

I dismiss this appeal. The appellant will pay his own costs and those of the contesting respondent.

*Appeal dismissed.*

(1) 10 O. C. 17.

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## PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 25, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

AMIR CHAND—PLAINTIFF—APPELLANT

*versus*

*Bakshi* HARIHAR PRASHAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 244—Objections—Execution—Decree—Suit, maintainability of—Transfer of Property Act (IV of 1882), ss. 88, 89—Mortgage.*

One *B* sued and obtained a decree against one *F* for the enforcement of his mortgage under sections 88 and 89 of the Transfer of Property Act. *A*, the adopted son of *F*, raised certain objections against the execution of the said decree of *B* under section 241 of the Civil Procedure Code of 1882, some of which were disallowed. *A* then brought a suit raising the same objections as in the execution proceedings making two other persons parties also:

*Held*, that the suit was barred by section 244 of the Civil Procedure Code, 1882, as the questions raised in the suit could have been and were raised in the execution proceeding. [p. 355, col. 1.]

*Prosunno Kumar Sanyal* v. *Kali Das Sanyal*, 19 I. A. 166; 19 C. 683 (P. C.), approved.

Appeal heard *ex parte* from a judgment and decree of the Calcutta High Court, dated December 20, 1909, reversing those of the Court of the Subordinate Judge of Arrah, dated June 29, 1908.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment.

Mr. *Dube*, for the Appellant, referred to sections 85 and 89 of the Transfer of Property Act and section 287 of the Civil Procedure Code of 1882 and contended that there was a lien irrespective of the decree.

[LORD HALDANE referred to *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1).]

The respondents did not appear.

JUDGMENT.

SIR JOHN EDGE.—The plaintiff in the suit in which this appeal has arisen is Babu Amir Chand, the adopted son and representative of Babu Fakir Chand, deceased. On the 29th March 1888, one Bakshi Ram Nawaz Singh obtained a decree for sale, under section 88 of the Transfer of Property Act, 1882, Act IV of 1882, of certain immoveable property of which he was a mortgagee. To the suit in which that decree was made Babu Fakir Chand was a defendant. An order absolute for sale, under section 89 of that Code, was made in the suit for sale on the 4th January 1902 by the Trial Judge, and was confirmed on appeal by the High Court at Calcutta on the 18th December 1903. The representatives of Bakshi Ram Nawaz Singh thereupon applied for execution of the decree for sale. On the 18th May 1904, Babu Amir Chand, who was the representative of Babu Fakir Chand then dead, presented to the Court executing the decree for sale a petition of objections under section 244 of the Code of Civil Procedure, 1882, Act XIV of 1882. Some of Babu Amir Chand's objections were allowed, others of his objections were disallowed on

(1) 19 I. A. 166; 19 C. 683 (P. C.).

the ground, amongst others, that he had failed to support them by sufficient evidence.

On the 23rd January 1907 Babu Amir Chand filed his plaint in the present suit in the Court of the Subordinate Judge of Arrah. In this suit he raises the same objections to the execution of the decree for sale of 1888 which had been put forward in his petition of objections of 1904 and which had been disallowed. The Subordinate Judge decreed in part the claims of Babu Amir Chand. On appeal the High Court at Calcutta on the 20th December 1909, holding that this suit is based on the very same objections that were made by Babu Amir Chand in his petition of objections of 1904, and further, finding that Babu Amir Chand had laid no foundation by reliable legal evidence for impleading in this suit Abdur Razak and Gangan Kunwar, who were not parties to the previous suit or execution proceedings, dismissed this suit. From that decree of the High Court this appeal has been brought.

Abdur Razak and Gangan Kunwar were made defendants to this suit in an attempt to avoid the bar to this separate suit which was provided by section 244 of the Code of Civil Procedure, 1882.

As was observed by this Board in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1):—

"It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 of the Code of Civil Procedure, 1882."

The questions raised in this suit could have been and were raised by Babu Amir Chand under section 244 of the Code of Civil Procedure, 1882, and whether then raised or not in his petition of objections of 1904, they are questions which relate to the matters which by section 244 it was enacted—

"Shall be determined by orders of the Court executing a decree and not by separate suit."

The suit was properly dismissed by the High Court. The respondents, with one exception, have not entered an appearance in this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay to the respondent who has entered an appearance such costs as he may be entitled to.

*Appeal dismissed.*

Solicitors for the Appellant: Messrs. *Barrow, Rogers* and *Nevill.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 4247 OF 1913.

January 5, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

KAILAS CHANDRA AICH AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

*versus*

ROMESH CHANDRA SEN AND OTHERS—PLAINTIFFS, AND REMAINING DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 87—Non-transferable occupancy holding, abandonment of, by sale—Landlord's right of re-entry—Abandonment, finding of—Second appeal.*

A finding of a lower Appellate Court on the question of abandonment, arrived at on evidence on the record, is unassailable in second appeal. [p. 356, col. 1.]

When an occupancy *raiyat* sells his non-transferable holding and abandons it, the lessee of the landlord, to whom the landlord's right of re-entry has been transferred, is entitled to an ejectment decree, even though the purchaser of the holding executes a deed of release in favour of the *raiyat* and puts him in possession. [p. 355, col. 1.]

Appeal against the decree of the Additional Subordinate Judge of Faridpur, dated the 18th September 1913, modifying that of the Additional Munsif, Madaripur, dated the 17th March 1913.

Mr. *A. K. Fuzlul Huq*, for the Appellants.

Babus *Gunada Charan Sen* and *Prakas Chandra Mojumdar*, for the Respondents.

### JUDGMENT.

D. CHATTERJEE, J.—The facts of this case are shortly stated as follows:—Defendants Nos. 4 and 5 were occupancy tenants in respect of 10 *bighas* of land. Occupancy

rights in that part of the country are not transferable by custom. Defendants Nos. 4 and 5 sold their occupancy rights to defendants Nos. 1 to 3 in 1910. Defendants Nos. 1 to 3 attempted to obtain recognition of the landlord but failed. Then on the 3rd February 1912 the plaintiffs took a *miras-ijara* of the 10 *lighas* of land. The landlord stated that he had not been informed when the original tenants had sold their rights and that the purchaser had not taken any settlement from him. On the 23rd February 1912, this suit was brought against the purchasers for ejectment on the ground that the holding had been abandoned by the original tenants. Three days after that, that is on the 26th of February 1912, there was a deed of release executed by the purchasers in favour of defendants Nos. 4 and 5 and defendants Nos. 4 and 5 were brought on the record as defendants in April 1912. The first Court gave a decree for a declaration that the plaintiff was entitled to rent from defendants Nos. 4 and 5 who were in possession under the release. The Court of Appeal below has set aside that decree and has given a decree for ejectment. The appeal before us is on the ground that upon the facts found there was no abandonment and, therefore, the decree for ejectment cannot be sustained. We think that this contention is not right. There was a sale and the learned Subordinate Judge has found that defendants Nos. 4 and 5 did not pay any rent after the transfer and refused to pay. He alse found that there was an abandonment by defendants Nos. 4 and 5 of their holding. If there was an abandonment, then the landlord had a right to re-enter and such right has been transferred to the plaintiffs by the *miras-ijara*. The contention that the landlord did not contemplate a transfer of his right of re-entry, does not appear to be supported by the document. It is further contended that the pendency of the negotiation with the landlord is evidence that the landlord did not treat the holding as abandoned. That, however, is negatived by the terms of the *miras-ijara* and I think that the finding of the learned Subordinate Judge on the question of abandonment, arrived at on evidence on the record, is one that cannot be assailed in second appeal.

The case seems, no doubt, to be a hard one for the original tenants, but they chose to make an out and out sale, refused to pay rent and went out of possession of the land until the vendees, finding it impossible to obtain recognition, rendered back the land to them.

In this view of the case the appeal is dismissed with costs.

BEACHCROFT, J.—I agree.

A strong appeal was made to our sympathy by the learned Vakil for the appellants. A bare recital of the facts would seem to suggest that his appeal was well-founded. But a reference to the deed of release and the written-statement, in which it was stated with the most engaging cynicism that the original transfer was made with the object of defeating the appellants' creditors, robs the appellants of any claim to our sympathy.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 482 OF 1913.

June 15, 1915.

*Present*:—Mr. Lindsay, J. C.

RAM DAYAL—DEFENDANT—APPELLANT

*versus*

SUMER SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—House of husband re-built by widow—Widow's absolute property—Alienation, widow's absolute power of.*

Where a Hindu widow re-built, after her husband's death, a house belonging to him out of her own money, and subsequently sold it off:

*Held*, that, in the absence of anything to show that the widow intended the house after its being re-built to be treated as a portion of her husband's estate, it ought to be taken as her absolute property which she could sell. [p. 357, col. 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 1st October 1913, modifying that of the Munsif, Sandila, dated the 26th May 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Chaudhri *Ram Bharose Lal*, for Respondents Nos. 1 and 3.

JUDGMENT.—The respondents were the plaintiffs in the Court of first instance and they brought a suit for the recovery of a certain house alleged to be in the possession of the defendant, on the allegation that

the house in question had once been the property of a man called Jugga Singh to whom they claimed to be the nearest reversioners. After the death of Jugga Singh his wife *Musammat* Dallo is said to have had possession of this house, which she disposed of by a sale-deed executed in favour of the defendant. The suit also comprised a claim for certain moveable property which had once belonged to *Musammat* Dallo and which was said to be in the defendant's possession.

The present appeal is concerned only with the question of the house. The defendant denied that the plaintiffs were the nearest reversioners of Jugga Singh. It was also denied that the house in question had belonged to Jugga Singh. There was a further plea that even if the house were found to have belonged to him, the widow had disposed of it to the defendant for a legal necessity inasmuch as she sold it in order to raise money to go on a pilgrimage undertaken with the idea of conveying spiritual benefit to her husband. The first Court dismissed the suit on a finding that the house was not proved to have belonged to Jugga Singh. It was admitted before the Munsif that after the death of Jugga Singh his widow *Musammat* Dallo lived with one Narpat Singh as his mistress. The Munsif was of opinion, on the evidence produced before him, that this house had been built after Jugga Singh's death by Narpat Singh. It could not, he said, have been built by the woman for she had no means to build the house, it being proved that the whole of Jugga Singh's immoveable property was under mortgage at the time. When the case came before the learned Judge in appeal he came to the conclusion that this finding of the Munsif was wrcng. He says in his judgment that it is quite clear that the house in dispute was re-built and the rest of the judgment makes it clear that it was re-built after the death of Jugga Singh, but the learned Judge was of opinion that the house had been built by *Musammat* Dallo herself and not by Narpat Singh. He relied principally in this connection upon a recital contained in the sale-deed which was executed in favour of the defendant, in which *Musammat* Dallo described this house as having been the ancestral house of her husband which she had re-built herself. As the learned Judge remarks, this recital in the sale-deed clinched the matter and made it clear beyond doubt that the house had been re-built by *Musammat* Dallo. On this finding it is contended for the defendant-appellant here that the learned Judge ought to have dismissed the appeal and confirmed the decree of the Court of first instance for, as is argued, if the finding is that the house was built by *Musammat* Dallo the necessary conclusion follows that the property was her own property, inasmuch as there was nothing made to appear from which it could be concluded that she intended that the house should be treated as a portion of her husband's estate. I think this argument must prevail and I think the Judge was wrong in holding that in these circumstances the plaintiffs whom he found to be the reversioners of Jugga Singh were entitled to possession of this ho se. It is difficult to understand how the Judge came to the conclusion that in these circumstances the house was not *Musammat* Dallo's absolute property. If, as he finds, she re-built the house she must have re-built it out of her own money over which, it must be assumed, she had absolute control, and, as has been said, there was no evidence whatever to show that she intended this house after its being re-built to be treated as a part of her husband's estate. The fact that she disposed of it to the defendant seems to negative any such theory.

It is not necessary for me to consider the other points which are raised in this appeal, for my decision on this particular point settles the case in favour of the appellant. I allow the appeal, set aside the decree of the lower Appellate Court and restore the order of the Court of first instance. The appellant will have his costs both here and in the Court below.

*Appeal allowed.*

BASDEO NARAIN *v.* BACHAN CHOWDHURANI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 30 OF 1913.

December 1, 1915.

*Present*:—Mr. Justice Sharf-ud-din and Mr. Justice Chapman.

*Lala* BASDEO NARAIN—DEFENDANT—APPELLANT

*versus*

*Musammat* BACHAN CHOWDHURANI—PLAINTIFF—RESPONDENT.

*Mortgage—Title paramount to mortgaged property pleaded—Costs against defendant contesting mortgage suit on title paramount, order for, setting aside of.*

A defendant contesting a mortgage suit on the claim of a title paramount to the mortgaged property cannot in appeal, after the suit has been decreed with order of costs against him, ask for setting aside the order on the ground that the suit as against him should have been dismissed. [p. 358, col. 2.]

*Jaggeswar Dutt* v. *Bhuban Mohan Mittra*, 33 C. 425; 3 C. L. J. 205, referred to.

Appeal against the decree of the Subordinate Judge, second Court, Muzaffarpur, dated the 12th of September 1912, reversing that of the Munsif, first Court, at that place, dated the 1st of March 1912.

Babu *Akhoy Kumar Banerjee*, for the Appellant.

Babu *Jogendra Chandra Ghose*, for the Respondent.

JUDGMENT.—On the 26th September 1889, *Musammat* Tafa Koer executed a conveyance purporting to convey a certain property in the name of Lala Rajbansi Lal. On the 17th May 1898 Lala Rajbansi Lal executed a mortgage of this property in favour of the plaintiff. But sometime after the execution of the mortgage, Mahant Darbishergir was recorded in the Collectorate as the proprietor of this property. On the 26th March 1907, Mahant Darbishergir executed a conveyance purporting to convey the property to Lala Bansdeo Narayan. The suit out of which this appeal arises is a suit brought upon the mortgage-bond executed by Lala Rajbansi Lal in May 1898. Lala Bansdeo Narain and Mahant Darbishergir were made parties to the suit on the allegation that the mortgagor Lala Rajbansi Lal, in order to defeat the plaintiff, fraudulently procured the registration of Mahant Darbishergir's name as the proprietor of the mortgaged property and with the same object subsequently fraudulently procured a fictitious conveyance by Mahant Darbishergir in favour of Lala Bansdeo Narain. The suit was contested by Lala Bansdeo Narain alone. He contested the *bona fides* of the mortgage, alleged that he was the owner of the mortgaged property and that the mortgagee never had had any title to the property. He also contested the allegation of payment which the plaintiff had made in order to save his claim from limitation. Lala Bansdeo Narain was defeated upon all these points and he now appeals to this Court.

The *first* ground taken in appeal is that inasmuch as Lala Bansdeo Narain claimed to have a title paramount to that of both the mortgagor and mortgagee, the suit should have been dismissed against him.

We cannot, however, find that any such prayer was ever made to either of the Courts below. It is manifest that the appellant invited the decision of the Court upon the question of his title to the mortgaged property. That being so, it is not open to him now to ask this Court to set aside the order directing him to pay the costs of the litigation which he invited. It has been held by this Court in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) that if a Court goes into such a question, the matter is not one of jurisdiction. As the case comes before us, it is at present merely a question of costs. As we have said, no ground has been made out as to why we should interfere with the order of the lower Court.

The *second* ground taken in appeal is somewhat inconsistent with the first. The contention is that the lower Court is wrong in coming to the finding that the payment of interest has been made in such a manner as to save limitation. If the first contention was sustainable that the suit should have been summarily dismissed as against the appellant then, of course it would not be open to us to go into this question. However, we may say that assuming that it is open to this Court to go into the matter, we find no ground of law on which we can interfere with the finding of the Subordinate Judge. The question involved was whether

(1) 33 C. 425; 3 C. L. J. 205.

a sum of Rs. 66 had been paid by way of interest on the 11th May 1898. The finding that the payment was by way of interest has not been contested.

It has, however, been argued that the Subordinate Judge was wrong in holding that the payment had been made by an agent duly authorised in that behalf within the meaning of section 20 of the Limitation Act. It appears that a sum of Rs. 186 was lying in deposit to the credit of the mortgagor and that this deposit was withdrawn by one Madan Behary Lal, who was at the time the Pleader of the mortgagor. There is evidence that Rs. 66 out of this sum was paid by the aforesaid Pleader to the mortgagee in discharge of the interest due upon the mortgage-bond. There is evidence also that the mortgagor was present when this payment was made. The learned Subordinate Judge adds that there were circumstances to show that the Pleader must have been authorised by the mortgagor to withdraw the deposit on her behalf and that the suit has not been contested by the mortgagor. From this circumstance, the Subordinate Judge has inferred that the Pleader was an agent duly authorised to make the payment on account of interest. There is no mistake of law in this conclusion.

The appeal is dismissed with costs.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 147 OF 1914.

July 1, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

KUNDAN LAL—DECREE-HOLDER—DEFENDANT No. 1—APPELLANT

*versus*

*Sheikh* WAJID HUSAIN—PLAINTIFF, AND OTHERS—JUDGMENT-DEBTORS, AND OTHERS—DEFENDANTS—RESPONDENTS.

*Mortgage—Sale in execution of prior mortgagee's decree against mortgagor alone—Purchaser of mortgaged property, position of—Suit by puisne mortgagee against both mortgagor and prior mortgagee—Puisne mortgagee, right of, to bring equity of redemption to sale—Auction-sale of mortgaged property pending another suit regarding same, effect of.*

A purchaser of property sold in execution of a decree obtained by the prior mortgagee against the mortgagor alone, and during the pendency of a suit for sale of the same property instituted by the puisne mortgagee against both the mortgagor and the prior mortgagee, cannot be permitted to say that as he was not a party to that suit, the puisne mortgagee cannot bring the equity of redemption to sale in execution of the decree obtained by him for sale of the property subject to the rights of the prior mortgagee. [p. 360, col. 2.]

*Ram Shankar Lal* v. *Ganesh Prasad*, 29 A. 385; A. W. N. (1907) 97; 4 A. L. J. 273 (F. B.); 2 M. L. T. 248; *Mahomad Karim Rowthan* v. *Abdulla*, 10 M. L. J. 347; *Debendra Narain Roy* v. *Ramtaran Banerjee*, 30 C. 599; 7 C. W. N. 766 (F. B.) and *Sohan Lal* v. *Jot Singh*, 20 Ind. Cas. 458; 16 O. C. 148, referred to.

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 28th October 1914.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mir *Abid Husain*, for the Respondents.

JUDGMENT.—In this case a prior mortgagee obtained a decree for the sale of the mortgaged property on foot of his mortgage without making the puisne mortgagee a party to his suit. The puisne mortgagee subsequently brought a suit on his puisne encumbrances, making the heirs of the prior mortgagee, who died meanwhile, parties to his suit, and obtained a decree for the sale of the mortgaged property subject to the rights of the prior mortgagee. In execution of the former decree, the plaintiff-respondent purchased the mortgaged property on the 20th day of May 1913 and obtained possession. The subsequent mortgagee then sought to bring the same property to sale in execution of his decree, but was resisted by the plaintiff-respondent, who claimed that the property purchased by him was not liable to re-sale. The Court executing the decree disallowed his objection. He then filed the present suit for a declaration that he was the owner and possessor of the property in question and that the subsequent mortgagee had no right to bring the said property to sale in execution of his decree, to which he was not a party. The Court below decreed the claim, regardless of the fact that the heirs of the prior mortgagee, in execution of whose decree the plaintiff-

respondent had purchased, were parties to the decree obtained on foot of the subsequent encumbrances. The plaintiff could not have been made a party to that decree, as he had not till then purchased the mortgaged property. The purchase made by him invests him with the rights of the prior mortgagee and of the mortgagor, as they existed on the date of the prior mortgage, but leaves the right of the subsequent encumbrancer, who was not made a party to the decree passed on the prior mortgage, to redeem it unaffected. What the subsequent mortgagee proposes to bring to sale in execution of his decree is the equity of redemption possessed by him, which remained unaffected by the sale in execution of the prior mortgage decree at which the plaintiff purchased. It is not open to the plaintiff to say that the subsequent mortgagee cannot bring the equity of redemption to sale in execution of his decree, because the effect of such a sale would not in any way injure the rights of the prior mortgagee whose interests the decree obtained by the subsequent mortgagee expressly safeguarded. As pointed out in *Ram Shankar Lal* v. *Ganesh Prasad* (1), a puisne mortgagee may have a sale of the interests mortgaged to him in a suit properly constituted for the purpose, subject to the rights of a prior encumbrancer, who holds under a paramount title and cannot be prejudiced by a sale of the equity of redemption. If a decree directs the sale of certain property subject to a prior mortgage, and the prior mortgagee is a party to that decree, neither the prior mortgagee nor the person who has stepped into his shoes can be permitted to say that a sale should not be effected, because such a claim would be inconsistent with the terms of the decree to which the prior mortgagee was a party. All he can say is that his rights under the prior mortgage, which were expressly reserved, shall not be affected by the re-sale [*Mahomed Karim Rowthan* v. *Abdulla* (2)]. In *Debendra Narain Roy* v. *Ramtaran Banerjee* (3) it was similarly held that a puisne mortgagee was entitled to a sale of the property secured by his mortgage, subject to the rights of the first mortgagee, even after the property had been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. The plaintiff purchased the property during the pendency of the suit brought by the heirs of the subsequent mortgagee for the sale of the mortgaged property, and as held in *Sohan Lal* v. *Jot Singh* (4) he would be bound by the result of any proceedings which may be taken in execution of the decree obtained in that suit, to the same extent to which the prior mortgagee, who was a party to it, can be bound. The plaintiff is not entitled to stop the sale, which, as the terms of the decree indicate, is practically a sale of the equity of redemption.

The appeal is, therefore, allowed and the plaintiff's claim dismissed with costs here and below. The defendant-appellant will get his costs from the plaintiff throughout.

*Appeal allowed.*

(1) 29 A. 385; A. W. N. (1907) 97; 4 A. L. J. 273 (F. B.; 2 M. L. T. 248.

(2) 10 M. L. J. 347.

(3) 30 C. 599; 7 C. W. N. 766 (F. B.).

(4) 20 Ind. Cas 458; 16 O. C. 148.

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ALLAHABAD HIGH COURT.

**FULL BENCH.**

PRIVY COUNCIL APPLICATION NO. 12 OF 1915.

December 22, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, Mr. Justice Tudball and Mr. Justice Rafique

NURI MIAN—DEFENDANT—APPLICANT

*versus*

THE GANGES SUGAR WORKS, LTD., CAWNPORE—PLAINTIFF—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s 109—Final order, meaning of—Order of remand—Privy Council appeal.*

A contract was challenged on various grounds, one of them being that it should have been under a particular seal. The High Court held that it did not require to be under the seal and remanded the case for decision upon the merits:

*Held*, that the decision of the High Court was not a 'final order' within the meaning of section 109 of the Civil Procedure Code, 1908. [p. 361, col. 2.]

Application for leave to appeal to the Privy Council in First Appeal No. 31 of 1914.

Dr. *S. M. Sulaiman*, for the Applicant.

The Hon'ble Mr. *Gokal Prasad*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council. The Ganges Sugar Works Company made an application under Schedule II, rule 17, of the Code of Civil Procedure to file an alleged contract to submit to arbitration. The Court of first instance without recording any evidence, or in any way considering the merits of the case, dismissed the application on the sole ground that the alleged contract not being under the seal of the Company was invalid as an agreement to submit to arbitration. The Company appealed and this Court held that the agreement to submit to arbitration did not require to be under the seal of the Company and made an order remanding the case for decision upon the merits. The decision of this Court will be found reported as *Ganges Sugar Works, Limited* v. *Nuri Miah* (1). It is contended on behalf of the applicant that the order of this Court is a "final order" passed on appeal within the meaning of section 109, clause (*a*), of the Code of Civil Procedure. The meaning of the expression "final order" is by no means very clear. The authorities dealing with a similar expression in other enactments in England are very conflicting. There have been several cases in this Court and in other Courts in India where the question as to what is a "final order" has been discussed and decided. Here again there is a considerable conflict of authority. We propose to deal with the present application on its own circumstances.

No doubt if the only issue between the parties was the validity of the contract, (it not being under seal), the decision of this Court would have finally decided the only matter between the parties. The matter in dispute was whether or not this contract should be filed as a submission to arbitration. If this Court held that it was necessary that the contract should be under seal, the application of the Company would be finally dismissed. If, on the other hand, it decided that it was not necessary that the document should be under the seal of the Company, it would have ordered the contract to be filed. We find, however, that the alleged contract was challenged on several other grounds. It was challenged on the ground that it was invalid for vagueness and that the agreement had been obtained by fraud and misrepresentation. The result was that even if this Court decided in favour of the Company on the question of the seal, it would not have finally disposed of the matters in dispute between the parties. It is conceivable that if the order of remand of this Court was appealed from to the Privy Council, there might be one or more other appeals arising out of the other pleas in the same matter. No doubt the decision of this Court was upon a very important issue between the parties; but the very same thing might be said if this Court decided (overruling the Court of first instance) that the loss of a document was sufficiently proved to admit of secondary evidence of its contents and remanded the case to take that evidence and decide the case upon the merits. The only distinction between such a case and the present would be that in the present case the question was one purely of law, while in the supposed case it would be a question of fact or partly of fact and partly of law. Again, we may suppose the case of an objection taken to a deed of mortgage on the ground that it had not been properly registered. If this Court (overruling the decision of the Court of first instance) held that the registration was sufficient and remanded the case for decision upon the merits, it could hardly be said that the order of remand was a "final order" within the meaning of section 109, clause (*a*), of the Code.

We could no doubt grant special leave to appeal under clause (*c*) of section 109. The point of law can hardly be said to be a question of "general importance" in view of the change that has been made in the new Companies Act. Furthermore, it appears that since the order of remand of this Court against which it is sought to appeal was passed, the Court below has heard and determined the other issues in the case and they are the subject-matter of a pending appeal to this Court. Under these circumstances we do not think that there are suffi-

(1) 28 Ind. Cas. 384; 13 A. L. J. 312; 37 A. 273.

INAYAT ALI *v.* JAITUN BIBI.

cient grounds why we should grant the certificate under clause (c).

The application fails and is dismissed with costs.

*Application dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 357 OF 1913.

April 28, 1915.

*Present*:—Mr. Lindsay, J. C.

*Syed* INAYAT ALI AND ANOTHER—PLAINTIFFS —APPELLANTS

*versus*

*Musammat* JAITUN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Muhammadan widow in possession of deceased husband's estate—Dower-debt, less than actually due, claimed in Court—Claim decreed—Decree satisfied from portion of property—Possession, suit for, by deceased's heirs—Widow's right to retain property for balance of dower-debt, if sustainable.*

The widow of a deceased Muhammadan having taken possession of his estate brought a suit to recover the unpaid portion of her dower-debt, *confining her claim to a sum less than what was actually due to her.* Her claim, as confined, was decreed in full, and the whole of the decretal amount was realised by sale of certain portions of the estate, but she retained possession of its remaining portions. Subsequently she resisted a claim for possession brought by one of the heirs of the deceased, on the ground that she was in possession of the estate with a charge on it for the portion of her dower-debt *that was actually due to her:*

*Held*, that in view of the decree obtained by the widow it was no longer open to her to say that *any portion* of her dower-debt was *still* unpaid, inasmuch as any right which she had under the marriage contract for dower had passed out of the stage of contract and had become a debt of record, and that such debt having been satisfied she had no longer any right to retain the deceased's estate. [p. 363, col. 2.]

*Wajid Ali Khan* v. *Sukhawat Ali Khan*, 15 Ind. Cas. 747; 15 O. C. 127, referred to.

*Hasan Raza* v. *Nawab Basti Begum*, 17 Ind. Cas. 81; 15 O. C. 257, distinguished from.

Appeal from the decree of the District Judge, Rae Bareli, dated the 15th May 1913, upholding that of the Subordinate Judge, Partabgarh, dated the 5th December 1912.

Mirza *Sami Ullah Beg*, Syed *Wazir Hasan* and Chaudhri *Mujtaba Husain*, for the Appellants.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by Syed Inayat Ali to recover a 6-annas share of the estate left by one Qazi Karam Maula who died on the 8th October 1904. The plaintiff claimed to be one of the legal heirs of the deceased. His co-plaintiff in the present appeal, Chaudhri Nazir Ahmad, is a person to whom Inayat Ali has transferred a portion of his interest in this claim. The principal defendant in the case was *Musammat* Jaitun Bibi who is the widow of the deceased Qazi, and the main defence which was raised by her was that she was in possession of her deceased husband's estate with a claim for the unpaid portion of her dower-debt. Her case was that the plaintiff was not entitled to succeed in this suit unless he paid the outstanding portion of that debt. This plea was accepted by the Court of first instance which dismissed the suit. In appeal the decree of the first Court was upheld.

The plaintiff comes here in second appeal and the case as put for him here is to the effect that the defence raised by *Musammat* Jaitun Bibi was not entertainable, inasmuch as by reason of certain proceedings to which reference will be made she was not entitled to assert that she held her deceased husband's estate under any lien for dower-debt due to her. The case for the appellants is that the lady has recovered the dower-debt which has been fully satisfied and that she has, therefore, no lien outstanding. In order to understand this plea it is necessary to refer to certain proceedings which were taken in the Court of the Subordinate Judge of Azamgarh. After the decease of her husband, *Musammat* Jaitun Bibi brought a suit for the recovery of Rs. 16,000 which, she stated, was owing to her on account of dower. In her plaint she set out that at the time of her marriage the amount of her dower was fixed at Rs. 51,000. She stated that she was in possession of the estate left by her deceased husband, but she wished to recover from the property the dower-debt which was owing to her. In that suit the present plaintiff-appellant Syed Inayat Ali was impleaded as a defendant. In her plaint the lady stated that the whole dower-debt was recoverable from the entire estate which was left by her husband Karam Maula, that she was the legal heir to one-

fourth of this estate and she pleaded that she was entitled to recover three-fourths of her dower from the remaining three-fourths of the estate. Three-fourths of the dower which was fixed amounted to Rs. 28,000 odd, but she confined her claim to one for Rs. 16,000. The Subordinate Judge who tried that suit found that the dower had been fixed at Rs. 51,000. He gave her a decree for the full amount which she claimed and it is admitted now that the whole of this money was realised by sale of certain portions of Karam Maula's estate. It is said that a 12-anna share in *Mauza* Kadipur and another 12-anna share in a property called Chak Qazi were sold in execution of the decree and the proceeds were applied in full satisfaction of the decree obtained by *Musammat* Jaitun Bibi. The question then is whether in view of these proceedings, *Musammat* Jaitun Bibi is now in a position to resist a claim for possession brought by one of the heirs of her deceased husband on the ground that she is in possession with a charge on the property for the unpaid portion of her dower-debt. The argument for the appellants is that the whole of her dower-debt has been discharged, that although the contract for dower was that she should receive a sum of Rs. 51,000, the debt is no longer due under the contract because the claim having been put in suit, *Musammat* Jaitun Bibi is now bound by the decree and cannot be allowed to plead that her dower-debt exceeds the sum of Rs. 16,000. It is, of course, well-settled law that when the widow of a Muhammadan is in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any portion of it is due and unpaid, she is entitled, as against the other co-heirs of her husband, to retain that possession until her dower is paid. The right of retention, however, is extinguished on payment of the dower-debt. In my opinion the contention which was put forward on behalf of the appellants must succeed and I hold that it is no longer possible for this lady to maintain that any portion of her dower-debt is still owing to her. A case which has some bearing upon this point was decided by a Bench of this Court [*Cf. Wajid Ali Khan* v. *Sakhawat Ali Khan* (1)]. In that case the wife of a Muhammadan had brought a suit for her dower in the Court of the Subordinate Judge of Shahjahanpur and in subsequent proceedings the question was raised as to whether the decree of the Court of the Subordinate Judge constituted *res judicata* so as to fix the amount of the dower. It was held that the question of the amount of the dower which was payable was concluded by the decree of the Shahjahanpur Court, and so in the present case any right which *Musammat* Jaitun Bibi had under the contract for dower has passed out of the stage of contract and has become a debt of record. Her only right in the matter of dower is the right which she got under the decree and it is admitted that her claim for dower as allowed by that decree has been fully satisfied. It has been argued on behalf of the lady that the proceedings in the Court of the Subordinate Judge of Azamgarh show clearly that she was only suing for three-fourths of her dower and that it cannot, therefore, be taken that the decree for Rs. 16,000 was passed on the understanding that that was the total amount of dower to which she was entitled. I am unable to accept this argument. It is obvious that the lady being entitled to one-fourth of the estate of her deceased husband, that one-fourth was liable to contribute proportionately to the dower-debt which was owing to her. She was in possession of the property at the time she brought that suit and she might, had she so chosen, have retained the property subject to her lien for the dower-debt which was owing to her under the marriage contract. She elected, however, not to rest upon this right. She put her claim in suit in order to realise the money which was due to her and having taken up this position and obtained a decree, it is, in my opinion, no longer open to her to say that any portion of her dower-debt is still unpaid. It is quite obvious that *Musammat* Jaitun Bibi cannot now bring any suit to recover any further sum under the contract for dower, and, that being so, I am unable to understand how it is possible for her in the present proceedings to set up the defence that she is still entitled to hold on to the property till she is paid something more on account of her dower-debt. I am unable, therefore, to accept the decision of

(1) 15 Ind. Cas. 747; 15 O. C. 127.

the Court below. I hold that any right which *Musammat* Jaitun Bibi had to retain the property of her deceased husband till the payment of her dower-debt has become extinguished. The amount of the debt has been decided by the decree of the Subordinate Judge of Azamgarh and it is admitted that that decree has been fully paid off. With regard to the decision reported as *Hasan Raza* v. *Nawab Basti Begam* (2), upon which the Courts below have relied, it appears to me that that case is quite distinguishable from the case with which I am now dealing. From the report it seems that in that case a suit was brought against the widow of a deceased Muhammadan for the recovery of a share of her deceased husband's estate. Simultaneously with this suit another suit was going on in which the lady was suing for the recovery of her dower-debt. In this latter suit she had stated that the real amount which was owing to her was Rs. 50,000 but that she contented herself with claiming Rs. 25,000 only. In the first suit, that is to say, the suit in which she was being sued as defendant, Basti Begam pleaded that she had a lien on the property for Rs. 50,000. The argument was that at the most she could only set up a lien for Rs. 25,000, which was the amount she was claiming in the suit she had brought for the recovery of her dower. The learned Judge who decided the case was of opinion that the mere fact that the lady was suing for only Rs. 25,000 did not in any way prevent her from raising a plea by way of defence to the effect that she was entitled to a lien on the property for Rs. 50,000. It is quite clear from these facts that the amount of the dower-debt had not in that case been determined. The suit for dower was still in progress and had not been decided. In the present case, however, the suit for dower has passed far beyond that stage and the right which the lady had under the marriage contract has merged in the right which she got under the decree of Court. I hold, therefore, that the lien for the dower-debt has been extinguished and that *Musammat* Jaitun Bibi was not entitled to raise this defence.

(2) 17 Ind. Cas. 81; 15 O. C. 257.

There remains the question of mesne profits, which is covered by three issues Nos. 4, 5 and 6 which were raised in the Court of first instance. Those issues were not determined by the Subordinate Judge, nor have they been touched upon by the Judge of the lower Appellate Court. Before this case can be decided here it is necessary to have findings on these issues. Under Order XLI, rule 25, of the Code of Civil Procedure, therefore, I direct that the case be sent back to the lower Appellate Court and that findings on issues Nos. 4, 5 and 6 raised in the Court of first instance be come to and returned to this Court. No further evidence will be allowed in the case. The parties will have ten days from the date of the findings of the lower Court to file objections. The findings of the Court below should be returned to this Court within two months from the receipt of this order of remand.

*Cause remanded.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914-15 OF ALLAHABAD DISTRICT.

August 4, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

IMAM-UN-NISSA BIBI—APPLICANT

*versus*

PERSHAD AND ANOTHER—RESPONDENTS.

*Agra Tenancy Act (II of* 190 ), *s.* 10 - Sir, *transfer of, by Will—Ex-proprietary rights, accrual of.*

Where a *sir*-holder gives away by Will his *sir* to one who is not his heir, the ex-proprietary tenancy does not arise in favour of the testator or his heirs. It becomes the *sir* of the person who gets it by Will. [p. 365, col. 1.]

Application for revision of the order of the Commissioner, Allahabad Division, dated the 1st July 1914, confirming that of the Assistant Collector, Allahabad District, in the case of determination of tenure.

JUDGMENT.

HOLMS, S. M. - (*August* 4th, 1915.)—In this case the present respondents sued the present applicant, *Musammat* Imam-un-nisa, for a declaration that they were occupancy tenants. Zakir Husain and Qasim Husain were made parties on their own request as

they alleged they were ex-proprietary tenants. The Assistant Collector held that the plaintiffs, the present respondents, were occupancy tenants. Both Zakir Husain and Qasim Husain and the lady appealed. Zakir Husain and Qasim Husain won their appeal, as the Commissioner held they were ex-proprietary tenants. This order of the Commissioner has been set aside by me on appeal to-day. The lady appealed urging that she was *sir*-holder of the land and the present respondents were only her sub-tenants. The Commissioner dismissed the lady's appeal, apparently because he held that Zakir Husain and Qasim Husain were ex-proprietary tenants. In his order he referred to his decision in Appeal No. 155, dated 1st July 1914, in a suit for ejectment brought by Zakir Husain and Qasim Husain against one Bakridi, in which the Commissioner held that Zakir Husain and Qasim Husain were ex-proprietary tenants. I have already decided that they were not ex-proprietary tenants, and the only question is whether the land is *sir* of the lady or not. Before Act XII of 1881 was in force, one Ata Husain transferred his proprietary rights in land part of which is now the present *sir* by Will to his sons' wives, one of whom was the lady in suit. The Commissioner, unfortunately in his decision in the ejectment suit dated 1st July 1914 as well as in the previous decision in a suit for declaration of ex-proprietary rights brought by Zakir Husain and Qasim Husain against the lady decided on 24th June 1913, based his decision on the misunderstanding that the document of transfer was a gift. Both sides now admit that it was a Will. This being, so, no ex-proprietary rights could arise, and, therefore, the *sir* which was transferred by Will became the *sir* of the transferee, that is to say, the lady. It is urged, however, that as the lady was a party to the declaration suit decided on 24th June 1913 and as the decision was against her—a decision from which she did not appeal—that she is now debarred from setting up her rights as *sir*-holder. In the circumstances of the case I do not think this contention is sufficient to debar her, for, whatever the result of that litigation was, whether she was declared a *sir*-holder or whether Zakir Husain and Qasim Husain were declared ex-proprietary tenants, the present respondents would have no right and the circumstances of the previous litigation are set out in the previous judgments. The mistake of law of the Commissioner has resulted in substantial injustice. The land continued to be recorded as *sir* of the lady from the date of the transfer, 1900, and it was not till 1913 that Zakir Husain and Qasim Husain, the husbands, sued the lady for a declaration. I do not think it can be said that the tenants were misled in any way. This is a case in which I think there should be interference on revision, and I would set aside the order of the lower Courts and dismiss the plaintiffs' suit holding that they are not occupancy tenants but mere sub-tenants of *sir*.

In view of the circumstances of the case, parties will bear their costs throughout.

CAMPBELL, J. M. - I agree.

*Application allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 85 OF 1914.

July 6, 1915.

*Present*:—Mr. Stuart, A. J. C.

*Musammat* SITARA BEGAM—DEFENDANT—APPELLANT

*versus*

MUHAMMAD ISHAQ KHAN PLAINTIFF—RESPONDENT.

Benami *transaction—Presumption, legal—Civil Procedure Code (Act V of 1908), s. 66—Declaration, suit for, maintainability of—Relief, vague, based on allegations outside pleadings—Court, power of.*

In a case for a declaration that the plaintiff was the real, and the defendant was the *benami*, purchaser of the property in suit, the plaintiff did not give any credible explanation why the *benami* transaction had been entered into but proved satisfactorily that the money advanced on the deeds was his own money, that the defendant at the time had no means of her own and that the plaintiff remained in possession of the property transferred from the time of the purchase:

*Held*, that in the absence of any rebutting evidence produced by the defendant, the transaction must, on the above evidence, be legally presumed to have been *benami*. [p. 366, col 2.]

The words "no suit" used in section 66, Civil Procedure Code, 1908, not only include a suit for possession but also a suit for a declaration. [p. 367, col, 1.]

SITARA BEGAM *v.* MUHAMMAD ISHAQ KHAN.

*Bishan Dial* v. *Ghazi-ud-din*, 23 A. 175; A. W. N. (1901) 44, referred to.

A relief, which is not based on the pleadings as they stand but on certain allegations which ought to have been definitely set up, but are not so set up in the pleadings and are such as, if allowed to be set up, turn the suit as brought into another and a different sort of suit, cannot be granted on the mere ground that the plaint contains a vague prayer to the effect that the Court may grant any other relief which it may deem proper. [p. 367, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 9th April 1914.

Syed *Wazir Hasan*, for the Appellant.

Mr. *Muhammad Nasim* and Mr. *Manmohan Nath Chak*, for the Respondent.

JUDGMENT.—The main point taken in the grounds of appeal is that the suit of the plaintiff-respondent is barred by the provisions of section 66, Act V of 1908. This was a suit for a declaratory decree brought by Muhammad Ishaq Khan against his daughter Sitara Begam. The plaint set forth that Ishaq Khan had lent money in the name of his daughter Sitara Begam and had secured the loan by the execution of deeds of simple mortgage, that he had obtained decrees on the foot of those deeds, and had in execution purchased the mortgaged property in the name of Sitara Begam. Paragraph 4 of the plaint is as follows:—

"That in execution of the decree for the amount due to the plaintiff the share of the mortgagor Bhagwat Singh amounting to 1 anna 4 pies was sold and purchased by the plaintiff in the name of the defendant at a public auction-sale on the 22nd March 1897 in lieu of the amount due to him, that in the same manner the plaintiff purchased at a public auction-sale the share of Madho Singh also, *i.e.*, 9 pies, on the 20th October 1896, and 7 pies on the 26th October 1898, total 1 anna 4 pies situate in Deorai Bharat, and that the mortgagor Jaswant Singh paid off the entire decretal amount due to the plaintiff."

I interpret this paragraph to mean that Sitara Begam was the certified purchaser at the Court sales of the share of 2 annas and 8 pies in question.

The fifth paragraph is as follows:—

"The plaintiff obtained possession of the said property, purchased by him from the Civil Court, and that he is in possession thereof since the date of purchase until now."

The plaintiff goes on to state that he had asked the defendant on more than one occasion to execute a deed in his favour to the effect that the transaction was fictitious and that the plaintiff was the real owner of the property, that the defendant had evaded decision of the point until April 1913, when she refused definitely to give the assurance required or to execute such a deed. The tenth paragraph contains the nature of the relief sought. It is as follows:—

"That the plaintiff prays that under a decree it be declared,—

(*a*) that he is the real owner in possession of 2 annas 8 pies share aforesaid situate in *Mauza* Deorai Bharat, *Pargana* and Tahsil Malihabad, District Lucknow, and that the name of the defendant is fictitious,

(*b*) that the defendant be made to pay the costs of the suit, and

(*c*) that any other relief which the Court may deem proper be granted."

The defendant in her reply stated that the transaction was not a fictitious transaction. She asserted that the plaintiff had purchased the property on her behalf and had given it to her by gift, and that she had been all along in possession of the property, first through the plaintiff as her agent and latterly through her servants. She further set up that the suit for a declaration was barred under the provisions of the Specific Relief Act and also under the provisions of section 66 of Act V of 1908. Very little evidence was recorded in the Court below. The plaintiff went into the witness-box and deposed in favour of his own assertions. He produced no other oral evidence at all. Although the plaintiff was unable to give any explanation of a credible nature which induced him to enter into *benami* transactions on behalf of his daughter, he proved satisfactorily that the money advanced on the deeds was his own money, that the defendant at the time had no means of her own, and that he remained in possession of the property transferred from the time of the purchase. According to the recognized presumption of law the transactions must be held on this evidence to have been *benami* transactions, unless and until the defendant rebuts the presumption. Here she made no attempt to rebut the presumption, and I find that the transactions were *benami* transactions

made by the plaintiff in the name of the defendant but for his own benefit.

The question remains whether the suit can lie under the provisions of section 66 of Act V of 1908. That section states clearly that no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or of some one through whom the plaintiff claims. The sale certificate is on the record. It shows that the defendant was the certified purchaser of the property in question, and his suit is clearly a suit against her on the ground that the purchase was made on behalf of the plaintiff. The latter part of the section lays down that a suit to obtain a declaration that the name of such certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser is not barred. But here there is no suggestion that the defendant's name was inserted fraudulently or without the consent of the plaintiff. The remaining provision of the section has no bearing on the present case. The words "no suit" not only include a suit for possession but also a suit for a declaration. This is plain from the words of the section. The question is discussed with regard to corresponding section of the old Code in *Bishan Dial* v. *Ghazi-ud-din* (1). The principles laid down in that decision are the principles which should guide this Court in the present case. So far it would appear that this suit is clearly barred under the provisions of section 66. The learned Counsel for the respondent has, however, argued that the plaintiff is entitled to a declaration of proprietorship, because he has obtained a title perfected by adverse possession against the defendant. His case is that the plaintiff might have had no claim to obtain such a declaration according to the provisions of section 66 if he had brought his suit before his title had become perfected by adverse possession, but that, his title having become perfected by adverse possession, the bar in section 66 does not apply to him. In answer to this plea the learned Counsel for the appellant has pointed out that nowhere in the plaint does the plaintiff assert title by adverse possession, that the defendant was never called on to answer such a plea, that no issue was framed upon the point and no evidence called upon it, and that in the claim for relief no claim is made that a declaration should be given to the plaintiff on the ground that his title had become perfected by adverse possession. The learned Counsel for the respondent admits that no special reference was made to such a plea in the plaint, but he suggests that the plea could be inferred from the general wording of the plaint, and that the relief could have been granted under the clause which asks the Court to give any other relief which it may deem proper. He admits that no issue was framed on the point and that no evidence was taken upon it, but he suggests that the Court might now frame an issue and send the suit back to the lower Court for the taking of evidence and a finding as to the question of adverse possession. I do not consider that the plaintiff can possibly claim a relief upon the plea that his title has become perfected by adverse possession. On the materials on the record there is nothing to show whether his title had or had not become perfected by adverse possession, and there is no necessity to remit the case back for evidence on the point as the plaintiff is not entitled to take the plea on his pleadings. If he had intended to put forward such a plea he should have put it forward in distinct language. Courts in this country rightly allow the parties considerable latitude in the matter of the pleadings and are always ready to look at the spirit of the pleadings rather than the exact words. But there is a point beyond which indulgence should not be permitted to extend. Here there can be no possible doubt as to the fact that the plaintiff had not the slightest intention of putting forward the plea of adverse possession in his pleadings in the lower Court. The plea has been suggested at a very late stage of the proceedings. It does not proceed out of the statements in the plaint, and it cannot be inferred from anything therein. It would appear that the plaintiff did not understand that the provisions of section 66 barred his claim, and that he was under the impression that, if he could prove that the transactions were *benami* transactions, he must succeed.

(1) 23 A. 175; A. W. N. (1901) 44.

PARBATI *v.* DHARAMRAJI.

I see no reason to suppose that it ever entered into his mind to claim such relief as the relief to which it is now said that he is entitled. If I were to entertain the suggestion, I should be turning the suit brought into another and a different suit, basing my action upon nothing more substantial than the vague request to the Court below to grant any other relief which it may deem proper.

I, therefore, find that the suit was barred under the provisions of section 66, Act V of 1908, and allow this appeal. The respondent will pay his own costs and those of the appellant in both Courts.

*Appeal allowed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 9 OF 1913-14 OF ALLAHABAD DISTRICT.

November 20, 1914.

*Present*:—Mr. Holms, J. M.

*Musammat* PARBATI--APPELLANT

*versus*

*Musammat* DHARAMRAJI AND ANOTHER—RESPONDENTS.

*Minor, statement of, against her interest, effect of—Will—Revenue Court.*

Where a guardian has been appointed for a minor for purposes of litigation, any admission made by the minor against her interests is waste paper.

Where a testator wills away his property and the Will is proved *prima facie* by the Sub-Registrar's endorsement and possession is doubtful, a Revenue Court will give effect to the Will.

Third appeal from the order of the Commissioner, Allahabad Division, dated the 2nd April 1914, confirming that of the Collector, Allahabad District, in the case of mutation.

JUDGMENT.—Since the Collector passed orders in appeal Sheoambar Singh, the father of the minor widow, has been appointed her guardian by order of the Civil Court. A guardian is appointed to a minor for purposes of litigation in order to look after her interests, and when this has been done any admission made by the minor against her own interests is waste paper. The respondent urges that the minor widow's statement before the Naib-Tahsildar should be regarded as a statement of a witness to the Will. I have read it carefully and cannot find that she speaks of her own knowledge to the execution. Disregarding the admission of the minor widow, when possession is doubtful, it has to be determined by summary enquiry who is best entitled to the property. Were it not for the Will, the widow, of course, would be. I have read the Sub-Registrar's endorsement and on the whole think that there is a *prima facie* case for the Will and that it is for the Civil Courts to set it aside if they think fit. In this view I refuse to interfere on third appeal and dismiss the appeal with costs and Rs. 16 Pleader's fee.

*Appeal dismissed.*

HAR SAHAI *v.* DHANPAL SINGH.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 290 OF 1911.

July 23, 1912.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

*Lala* HAR SAHAI—PLAINTIFF—APPELLANT

*versus*

*Thakur* DHANPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Grove, when losing its character as such—Landholder not objecting to grove-holder's planting new trees, effect of—Grove-holder, right of, to retain possession of grove—Trees, portion of grove becoming devoid of Resumption, piecemeal, if permissible.*

There is no criterion laid down by law for judging when a grove ceases to retain its character as such. The question is more or less one of inference to be drawn from the surrounding circumstances. And the fact that the landholder took no objection to the grove-holder's planting new trees when the grove began to lose its character as such, must be taken into account in judging the character of the property. [p. 369, col. 2.]

A grove-holder is entitled to hold possession of the plot covered by the grove so long as it retains the character of a grove. And the mere fact that a portion of the grove has become devoid of trees does not entitle the landholder to resume that portion of it, inasmuch as the plot must, in the absence of proof of an agreement or a custom to the contrary, be taken to have been granted as a whole and the tenure must, therefore, stand or fall in its entirety. [p. 369, col. 2.]

*Mehdi Ali Khan* v. *Gurdin*, 2 O. C. 73 and *Jwala Singh* v. *Saheb Din Singh*, 9 O. C. 109, referred to.

HAR SAHAI *v.* DHANPAL SINGH.

Appeal from the decree of the Subordinate Judge, Kheri, dated the 25th May 1911, upholding that of the Munsif, Kheri, dated the 9th August 1910.

Babu *Rudra Dutt Sinha*, for the Appellant.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—The plaintiff-appellant is the occupant of grove-land No. 706 old, corresponding with 1413 new *khasra*. The defendant No. 2 is the *taluqdar* of the village, in which the grove in suit is situated. The plaintiff's allegation was that the defendant No. 1, who is a servant of defendant No. 2, prevented the plaintiff from grazing his cattle over the grove-land and wrongfully cultivated a portion of the grove area and cut and appropriated all the *patwar* growing over the ditch. He, therefore, sued for a declaration that the plaintiff was entitled to remain in possession and enjoyment of the grove land and to graze his cattle therein so long as it retained the character of a grove and that the defendants had no right to interfere with the plaintiff's occupation of the same. The plaintiff also sued for Rs. 10 damages on account of the loss suffered by him by the defendants' act. The defence was that only three green trees and 18 dried trees stood on the plot in question, that the said land did not retain the character of a grove and that according to the custom obtaining in the village, the landholder had the right to cultivate the whole area.

The Courts below found that the land in question did not retain the character of a grove and that the landholder had, therefore, the right to cultivate the same.

In appeal, it is contended that the number and position of trees, standing on the plots in question, were sufficient to indicate that the land maintained its character of a grove and that the landholder had no right to cultivate the land so long as the grove or any portion of it existed over it.

It appears from the findings of the Courts below that there were 33 trees standing on the plot in question at the time of the Settlement. The plaintiff had then filed a suit for possession of the said grove with the land occupied by it, and by an order of the Settlement Officer, dated the 15th January 1870, the plaintiff was awarded possession over the said grove and his claim with regard to the right to the land was dismissed. The finding of the Settlement Officer was that the said grove originally belonged to Mangal Khan, who died without leaving any heirs, that only two or three trees were left on the land at the time of Mangal Khan's death and that, about two or three years later, the grove in question was planted by Nur Muhammad, a servant of the plaintiff, and a well and a *chabutra* were constructed therein. The *chabutra* still exists and the southern portion of the grove is, according to a map prepared by the *Amin*, occupied by 6 green and 18 dried trees, while the northern portion is occupied by 12 green trees, 11 of which are said to have been planted between 8 to 15 years ago. There is no criterion laid down by law for judging when a grove ceases to retain its character as such. The question is more or less one of inference to be drawn from the surrounding circumstances, and, though a portion of the area in the centre is at present not occupied by trees, there is nothing to indicate that the grove has ceased to retain its character as such, for 18 green trees are still standing there occupying almost different sides of the grove. According to the decision in *Mehdi Ali Khan* v. *Gurdin* (1) the tenant is entitled to hold possession as long as the plot in question retains the character of a grove, and as observed in *Jwala Singh* v. *Saheb Din Singh* (2) the mere fact that a portion of the grove has become devoid of trees would not entitle the landholder to resume that portion of it. The plot must be taken to have been granted as a whole and the tenure must stand or fall in its entirety. Piecemeal resumption of a grove is not permissible. The question is not so much of customary law as of the terms of the contract between the grantor and the grantee, and in the absence of proof of an agreement or a custom authorising the landholder to take possession of such portion of the land as has become devoid of trees, it must be held that the grantee has a right to occupy the whole plot so long as it retains the character of a grove, and the grantor has no right to resume as long as any portion of the grove continues to be used as such. The landholder in the present case had, therefore,

(1) 2 O. C. 73.
(2) 9 O. C. 109.

no right to resume and cultivate any portion of it. No objection was raised on behalf of the landholder to the planting of the 11 new trees, now existing, by the respondents, 8 to 15 years back, and that must, therefore, be taken into account in judging the character of the property. I do not, consequently, think that there was any justification for the Courts below to dismiss the plaintiff's claim so far as he claimed a right to occupy the land in dispute for the purposes of maintaining the grove. The plaintiff-appellant does not press his claim for damages.

The appeal is, therefore, allowed and the plaintiff's claim decreed for an injunction, restraining the defendants from interfering with the land in dispute so long as the grove in question or any portion of it subsists. The plaintiff will get his costs throughout from the defendants, who will bear their own costs.

*Appeal allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 105 OF 1914.

August 3, 1915.

*Present*:—Mr. Lindsay, J. C.

RAM SARAN—DEFENDANT—APPELLANT

*versus*

*Babu* PRITHIPAL SINGH—PLAINTIFF—RESPONDENT.

*Burden of proof—Possession within limitation—Suit for possession*—Zemindar's *title in and possession over jungles, groves or tanks in village or scattered trees in* abadi—*Presumption as to* zemindar's *title and possession—Under-proprietary title, plea as to—Adverse possession.*

Where the plaintiff, the *zemindar* of a village, sued the defendant for possession and declaration in respect of certain plots of land, consisting of jungles, groves or tanks, situated in the village, and also in respect of some scattered trees planted in the *abadi* of the village and the defendant pleaded under-proprietary title in respect of the plots and ownership over the trees by adverse possession, and evidence was produced to show that some other trees in the *abadi* were the property of tenants:

*Held*, that the plaintiff could not be called to establish his possession within limitation, but that the burden of proving under-proprietary title and ownership lay on the defendant, inasmuch as the plaintiff being the *zemindar* of the village the presumption of title was naturally in his favour, and as having regard to the nature of the property in suit there was a further presumption that the plaintiff had had possession, because the presumption of possession follows the title. [p. 371, col. 1.]

Where the plaintiff *zemindar* sued to recover possession of certain plots on the allegation that the defendant had encroached on them by including them in his holding, and it was found that the defendant was an occupancy tenant of these plots:

*Held*, that the plaintiff was not entitled to a decree for possession nor could he get a declaration of his proprietary title with respect to the plots as there was no cause of action for any declaratory suit. [p. 371, col. 2; p. 372, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 26th November 1913, modifying that of the Munsif, Ramsanehi Ghat, dated the 24th February 1913.

Mr. *G. H. Thomas*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—These are cross-appeals arising out of a suit brought by Babu Prithipal Singh against one Ram Saran for possession and declaration in respect of certain plots of land situated in a village called Maholara. The plaintiff is admittedly the *zemindar* of this village. It was alleged that the defendant Ram Saran had been asserting title to some of these various plots of land and that he had dispossessed the plaintiff from others of them and so the suit was in the form both of a suit for possession and a suit for declaration of title. The general defence put up by the defendant was that he was an under-proprietor. The Court of first instance decreed the plaintiff's claim in part. The defendant appealed and the plaintiff filed cross-objections and these were disposed of by the Subordinate Judge of Bara Banki. Eventually he allowed the appeal of the defendant to a certain extent and made a slight modification in the decree of the Court of first instance. Both the parties now appeal against the decision of the Court below.

I will deal first with the defendant's appeal which is No. 105 of 1914. This appeal relates to the following plots, Nos. 498, 667/2, 711/1, 712/1, 776/2, 360 and 183, and also to certain tanks, the numbers of which are 29, 30, 175, 652 and 654. I may notice here that the memorandum of appeal also shows that it was the intention to appeal with respect to plot No. 772/1,

but it has been admitted in argument before me that this is a mistake for the claim of the plaintiff in respect of that number has been dismissed. The learned Counsel who appears for the defendant-appellant has stated that the main ground upon which he attacks the decision of the Court below is that the Subordinate Judge laid the burden of proof on the wrong party, in other words, he contends that in respect of all the plots just mentioned the plaintiff ought to have been called to establish his possession within limitation. The fact being admitted that the plaintiff is the *zemindar* of the village, I think the Court below rightly laid the burden of proof on the defendant who asserted his under-proprietary title. The plaintiff being the *zemindar* of the village the presumption of title would naturally be in his favour, and having regard to the nature of the property in dispute there would be a further presumption that the plaintiff had possession. In order to make this clear it will be necessary to refer in detail to the character of the various plots concerning which the defendant has appealed. Plot No. 498 is a jungle. With regard to property of this kind the ownership could only be exercised by occasional acts of dominion. The presumption of possession follows the title and it would in such a case be for the opposite party to prove adverse possession. There can be no doubt that on the evidence as brought before the Court below the defendant-appellant failed to prove his adverse possession over this plot. Similarly in the case of plot No. 667/2 which is described as jungle; with regard to this the same rule would apply. The two plots Nos. 711/1 and 712/1 make up an area which is known apparently as the Kurmi's grove. With regard to this the plaintiff filed definite evidence both of his title and possession and the case was not decided in the plaintiff's favour in this instance merely on the presumption arising out of the fact that he is the owner of the village. I find that the plaintiff put in the *khasra* for the year 1865. He also filed similar papers for the years 1306, 1307, 1308, 1314, 1315 and 1316 *Faslis* The only piece of documentary evidence against this was Exhibit D13, the *khasra* for the year 1301 *Fasli*, in which is recorded a remark that the defendant Ram Saran took the mangoes of the grove in this year. The defendant-appellant has clearly got no case with respect to these plots. Similarly with respect to plot No. 776/2 the documentary evidence which has just been referred to in connection with plots Nos. 711/1 and 712/1 applies to this grove also. The defendant was unable to produce any documentary evidence regarding his possession over this plot. Plot No. 360 regarding which the defendant appealed is a jungle and here again the same reasoning would apply as in the case of plot No. 498 above mentioned. As for plot No. 183 the dispute here is with regard to certain trees standing upon this number, which is an *abadi* plot. The Court of first instance dismissed the plaintiff's claim regarding two trees standing upon this plot. It found that as regards these two trees the possession of the defendant for a period over 12 years had been established. With regard to the other trees the Court was of opinion that there was evidence of plaintiff's possession within limitation and this finding has been accepted by the Court below and is conclusive on this part of the case. As for the remaining numbers, namely, the tanks, there is nothing to add to what has already been said. It was for the defendant to prove adverse possession with respect to these items of the property in dispute. The defendant's appeal, therefore, cannot succeed and must be dismissed with costs.

With regard to the appeal of the plaintiff, No. 150 of 1914, the first point taken is with respect to three plots Nos. 193, 194 and 196. The finding of the Court below is that the defendant Ram Saran is an occupancy tenant of these lands. In the plaint it was stated that the defendant had in the month of May 1912 encroached on these lands by including them in his holding and it was for this reason that the plaintiff sought to recover possession of them. On the finding that the defendant is the occupancy tenant of these plots it was obviously impossible to give the plaintiff a decree for possession. Such a decree could only be passed by a Revenue Court. It has been argued here on behalf of the plaintiff in appeal that he ought at any rate to have got a declaration of his proprietary

title with respect to these three plots. The lower Appellate Court refused this relief on two grounds, *first*, that no relief of this kind had been specifically asked for and *second*, that there was no cause of action for any declaratory suit. I think this decision of the Court below is correct. The only cause of action which the plaintiff could put forward with respect to these plots was, as stated above, an allegation that the defendant had unlawfully taken the plots into his possession. That allegation was found to be without substance, for the defendant undoubtedly had a right to hold possession of these plots as an occupancy tenant. I cannot, therefore, give the plaintiff any declaratory relief regarding these lands.

The next point raised on behalf of the plaintiff in his appeal is with respect to certain trees standing on the *abadi* plots Nos. 183, 772 and 562/1. It has already been mentioned that the Court below has dismissed the claim of the plaintiff with respect to two trees situated on No. 183 and four trees situated in No. 772. In other respects the plaintiff's claim was allowed. The finding is that with respect to the trees exempted from the decree the defendant had been able to establish his possession for more than twelve years. This finding is sufficient to dispose of the argument that the plaintiff was entitled to a decree for possession of these trees. With reference to the trees standing on plot No. 562/1 the Court of first instance allowed the plaintiff's claim. The lower Appellate Court has dismissed the claim regarding the trees on this number. The learned Subordinate Judge held that as these were scattered trees planted in the *abadi* of the village, there was no presumption of ownership on the part of the plaintiff who is the *zemindar* of the village and he held, therefore, that it was necessary for the plaintiff to establish his possession over the trees of this plot within limitation. The argument here is that the presumption was in favour of the landlord and that if the defendant set up any adverse proprietary title he was bound to prove it. I think this argument must be accepted. I cannot agree with the lower Appellate Court that the fact that these trees are isolated trees standing on the inhabited site in any way affects the presumption arising out of the landlord's ownership. The soil of the *abadi* is as much the landlord's as any other part of the village and the trees standing on the land are to be deemed to be his until the contrary is proved. The Subordinate Judge says that evidence was produced in the case to show that other trees in the inhabited site were the property of tenants. That may be, but it does not follow that because other trees are proved to belong to other tenants in the village these trees now in dispute should be held to belong to the plaintiff who gave no proof of his ownership. The presumption must prevail and I think the Court below was wrong in dismissing the suit regarding the trees situated on this number.

There remains only one other question. In the plaint, as it stood originally, certain plots of land were specified in paragraph 5 and in respect of these the plaintiff sought only a declaratory decree. This is apparent from paragraph 11, clause (*d*), of the plaint. It appears that while the case was at trial in the first Court the plaintiff's Pleader asked that he should be allowed to claim possession of the plots specified in this paragraph of the plaint. The lower Court appears to have agreed to this being done and an amendment of the sixth issue was made in consequence. The Subordinate Judge points out that the first Court failed to get the plaint amended and that it also failed to call for an additional Court-fee payable on the value of the plots specified in this paragraph. The only Court-fee which had hitherto been paid was a Court-fee of Rs. 10 for a declaratory relief. The learned Subordinate Judge was asked by the plaintiff to give a decree for possession of these plots. The learned Subordinate Judge appears to have had no doubt as to the title of the plaintiff with respect to these plots, but he refused to grant this relief on the ground that the plaintiff had failed to amend his plaint and to pay the additional Court-fee. It appears to me that the only result of refusing this relief in this case will be to drive the plaintiff to another suit—a course which I think should, if possible, be avoided—and it is always open to the Court to grant extra relief of this kind if the plaintiff pays the additional Court-fee which is required by law. I, therefore, allow this part of the plaintiff's appeal.

The result, therefore, is that the plaintiff's appeal is allowed in part. The decree of

the first Court is restored, and to it there will be added a clause declaring that the plaintiff is entitled to recover possession of the plots specified in paragraph 5 of the plaint. The decree will not be drawn up until the plaintiff has deposited the requisite additional Court-fee. As regards costs in the plaintiff's appeal I think the proper order is to allow each party to bear its own costs.

*Appeal dismissed.*

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## PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 17, 1915.

*Present:*—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

V. VENCATANARAYANA PILLAI—APPELLANT

*versus*

V. SUBBAMMAL AND ANOTHER—RESPONDENTS.

*Hindu Law—Will, construction of—Doctrine of dependent relative revocation—Intention—Widow—Adoption.*

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property. [p. 376, col. 1]

If by his Will a testator gives property to *A* and by a codicil gives the same property to *B*, and if in the event it turns out that *B* cannot take, it has to be ascertained from the language of the testator, as found in his testamentary documents, whether he intended that the gift to *A* should be displaced altogether or that it should be displaced only in favour of *B*, and (if *B* cannot take) the gift to *A* should remain. [p. 375, col. 2.]

A Hindu, who was the sole surviving co-parcener of his divided share of ancestral property, made a Will appointing his wife and his daughter to be executrixes and giving *inter alia* authority to his widow to adopt a certain son of his daughter in case of his own death before completing the adoption, and in the event of the death of that son to adopt another son of the same daughter. The testator completed the adoption and thereafter executed another Will which contained no words of revocation of the previous Will and was wholly silent as to adoption. Both the testator and the adoptee died. On a suit of the reversionary heir of the adoptee the second Will was declared null and void and inoperative according to Hindu Law. The widow made another adoption in accordance with the first Will. On a suit to set aside the adoption it was contended that the former document was not a Will and that if it was a Will it was revoked by the second document and the widow had no power to adopt:

*Held*, (1) that the first document was a Will, inasmuch as it contained an appointment of executors and it was executed by a testator who at its date could dispose of the property of which he purported to dispose. [p. 375, col. 1.]

(2) that the power to adopt in the earlier instrument was unaffected by anything in the later and that the widow had the power to adopt. [p. 376, col. 1.]

*Alexander* v. *Kirkpatrick*, (1874) 2 H. L. Sc. 397, approved of.

*Tupper* v. *Tupper*, (1855) 1 Kay & J. 665; 1 Jur. (N. S.) 917; 3 W. R. 616; 69 E. R. 627; 103 R. R. 311; *Quinn* v. *Butler*, (1868) 6 Eq. 225 and *Baker* v. *Story*, (1875) 31 L. T (N. S.) 631; 23 W. R 147, distinguished.

Appeal from a judgment and decree of the Madras High Court, dated March 12, 1912, affirming those of the High Court (Original Side), dated March 26, 1909.

FACTS.—One Vendalore Vencatadari Pillai died in 1850 leaving him surviving his mother, Chinnammal, and three sons: (1) Vencatranga, (2) Vencatanarayana and (3) Vencatarama. The three brothers lived together till 1854 when Vencataranga relinquished all his rights in the family property in return for some property for his maintenance. The family property was divided between Vencatanarayana and Vencatarama. The properties set apart for the maintenance of Chinnammal and Vencataranga remained joint and were to be divided after the decease of Chinnammal and Vencataranga, respectively. They having died, the properties in question were divided between Vencatanarayana and Vencatarama. In 1890 Vencatarama adopted Vencatakrishna, his daughter's son, having previously made a Will in 889 by which he gave his widow, Subbammal, authority to adopt Vencatakrishna and on his decease during the lifetime of Subbammal to adopt one of Rajammal's sons, (who was his daughter). In 1890 after the said adoption he executed another Will in which he made no mention of the power to adopt given to his widow in case of Vencatakrishna's death. Vencatarama died in 1890 and Vencatakrishna in 1891. Vencatanarayana then in 1893 brought a suit for a declaration that the Will made by Vencatrama in 1890 was void according to the Hirdu Law. The High Court decided in his favour on the ground that Vencatarama had no power after adoption to make a Will disposing the property which only partially belonged to him, the said adoptee having become a joint owner. In 1906 Subbammal adopted Parthasarathy, a son of Rajammal, as directed in the Will executed in 1889. Vencatanarayana thereupon brought a suit for a declaration that the adoption was bad according to the Hindu Law. The High Court, on its original side, decided that the

adoption was good as being in conformity with the Will executed in 1889, which was not expressly revoked by the Will of 1890. On appeal the judgment of the lower Court was affirmed and the Will of 1889 held as not revoked by the mere making of another Will. The Will of 1889 was not admitted to Probate, but the High Court expressed its willingness to take evidence for that purpose, but it was held unnecessary in view of the fact that it was admitted by the opposing party (appellant). Section 59 of the Probate and Administration Act of 1881 did not apply to joint property and could not affect a suit for a declaration to succeed to the property. Nor did section 187 of the Indian Succession Act, as there was no question of establishing any right as executor or legatee in the present case, for authority to adopt was not a legacy to a widow. An appeal was then preferred to the Judicial Committee of the Privy Council. The appellant Venkatanarayana Pillay died before the disposition of the appeal. Kuppusami Pillay the next reversioner of the deceased appellant applied for substitution of his name in place of the deceased. Their Lordships allowed the petition by an order dated the 15th March 1915, reported in 29 Ind. Cas. 298.

Sir *Robert Finlay*, *K. C.* (with him Mr. *Dube*), for the Appellant.—The first Will was in substance a power to adopt as the property disposed of was ancestral. It was, therefore, not a Will as understood by section 1 of the Indian Succession Act of 1865. The second Will was declared invalid and set aside as reported in *Subba Reddi* v. *Doraisami Bathen* (1). Though the second Will was declared inoperative as regards ancestral property it remained in force in other respects. It was admitted to Probate. It contained no mention of any power to adopt on the death of the son already adopted. Clause 5 was quite inconsistent with any intention on the part of the testator that the power to adopt continued. It in effect revoked the power contained in the first Will. [Indian Succession Act, section 187, *Tupper* v. *Tupper* (2), *Onions* v. *Tyrer* (3).] All parties from 1890 regarded the second Will as containing the whole testamentary disposition. Probate was to be taken out of the second Will and not of the first [*Baker* v. *Story* (4), *Quinn* v. *Butler* (5), *Alexander* v. *Kirkpatrick* (6).]

[Mr. *De Gruyther*, *K. C.*:—At the time of the first Will the testator had power to dispose because he had no co-parcener, but the second Will was invalid as at that time he had a co-parcener, *viz.*, the adopted son.]

It appeared upon the face of the 2nd Will that it was intended to be a complete disposition of the whole property. It was based on the assumption that the authority to the widow had ceased to exist.

Messrs. *De Gruyther*, *K. C.*, and *K. Brown* appeared for the Respondents, but were not called upon.

JUDGMENT.

LORD WRENBURY.—At the date of the first testamentary instrument, *viz.*, the 8th September 1889, the testator, Vencatarama, was sole surviving co-parcener of the property here in question. It was ancestral property, but a division had been effected, and of the testator's divided share he had no co-parcener. He could, therefore, dispose of it. Under those circumstances he made a Will, dated the 8th September 1889, which contained an appointment of his wife and his daughter to be executrixes and for the present purpose consisted of two parts, *viz.*: (1) a disposal of the property in a certain way, and (2) an authority to his widow in a certain event to take a son by adoption.

He had, and it appears by the Will that he had, nominated as his son Vencatakrishna, who was a son of his daughter Rajammal, but he had not completed the adoption. By his Will he directed that if he should die before completing the adoption, his wife Subbammal should, after his death, complete the necessary ceremonies, and take the said grandson in adoption, and his Will contained the following clause:—

"In case any danger may happen to my grandson Siranjeevi Vencatakrishna Pillay during the life-time of my wife Subbammal

(1) 30 M. 369; 17 M. L. J. 269; 2 M. L. T. 242.
(2) (1855) 1 Kay & J. 665; 1 Jur. (N. S.) 917; 3 W. R. 616; 69 E. R. 627; 103 R. R. 311.
(3) (1716) 1 P. Williams 343; 2 Vern. 741; Pre. Cha. 459; Gilb. Eq. Rep. 130; 24 E. R. 418.
(4) ((1875) 31 L. T. (N. S.) 631; 23 W. R. 147.
(5) (1868) 6 Eq. 225.
(6) (1874) 2 H. L. Sc. 397.

who is one of my executrixes, my wife Subbammal may according to her wishes take in adoption one of my aforesaid daughter Rajammal's sons, and give my properties to that son."

An argument was tentatively put forward, but was not pressed by the appellant's Counsel that this document was not a Will. Their Lordships can entertain no doubt that it was a Will. It contained an appointment of executors, and (as has already been pointed out) it was executed by a testator who at its date could dispose of the property of which he purported to dispose.

On the 9th February 1890 the testator completed the adoption of Vencatakrishna. Another member of the co-parcenary thus entered the joint family, and when the testator subsequently died, the property was ancestral property, of which he was not at that date competent to dispose. In this sense, and to this extent, the Will of the 8th September 1889 became ineffectual.

On the 21st March 1890 the testator executed another Will. It contains a new appointment of executors. They are the two executors appointed by the Will of the 8th September 1889, and a third. It discloses on its face that the property of which it purports to dispose is ancestral, but nevertheless purports to dispose of it although at this date the testator had a co-parcener, and could not dispose of it. It contains in Article (5) a gift that, in case Vencatakrisha shall happen to die at any time, his issues shall enjoy the property. It contains no words of revocation of the previous Will; is wholly silent as to adoption, and does not refer in any way by revocation or otherwise to the clause in the Will of the 8th September 1889, set out above, which gave the widow a contingent power of adoption.

On the 4th April 1890 the testator died. The Will of the 8th September 1889 was not, and the Will of the 21st March 1890 was, admitted to Probate. On the 4th June 1891 Vencatakrishna died.

In 1893 the plaintiff in the present proceedings being the brother of Vencatarama and thus reversionary heir to Vencatakrishna instituted a suit, and on the 20th November 1894 obtained a decree that the Will of the 21st March 1890 was null and void, and inoperative according to Hindu Law. This must have meant as regards the disposal of the ancestral property.

In this state of facts the widow, Subbammal, on the 13th August 1906 adopted the defendant Parthasarathi.

The present suit is one instituted by Vencatanarayana, as reversionary heir of Vencatakrishna, against Subbammal, the widow, and Parthasarathi, the son adopted by the widow, for a declaration that his adoption was illegal and invalid.

The appellant advanced two contentions, (1) that the document of the 8th September 1889 was not a Will—with this their Lordships have dealt above—and (2) that if it was a Will, it was revoked by the Will of 21st of March 1890 and that no power existed in the widow in 1906 to make an adoption.

The appellant rests his case not upon any words in the Will of 1890 revoking the Will of 1889, for there are none, but upon such an inconsistency between the two Wills as that the provisions of the earlier Will cannot stand with the existence of the later Will. It has already been pointed out that the Will of 1889 consists of two parts, and assuming for the moment that the contention is well founded as to the one part, *viz.*, that which effects a disposal of the property, it does not touch the other part, *viz.*, that which gives a power to adopt.

Whether the contention is well founded as regards the other part, *viz.*, that which effects the disposal of the property, turns upon the application of the doctrine of dependent relative revocation. This is really a question of intention. If by his Will a testator gives property to *A* and by a codicil gives the same property to *B*, and if in the event it turns out that *B* cannot take, it has to be ascertained from the language of the testator, as found in his testamentary documents, whether he intended that the gift to *A* should be displaced altogether or that it should be displaced only in favour of *B*, and (if *B* cannot take) the gift to *A* should remain. If, as in *Tupper* v. *Tupper* (2), the testator's language

is that (1) he revokes the gift to *A* and (2) in lieu thereof he gives to *B*, it may well be that there is a revocation for all purposes. If, as in *Quinn* v. *Butler* (5), the donee of a power to charge does by his Will charge with £4,000 to be paid to *A* and £3,000 to be paid to *B*, *C* and *D* equally, and then by codicil revokes the aggregate charge of £7,000 made by his Will and charges with £7,000 for *A*, the charge in the Will is no doubt gone for all purposes. If, as in *Baker* v. *Story* (4), *A* takes absolutely under the Will, but under the codicil takes for life only with a gift over which fails, and there is an ultimate effectual residuary gift, it is difficult to find any room for a contention that the gift by Will is not gone altogether. But no one of these authorities is pertinent to the present case. *Alexander* v. *Kirkpatrick* (6), although a case upon two dispositions of which the former contained a power of revocation, and not upon two Wills, contains a principle applicable in their Lordships' opinion to the present case, *viz.*, that an alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

It is admitted that by the Will of 1890 the testator could not give his ancestral properties as he purported to do, but it is argued that from the fact that he purported so to give them there is to be inferred an intention that if he could not give them as he purported to do in 1890, his disposition in 1889 should nevertheless be revoked—and the argument goes beyond this to affirm that not only his disposition of property in 1889 but also the independent provision conferring a power to adopt given in 1889 is in like manner revoked. Their Lordships do not accept either argument as well founded. The effect of that which has taken place is that there are two testamentary instruments. The later must, no doubt, prevail over the earlier, but the contingent power to adopt in the earlier instrument is unaffected by anything in the later. In their judgment it has been rightly held that on the 13th August 1906, the widow had the power of adoption which she exercised, and the plaintiff's case fails.

Their Lordships will humbly advise His Majesty that the appeal fails and must be dismissed with costs.

*Appeal dismissed.*

Solicitor for the Appellant:—Mr. *John Josselyn.*

Solicitor for the Respondents:—Mr. *D. Grant.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 433 OF 1913.

August 3, 1915.

*Present*:—Mr. Lindsay, J. C.

*Raja* MUHAMMAD MUMTAZ ALI KHAN —PLAINTIFF—APPELLANT

*versus*

HARPAL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Burden of proof—Under-proprietary rights, plea as to—Declaratory suit—Adverse possession, commencement of—Ejectment refused by Revenue Courts, effect of.*

The plaintiff who was a *talukdar* of certain villages sued for declaration that the defendants had no proprietary or under-proprietary rights in certain plots of land situate in those villages, and the defence was that they were under-proprietors of those plots:

*Held*, that the burden lay on the defendants to prove that they were under-proprietors. [p. 377, col. 1.]

*Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh*, 8 O. C. 145, referred to.

Where in ejectment proceedings before a Revenue Court the persons sought to be ejected by the landlord set up under-proprietary rights, and the Revenue Court refuses to eject them on the ground that they are under-proprietors or that they have rights superior to those of an ordinary tenant, they may subsequently claim under-proprietary rights by adverse possession commencing from the date of such Revenue Court decision. [p 378, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 5th July 1913, reversing that of the Munsif, Utraula, dated the 30th April 1913.

Mr. *Mohammad Wasim*, for the Appellant.

Mr. *P. C. Bhattacharji*, for the Respondents.

JUDGMENT.—These eleven appeals have arisen out of eleven suits brought by the plaintiff-appellant Raja Muhammad Mumtaz Ali Khan, the *talukdar* of Utraula, for the purpose of obtaining declarations that the various defendants who are in possession of certain plots in four villages included in his estate, namely, Khaira Dih, Bareha Farid, Udaipur and Bhairwan, have no

proprietary or under-proprietary rights therein. The cause of action alleged arose out of certain ejectment proceedings taken in the year 1905. Notices of ejectment were served upon these various defendants and were cancelled by the Revenue Courts on the ground that these defendants had under-proprietary rights. The defence set up in all the cases was that the defendants were under-proprietors and that the plaintiff had no right to get the declaration. The Court of first instance decreed the suit. The Munsif in his judgment stated that documentary evidence which was led by the plaintiff established his right to have the declaration. The plaintiff produced the *khasra* of the old Settlement and the *khasra* of the new Settlement. He also produced the *wajib-ul-arz*, which showed that there were no under-proprietary rights in existence in these villages. Certain other *khasras* were produced in which there were no entries regarding under-proprietors, and as observed by the first Court, the whole documentary evidence was in favour of the plaintiff. The Munsif disposed of the case in a somewhat perfunctory manner. With reference to the documents which were put forward by the defendants all he said was that they did not help the defendants' case. The defendants went in appeal to the District Judge. Their appeals were allowed and the suits of the *talukdar* were all dismissed. It is against these decrees of the lower Appellate Court that these appeals have been filed. Before proceeding to discuss the merits of the case I may say at once that the learned Judge of the lower Appellate Court appears to me to have failed to appreciate the position of the parties with respect to the burden of proof. It is an admitted fact that the plaintiff is the *talukdar* of these villages and it necessarily follows that if the defendants wished to establish their under-proprietary rights in these villages, the burden of proving that they had such rights lay upon them. In summing up the case the learned Judge after referring to previous litigation between the parties remarked:—"In the face of the claims and disputes of this sort well-authenticated as extending over thirty years, or more, I am asked to rely on a couple of *khasras* and a *wajib ul-arz*. I cannot do it. The plaintiff respondent has, in my opinion, failed to prove that the defendants-appellants are his ordinary or other tenants without under-proprietary rights and I decline to grant him a declaratory decree that they have no under-proprietary rights in the plots in suit." These remarks clearly show that the learned District Judge was under the impression that the burden of proof was upon the plaintiff. This is erroneous and if any authority is needed for a proposition so obvious, it will be found in the case reported as *Maharaja Jagatjit Singh Bahadur* v. *Suraj Bakhsh Singh* (1). The same ruling may usefully be referred to in order to show what proof is required from persons who set up claims to under-proprietary rights in villages. In this judgment Mr. Wells points out that under rule 10 of the rules contained in the Schedule attached to Act XXVI of 1866, a person who claims under-proprietary title is bound to show (1) that he had formerly been a proprietor of the village, (2) that the lands were held by him or by some one from whom he inherited within twelve years before the annexation of Oudh and (3) that the land was *sir* or *nankar* at the time he was in proprietary possession. As was remarked in the judgment, it is very difficult for a person to prove all these facts at the present time. Cases like these, of course, have been easily established at the time of the first regular Settlement. It may be added that a person may acquire under-proprietary rights by adverse possession. Applying the test laid down in the case referred to and having regard to the fact that the burden of proving under-proprietary title in these cases lay upon the defendants, it appears to me, after consideration of all the evidence, that the defendants' case failed. Regarding the history of these villages it would seem that they belonged to the *talukdar* of Utraula in the days of the native rule. They were mortgaged in the year 1846 and redeemed by the Raja of Utraula by two suits which were decided respectively in 1873 and 1875. In the year 1880, that is to say, a considerable time before the first regular Settlement, a claim seems to have been put forward by Dawan Singh, Ausan Singh and others with respect to

(1) 8 O. C. 145.

an area in eight villages including the four villages now in suit. This claim came before the Commissioner who gave a judgment on the 16th of August 1860 (Exhibit A22). The Commissioner held that these claimants were entitled to be maintained in possession of the lands they previously had held. He said that they were in possession of 2,829 *bighas* of *sir*. With regard to this order it may be remarked that it cannot be construed as a decree declaring title, for at that time Commissioners had no powers to pass decrees relating to title to landed property. The next thing we find is that a claim was made at the time of the regular Settlement. Dawan Singh and a man called Dhur Singh put in a claim against the mortgagee of these villages, Kishan Dat Ram. They asked for a decree covering 4,000 *bighas* of land of which they said they were the under-proprietors. The first Court gave them a decree for 2,829 *kachcha bighas* (*vide* Exhibit 7). The case was taken in appeal to the Commissioner, who reversed the decree of the Court of first instance on the ground that the mortgagor of the villages had not been made a party to the proceedings. It does not appear that Dawan Singh and Dhur Singh prosecuted their claim any further and the result, therefore, is that there is no settlement decree upon which the defendants in these present suits can rely, that is to say, even if we assume in their favour a fact which has not been proved, *viz.*, that they are the present representatives of Dawan Singh and Dhur Singh. The defendants, not having secured any decree at the time of the regular Settlement, have been driven to rely upon a prescriptive title and it is necessary in this connection to consider carefully the nature of the title so set up. In the year 1888 the Raja of Utraula issued a notice of ejectment against a certain person named Motbar Singh. The plots in respect of which notice was issued were eight in number. This notice appears to have been cancelled. We next find that in the year 1891 another notice was issued against Motbar Singh in respect of the same plots (*vide* Exhibit A9). This notice was apparently cancelled by the Revenue Courts on the ground that Motbar Singh had rights superior to those of an ordinary tenant and Exhibit A 23 is another judgment which shows that other persons were served with similar notices which were cancelled on the same ground. In dealing with this case the learned Judge of the lower Appellate Court appears to have assumed that the plots in suit were the plots in connection with which these notices of ejectment were issued. But that fact has not been established, except with respect to five numbers which were in suit in the case filed against Mohan Singh and others. The appeal relating to this latter case is Appeal No. 442. I will deal with this matter presently. The next litigation with which we are concerned took place in the year 1905. In that year notices of ejectment were served in respect of the five numbers I have just referred to, which were at that time in the possession of Beni Singh. These notices were cancelled in the same way and it is the cancellation of these notices which has led to the institution of the present suits. Now as regards the plea of adverse possession it would be necessary for the defendants in order to establish a prescriptive title as under-proprietors to show at least that all the numbers now in suit were in dispute in the ejectment proceedings which came to an end by the order of the Revenue Court dated the 30th of March 1892 (Exhibit A9). I have already mentioned that the defendants have failed to prove this necessary fact and I cannot understand how the learned Judge was able to come to the conclusion that all these numerous defendants have been able in this way to establish their title as under-proprietors. Another point which the defendants have not succeeded in making good is that they are the present representatives of the persons who were concerned in those ejectment proceedings. The whole case has in fact been loosely handled and these defendants have failed to produce the evidence which was requisite to support their case. It is obviously futile for all these defendants to rely upon proceedings in ejectment which were taken against Motbar Singh, unless they can prove that they in some way represent Motbar Singh in respect of the lands in dispute. The learned Judge has passed very lightly over these matters,

He describes these defendants as being collateral relations of Motbar Singh. He goes on to say that they and their predecessors have been twice successful in contesting ejectment proceedings taken by the *talukdar*. This is altogether erroneous, for it is not at all proved that the persons who contested these ejectment proceedings were the defendants' predecessors-in-interest.

I come now to discuss in particular the Appeal No. 442. I have already mentioned that so far as this case is concerned, it has been established that five of the plots which are at issue in the present case were plots in respect of which ejectment notices issued in the years 1891 and 1892. The defendants in the suit out of which Appeal No. 442 has arisen are Mohan Singh, Sardawan Singh and Jhukku who are described as the sons of Beni Singh. The fourth defendant Haunsla Singh is described as the son of Basudeo Singh. How then is connection made between these defendants and Motbar Singh who successfully contested the notices issued by the *talukdar*? There is evidence to show that Beni Singh, the father of the first three defendants in this case, was a brother of Motbar Singh. There is no evidence to connect the fourth defendant with Motbar Singh. In the year 1905 when the last notices of ejectment were issued, these five particular plots were described as being in the possession of Beni Singh. It has not been explained how these plots which were undoubtedly in possession of Motbar Singh in the year 1892 came to be in the possession of Beni Singh in 1905. In his judgment the learned Judge remarks, as I have said, that these defendants are Motbar Singh's collateral relations and he mentions it as a fact that Motbar Singh has descendants of his own. If Motbar Singh has descendants alive, it is difficult to understand how the sons of Beni Singh can now represent Motbar Singh with respect to these plots in suit. I am unable to hold in favour of the defendants in this particular case that they have succeeded in establishing a title by adverse possession of these five plots. Cases like these must be supported by clear and definite evidence and are not to be decided upon assumption such as the learned District Judge appears to have made. The learned Counsel has failed to put before me any reliable and direct evidence upon which it would be possible for me to hold that any of these defendants succeeded in discharging the burden of proof which lay upon them and which it was necessary that they should discharge in order to defeat the plaintiff's claim.

The result is that all these appeals must be allowed. I set aside the decrees of the lower Appellate Court and in each case restore the decrees of the Court of first instance. The plaintiff-appellant is entitled to his costs both here and in the lower Appellate Court.

*Appeal allowed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 29 OF 1912-13 OF ALLAHABAD DISTRICT.

December 9, 1913.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

NASIR-UD-DIN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Shaikh* MUNIR-UD-DIN—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 11—Occupation without payment of rent—'Tenant,' meaning of—Occupancy right—Period, if counted.*

The period for which no rent has been paid by a tenant cannot be counted by him towards the period necessary for acquisition of occupancy rights, as he cannot be called a 'tenant' during that period. [p 380, col. 1.]

Second appeal from the order of the Commissioner of Allahabad Division, dated 30th April 1913, reversing that of the Assistant Collector of Allahabad District, in the case of ejectment.

### JUDGMENT.

BAILLIE, S. M.—(*December 3rd*, 1913.)—The facts found in this case are that respondent has held the land in question for a period of 26 years and that until 1313, that is to say, six years ago, no rent was contracted for or payable. In 1314 he agreed to pay for this land along with two other fields a rent of Rs. 4. The Commissioner has held that it must be assumed that respondent has held with the assent of the plaintiff-appellant and that, therefore, he has by his possession for over

twelve years acquired occupancy rights. In my opinion this decision cannot be supported. To acquire occupancy rights, possession for twelve years as a tenant must be proved. A tenant is a person by whom rent is or but for a contract, express or implied, would be payable. Respondent was until 1314 clearly not a person by whom rent was payable and there is no suggestion made in the case that there was a contract, express or implied, freeing him from payment of rent. The result is that respondent was, until he agreed to pay rent, not the tenant of this land. He cannot, therefore, have occupancy rights.

The appeal should be allowed with costs on respondent.

TWEEDY, J. M.—I concur.

*Appeal allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 24 OF 1913.

May 19, 1915.

*Present*:—Mr. Lindsay, J. C.

GHANSHYAM DAS—PLAINTIFF—APPELLANT

*versus*

*Musammat* HARDEI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Evidence—Credit of witnesses—Witnesses interested in result of suit, testimony of, worth of—Minor, major defendant described in plaint as, effect of Guardian* ad litem*—Representation, if proper—Notice not served upon minor prior to appointment of guardian* ad litem, *effect of—Proceedings, subsequent, validity of—Decrees, if binding on minor—Civil Procedure Code (Act V of 1908), O. XXXII, r.* 3 (4)*—Hindu Law—Joint trading family—Debts contracted by managing member, when binding on whole family—Creditor, duty of—Limitation Act (IX of 1908), s.* 5*—Extension of period of limitation—Decision of first Appellate Court on technical point set aside in second appeal—Merits, trial on—Second Appellate Court, election of.*

The mere fact that a party's witnesses upon a certain point are his relations or are in some way connected with him, and are thus more or less interested in the result of the suit, is no ground for disbelieving them, when the point is such as can reasonably be expected to be reliably established only by their testimony. [p. 382, col. 2.]

If a defendant is of full age at the time that he is sued, but is described in the plaint as a minor, and a guardian *ad litem* is appointed for him, he is not properly represented in the suit by such guardian. Nor is a minor defendant so represented in a case where no notice has ever been served upon him prior to the date of the order by which his guardian is appointed, for the language of Order XXXII, rule 3 (4), Civil Procedure Code, is peremptory and requires a very strict construction. And, in such cases, the subsequent proceedings are invalid so far as the minor is concerned, so that he is not bound by the decrees obtained against him under such circumstances. [p. 383, col. 1.]

Debts contracted by a managing member of a joint Hindu family are binding on the other members *only when they are for a family purpose.* But where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes and the creditor is not bound to inquire into the purpose of the debts in order to bind the whole family thereby, because that power is necessary for the very existence of the family. [p. 385, col. 1.]

*Raghunathji Tarachand* v. *Bank of Bombay*, 2 Ind. Cas. 173; 11 Bom. L. R. 255; 34 B. 72, referred to.

Two suits of different valuations filed in a Subordinate Judge's Court were disposed of in one judgment. In the smaller of them the appeal lay to the District Judge's Court, and in the other to the Judicial Commissioner's Court direct. The appellant applied for a copy of judgment and decree. When he got the copy he found out that that decree related to the suit in which the appeal lay to the Judicial Commissioner's Court. The result was that by the time that an appeal was filed in the District Judge's Court, its period of limitation had already expired, and the District Judge, therefore, dismissed it as time-barred:

*Held*, that under the above circumstances the provisions of section 5 of the Limitation Act were applicable and that the appeal ought not to have been dismissed as time barred. [p. 386, col 1.]

Where a first Appellate Court decides a first appeal only on a technical point, for example, on a point of limitation, and in second appeal the second Appellate Court sets aside that decision, it may itself, if proper, dispose of the case on the merits, instead of sending it back to the first Appellate Court for that purpose. [p. 385, col. 1.]

Appeal from the decree of the Subordinate Judge, Fyzabad, dated the 9th December 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Syed *Ali Muhammad*, for the Respondents.

JUDGMENT.—These two appeals have arisen out of two separate suits filed by the plaintiff-appellant, Ghanshyam Das, for the purpose of obtaining a declaration that two decrees which were passed in mortgage suits on the 30th of March 1910 and which were made absolute on the 17th of August 1911 were not binding upon him. These suits were brought in respect of two

deeds of mortgage, which had been executed on the 6th of February 1904 by a number of persons who are said to be members of a joint family descended from one Debi Charan. In both of the mortgage-deeds in question the name of this plaintiff, Ghanshyam Das, appears as an executant. He was described as a minor and the execution on his behalf was said to have been made by his guardian Gauri Shankar. Gauri Shankar, it may be noted, is the plaintiff's uncle. When these mortgage suits were filed in the year 1909, this plaintiff, Ghanshyam Das, was impleaded as defendant No. 11. It was alleged in the plaint that Ghanshyam Das was still a minor and certain proceedings were taken, with the result that his uncle Gauri Shankar was appointed his guardian *ad litem*. The principal plea which was put forward by the plaintiff in the suits now before me was to the effect that at the time these mortgage suits were brought he was of full age, that he was, therefore, entitled to conduct his own defence in these suits and that because he was not properly represented in the proceedings which resulted in the decrees passed on the 30th of March 1910, he was not bound by the decrees. There was a further allegation in the plaint that the mortgages which had been put in suit in the manner above described were not binding upon the plaintiff inasmuch as the debts had not been incurred for any purposes beneficial to or binding upon the joint family of which he was a member, and the reliefs which the plaintiff claimed were, *first*, that the mortgage-deeds should be cancelled, and *secondly*, that there should be a declaration that the decrees obtained upon these mortgage-deeds were not binding upon him. In defence the contesting defendants, namely, the persons who had obtained the mortgage-decrees, insisted that Ghanshyam Das was properly represented in the mortmage suits, that he was in fact a minor at that time, that a guardian *ad litem* had been duly appointed for him in the person of his uncle Gauri Shankar, that the mortgage-debts had been incurred for purposes which were binding upon the joint family and that, therefore, the plaintiff was not entitled to any relief. The Subordinate Judge dismissed the suits. He held that the plaintiff had failed to prove that he was of full age at the time the mortgage suits were brought and tried, he also was of opinion that the plaintiff had been properly represented in those previous suits, and he, therefore, found that the plaintiff had failed to prove that the mortgage-deeds were not binding upon him. I may note here that both suits were tried together. In one of them the value of the subject-matter was Rs. 6,500 odd: in the other the value was Rs. 3,400. Separate decrees were drawn up in the Court of the Subordinate Judge. The First Appeal No. 24 of 1913 which lies to this Court is against the decree passed in the suit of larger value. The Second Appeal No. 200 of 1913 has reached this Court through the Court of the District Judge. There was a first appeal to the District Judge, who dismissed it on the ground that it was barred by limitation. In the latter case the point taken here is that the decision upon the question of limitation is wrong. As the facts which are necessary to be considered in this judgment are common to both cases, I shall deal with both cases together premising that for reasons to be stated hereafter I am of opinion that the Second Appeal No. 200 of 1913 must be allowed. I hold that the lower Appellate Court's decision on the question of limitation in that case is erroneous.

To come now to the facts. The first and most important issue in the case is with respect to the age of the plaintiff. Is it or is it not proved that at the time these mortgage suits were brought in the year 1909 the plaintiff Ghanshyam Das was of full age, that is to say, over the age of 18? Ghanshyam Das produced a number of witnesses some of whom are his relatives and other persons who swear that they have known Ghanshyam Das and his family for a very long time. There is for example the statement of the plaintiff's witness No. 1, a man named Sukhdeo Prasad who is related on the mother's side to the plaintiff. This man has known Ghanshyam Das for some considerable time. He belongs to the Chhapra District and says that Ghanshyam Das lived there for a good while with his maternal grandfather, one Dori Lal. The witness has paid one or two visits to the family to which Ghanshyam Das belongs and which resides at Tanda in the Fyzabad District. A *janmapatra* was produced in the case (Exhibit 38) which was shown to this witness and he identified this document, which he says he had seen some

years before at the time when it was looked at in connection with proposals which were being made for the marriage of Ghanshyam Das. The second witness on the plaintiff's behalf was a man named Bindeshuri Prasad. He swore that he had lived for 35 years in the town of Tanda, where his brother Salig Ram who died ten years ago was a *pandit*. According to this witness the *janmapatra* (Exhibit 38) which was produced was prepared by his brother. Apart from this the witness claimed to have known Ghanshyam Das since the time of his birth and he deposed that on the date on which he was giving evidence Ghanshyam Das was about 25 years of age. This witness also produced a calendar or *patra* (Exhibit 45), in which there was an entry which he swore was in his brother's handwriting to show that a son had been born to one Thakur Prasad on *Katik Sudi* 14th 1944 *Sambat*. This date corresponds to some date in October or November 1887 A. D. A third witness Raghunath Das who is married to the sister of Ghanshyam Das also deposed to the plaintiff's age and he also deposed having seen the *janmapatra* some years before the suits were brought. He had occasion, he says, to consult it in connection with Ghanshyam Das's marriage. The plaintiff himself gave evidence as to his age and another witness who was called in his behalf was his uncle Balbhaddar, who supported the plaintiff's case in the matter of age. Bhikham Chand, another member of the family, also deposed that Ghanshyam Das was about 25 years of age. As against this evidence the defendants were able to produce very little by way of rebuttal. They relied principally upon a medical certificate granted by Colonel Vost, Civil Surgeon of Fyzabad, on the 31st October 1912. According to the medical witness Ghanshyam Das on that date appeared to be between 18 and 20 years of age. The Civil Surgeon, of course, did not profess to give this as an accurate estimate. He was only able to say in a general way that this was the approximate age. As for the evidence of the other defence witnesses it was of a very feeble character and could lead to no definite conclusion upon the matter in issue. The learned Subordinate Judge disposed of most of the plaintiff's evidence by remarking that it came from the mouths of witnesses who were more or less interested in the result of the suit. As against this there is the fact that the only persons who could reasonably be expected to give reliable testimony regarding the age of the plaintiff would necessarily be members of his family. It is, of course, a matter of common experience that documents like horoscopes (*janmapatras*) are frequently fabricated for the purposes of cases like these in which the question of age is of primary importance. At the same time it is difficult to discover any reason for disbelieving the statement of some of the plaintiff's witnesses that they had seen this document a good many years before the present suits were brought. I have been impressed a good deal by the evidence of Raghunath Das, plaintiff's witness No. 3, who seems to be a reliable witness, and I am not prepared to hold that his testimony is liable to be rejected merely on the ground that he was married to the plaintiff's sister. One fact seems to me to tell very strongly in favour of the plaintiff's contention that he was of full age at the time the mortgage suits were brought. It is proved beyond all doubt that while these suits were at hearing, Ghanshyam Das put in a petition to the Subordinate Judge saying that he was of full age, that he desired to conduct his own defence in the case and that his guardian *ad litem* Gauri Shanker should be removed from his office. The Subordinate Judge who tried the mortgage suits acted, in my opinion, most improperly in connection with this application. He shelved it for the time and proceeded to try out the suits. Long after the decrees had been passed, he had the petition put up again and then recorded an order consigning it to records on the ground that there was no longer any necessity to deal with it. With regard to the issue of age, therefore, I hold that the evidence on the record establishes that at the time these suits were brought in the year 1909 the plaintiff, Ghanshyam Das, was not a minor but a person of full age. My finding, therefore, is against the decision of the Subordinate Judge on this point.

The next question which arises is whether Ghanshyam Das was properly represented in these mortgage suits. The answer may be given shortly in view of the finding which has already been arrived at on the question of Ghanshyam Das's age. If, as

GHANSHYAM DAS *v.* HARDEI.

I have found, Ghanshyam Das was of full age in 1909 it necessarily follows that he could not have been properly represented in proceedings before the Court by his uncle, Gauri Shankar. Apart from this, however, it is quite plain that Gauri Shankar was never properly appointed a guardian *ad litem* of Ghanshyam Das. In this connection the provisions of Order XXXII, rule 3, have to be considered. Under rule 3, sub-rule 4, of this Order it is laid down that no order shall be made on any application for the appointment of a guardian for the suit for a minor except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor. The Subordinate Judge had the provisions of this sub-rule before him and he seems to have misunderstood them. It is quite true that when these suits were brought and when Ghanshyam Das was described in the plaint as being a minor, an application was made on behalf of the plaintiff to have a guardian *ad litem* appointed for him. It is also proved that when this application was made the Court directed a notice to issue both to the minor and to the proposed guardian, Gauri Shankar. But it has been found by the Court below, and the matter is no longer in dispute, that as a fact no notice was ever served upon Ghanshyam Das prior to the date of the order by which Gauri Shankar was appointed his guardian *ad litem*. For the appellant it is contended that this fact settles the point conclusively and in my opinion the contention must be accepted. The language of Order XXXII, rule 3, sub-rule 4, is peremptory and lays down that no order shall be made for the appointment of a guardian unless notice has been given to the minor. The Courts have always construed these rules of procedure relating to the appointment of guardian *ad litem* very strictly and there can, I think, be no doubt that if these provisions of the law are not strictly complied with, the subsequent proceedings are invalid so far as the minor is concerned. I hold, therefore, that even if it were to be assumed that Ghanshyam Das was a minor at the time these mortgage suits were before the Court, he was not properly represented and the result will, therefore, be that the decrees were not binding upon him. It is not necessary for me to take notice of certain other arguments which were put forward, chiefly in order to show that the so-called guardian, Gauri Shankar, had been guilty of gross neglect in the discharge of his office. What I have said is, in my opinion, sufficient to support the conclusion that Ghanshyam Das was not properly represented in these two suits.

There remains, however, another question for decision and that is in connection with the effect of these two mortgages upon the interests of Ghanshyam Das. It is quite clear from the evidence in the case and from the admission of the parties that the family to which Ghanshyam Das belongs was, up till a year or two ago, a joint family carrying on a family business at different places in India. One branch of the family business was at Tanda, another in another town of the Fyzabad District. There was also a branch at Mendaul, in the Basti District, and another branch at Calcutta. The mortgage transactions, dated the 6th of February 1904, are said to have been entered into with the mortgagors in connection with their family business which they were carrying on at these various places. There is evidence on the record to show that the mortgagees, Binda Ram and Ganga Ram, had had a long course of dealings with the branch of the plaintiff's family business at Tanda before these mortgages were executed and the mortgages purport to have been executed in order to secure a balance of account in favour of the mortgagees, Binda Ram and Ganga Ram. When the mortgage suits were brought in the year 1909, an issue was raised as to whether these debts had been incurred for a purpose which was binding upon the joint family. The finding of the Subordinate Judge in those suits was to the effect that the mortgages were binding. In this connection it is necessary here to state that this finding was arrived at after an order had been passed by the then Subordinate Judge that the proceedings in those mortgage suits should continue *ex parte* as against Gauri Shankar and Ghanshyam Das. It appears that

the learned Counsel who appeared for Gauri Shankar in those mortgage suits had obtained an adjournment in connection with which Gauri Shankar was directed to deposit a sum of Rs. 100 payable by way of costs to the opposite party. There was a further adjournment for which Gauri Shankar was condemned to pay costs to the tune of Rs. 10. He failed, it seems, to deposit these costs and thereupon the Subordinate Judge directed that the trial should proceed *ex parte* and it was continued *ex parte* till the end of the case, and so the finding in these mortgage suits with reference to the purposes for which the mortgage-debts were incurred was an *ex parte* finding which the plaintiff here, Ghanshyam Das, had certainly no opportunity of contesting. In two suits which are now under appeal Ghanshyam Das stated in his plaint (paragraph 14) that he denied the genuineness and validity of both the mortgage-deeds which had been put in suit. He asserted that the executants of those deeds had no power to mortgage joint family property, that no money had been taken for the family benefit, that there was no necessity for any loan, that the deeds were inoperative and invalid, and that the mortgaged property was not affected. He also pleaded that even if the deeds were found to be genuine he would not be bound. The defendants in the written statements denied these allegations and further alleged that the money had been advanced for expenses of the family including the plaintiff Ghanshyam Das who derived benefit from the loans. The Subordinate Judge raised an issue on these pleadings in the following form:—"Whether the mortgages in dispute in those cases are not genuine and not valid and binding on the plaintiff." In his finding on this issue the Subordinate Judge has remarked that the plaintiff had failed to prove that the mortgages in dispute were not genuine and not valid and binding on him. As a matter of fact the genuineness of the documents has been established. There is the evidence of one of the attesting witnesses, whose statement proves beyond doubt that the deeds were executed. According to the statements of these witnesses three of the executants, namely, Binda Prasad, Jagan Nath and Kedar Nath, were represented in these mortgage transactions by Raghunandan who is said to have been a general attorney of the family. It has been argued here on behalf of the respondents that if the findings on the other issues are in favour of the appellant there ought to be an inquiry as to the binding nature of these mortgages. I have already mentioned the plea which was put forward by the plaintiff in both these suits and I have referred to the fact that he claimed cancellation of these mortgage-deeds. On the other hand it has been argued on the plaintiff's behalf that the issue was clearly raised and that the defendants failed to give any evidence in rebuttal of the evidence which was brought by the plaintiff to prove that the debts were not incurred for purposes which would be binding upon the family. All I need say here is that if the plaintiff relies upon the only evidence which has been produced in the case to show that the debts were not incurred for family purposes, he will be in a rather unfortunate position. The only witness in this connection is his uncle, Balbhaddar, who wished the Court to believe that these debts for which these mortgages were executed were his personal debts. I have no hesitation in stating that Balbhaddar's evidence on this point is entirely false. I have given this matter most careful consideration and I have come to the conclusion that the question as to the binding character of these mortgage deeds must be further investigated. To begin with, although the defendants can rely upon the finding which was come to by the Subordinate Judge who tried the mortgage suits, there are on the other hand the considerations that that finding was an *ex parte* finding and that Ghanshyam Das had not in those mortgage suits a proper opportunity of putting forward any evidence which was available to him to show that the mortgages were not binding. In the second place, so far as the issue in the present suits is concerned it appears to me to have been framed in a vague way and so far as I can see the point which really arises in the case was not present to the mind of the Subordinate Judge. Certainly the defendants do not appear to

have produced any direct evidence to prove that the mortgages were binding upon the plaintiff, but it is very doubtful whether in the circumstances of the case it was the duty of these defendants to produce any such evidence. They cross-examined the plaintiff's witnesses, however, and there is certainly some evidence on the record which, if believed, would tend to show that these debts were really incurred for purposes which were binding upon all the members of the plaintiff's family. I wish here to say a few words as to the law which governs a case of this kind. I have already mentioned that the plaintiff up till a year or two ago was a member of a joint family which admittedly carries on a hereditary business. It is, therefore, what is known to the Hindu Law as a trading family. It is now, I think, settled that the law with respect to debts incurred by a member of a trading family differs at least in one important respect from the ordinary law which governs the money dealings of an ordinary joint Hindu family. The rule has been laid down very clearly in an elaborate judgment of Chandavarkar, J., in the case reported as *Raghunathji Tarachand* v. *Bank of Bombay* (1). The learned Judge in that case held that the rule of Hindu Law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception. Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes and the creditor is not bound to inquire into the purpose of the debts in order to bind the whole family thereby, because that power is necessary for the very existence of the family. These principles of law must be applied in the present case in order to ascertain whether or not these mortgage-deeds are binding upon the plaintiff. The issue is one which must be decided, for the plaintiff himself by his pleadings has invited decision upon the point and again it would be of no avail to him to give him a declaration that the mortgage-decrees were not binding upon him because he was not properly represented at the trial which resulted in those decrees, if on the other hand it is found that the mortgage-deeds are still binding upon him. I have decided, therefore, under the provisions of Order XLI, rule 25, of the Code of Civil Procedure, to remit the following issues to the Court of the Subordinate Judge of Fyzabad for decision: —

(1) At the time when the two mortgages of the 6th February 1904 were executed in favour of Binda Ram and Ganga Ram, who was the member of the plaintiff's family who was managing the joint family business on behalf of the family?

(2) Were the mortgage debts incurred for the purpose of the joint family business which was being carried on by the joint family to which the plaintiff belonged at that date?

(3) Were the mortgages in question executed by the member of the family who was managing the joint family business?

I think it proper to direct the lower Court to receive all evidence which the parties may desire to produce in these issues. The findings will be submitted to this Court within three months from the date of this order of remand and the parties will be given fifteen days to run from the date of the lower Court's findings for the purpose of filing objections to the findings, if they so desire.

I have only now to say a word or two about Second Civil Appeal No. 200 of 1913. I have already expressed the opinion that the decision of the lower Appellate Court that the appeal of the plaintiff-appellant was time-barred is erroneous. When the appeal was presented to the District Judge it was admitted that the presentation was beyond time. The appellant, Ghanshyam Das, asked for an extension of the time with reference to the provisions of section 5 of the Limitation Act. He pointed out that he had been led into a mistake in the matter of applying for copies of the decrees for the purposes of making his appeal. I have mentioned earlier in this judgment that although there was only one judgment in the two suits, there were two separate decrees prepared. In one case undoubtedly the appeal lay to this Court direct. In the smaller of the two cases the appeal lay to the Court of the District Judge. It has been explained that the plaintiff-ap-

(1) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

pellant, Ghanshyam Das, in making his applications for copies got confused and the result of his making a mistake was that when he got the copy of the judgment and decree which he had to file in the Court of the District Judge the time for appealing had already passed. The judgment which governed both the suits was delivered on the 9th of December 1912 and it is proved that on the 12th of December, Ghanshyam Das filed an application for a copy of the judgment and decree. The appellant seems to have thought that it was only necessary for him to obtain one copy of the decree and judgment, the fact being that as there were two separate decrees it was necessary for him to get a copy of each decree. In his application to the District Judge, Ghanshyam Das stated that he had made his application for copy on the 12th of December 1912 in order to file an appeal in the Court of the District Judge. It was found out, however, when he got this copy that it related to that particular suit in which the appeal lay to the Judicial Commissioner's Court. But at the time the mistake was discovered, the period of limitation for an appeal to the District Judge's Court had expired. I think these facts are borne out from what I find upon the record and it is by no means improbable that the appellant was confused by the facts that the two suits had been tried jointly that there was only one judgment while on the other hand there were two separate decrees. Having regard to all these circumstances I think the lower Court might very well have given Ghanshyam Das the benefit of the provisions of section 5 of the Limitation Act and should have held that the delay in the presentation of the appeal was excusable. I hold that the appeal was presented within time. I do not think it necessary to send this second appeal back for decision to the District Judge, for I shall be able to dispose both of it and of the first appeal after I have received the findings upon the issues which I have remitted for trial.

*Issues remitted.*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 107 OF 1911-12 OF GORAKHPUR DISTRICT.

January 30, 1913.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

*Sardar* UMRAO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAM TAHAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Agra Tenancy Act* (*II of* 1901), *s.* 11—*Ejectment for arrears of rent—Possession, effect of—N. W. P. Rent Act* (*XII of* 1881), *s.* 35.

Where a tenant was ejected under section 35 of Act XII of 1881, but was thereafter allowed to remain in occupation of the land:

*Held*, that the ejectment broke the continuity and the question whether possession was disturbed or not was immaterial.

Second appeal from the order of the Commissioner of the Gorakhpur Division, dated the 10th May 1915, reversing that of the Assistant Collector of Gorakhpur District in a case of ejectment.

JUDGMENT.

TWEEDY, J. M.—(*January 25th*, 1913.)—The view of the Commissioner is altogether wrong. Whether possession was disturbed or not, is irrelevant because the ejectment was under section 35 of Act XII (of 1881). The ejectment took place on 15th November 1899 and the present suit was filed on the 27th September 1911, less than 12 years after the ejectment.

By no possibility could occupancy rights have been acquired and I would decree the appeal and restore the decision of the first Court with costs.

BAILLIE, S. M.—I concur.

*Appeal allowed.*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 17 OF 1912-13 OF BASTI DISTRICT.

March 18, 1913.

*Present*:—Mr. Tweedy, J. M.

BIRJ NANDAN TEWARI—DEFENDANT—APPELLANT

*versus*

PHALLU RAM MISIR—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 11—Non-occupancy tenant taking up mortgage of village—Occupancy rights, acquisition of—Period of mortgage, if counted.*

If a non-occupancy tenant takes a mortgage of a share of the village in which the holding is situate, he cannot count the period of the mortgage, nor the period of occupation prior to the mortgage towards the acquisition of occupancy rights.

Second appeal from the order of the Commissioner of the Gorakhpur Division, dated the 24th September 1912, reversing that of the Assistant Collector of Basti District, in a case of ejectment.

JUDGMENT.—I entirely agree with the Commissioner's finding. The mortgage was of a 2-annas 5-pies share of the village and it is impossible to say that the cultivation in dispute did not belong to this share as much as to the remaining 13-annas 7-pies share. The cultivation of the appellants between the time the mortgage was made and the time of redemption cannot count towards occupancy rights. It is a well-known principle of law that a mortgagee cannot acquire in the mortgaged property rights prejudicial to the mortgagor. Rights of occupancy were not acquired when the mortgage took place, and it would be contrary to law to give the period previous to the mortgage to that subsequent to the redemption of mortgage, which took place in 1901.

The appeal is dismissed with costs.

*Appeal dismissed.*



## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 4 OF 1911-12 OF ALLAHABAD DISTRICT.

August 22, 1912.

*Present*:—Mr. Baillie, S. M., and Mr. Broun, J. M.

PUNCHAM DUBE—DEFENDANT—APPELLANT

*versus*

*Musammat* SHAHZAD KUER—PLAINTIFF—RESPONDENT.

*U. P. Land Revenue Act (III of 1901), s. 4—Estoppel—Sir, sale of—Land ceasing to be sir—Land recorded as sir—Co-sharer, no objection by—Co-sharer becoming tenant—Estoppel.*

One *S* purchased a certain *sir* land in 1873 but by mistake it continued to be recorded as *sir* in the papers including the Settlement papers and was so recorded at a partition to which one *P* was a party. Since then *P* became a tenant of the land and claimed occupancy rights on the ground that the land was not *sir*:

*Held*, that *P* was estopped from asserting that the land was not *sir*. [p. 388, col. 2.]

Second appeal from the order of the Commissioner of Allahabad Division, dated the 10th October 1911, reversing that of the Assistant Collector of Allahabad District in a case of ejectment.

JUDGMENT.

BAILLIE, S. M.—(*August 2nd*, 1912.)—The question in issue is whether the land in suit is the *sir* of respondent or not.

Respondent admittedly purchased his share in the village after 1873, but the land has continued to be recorded as *sir* since. The Commissioner considered that when such record has been proved it must be regarded as conclusively shown that the land is *sir*. He refers to a decision of Mr. Cadell's in which it was held that *sir* rights could, when no ex proprietary rights were asserted, be transferred. At the present time it is, I think, recognised law that *sir* rights cannot be transferred even though ex-proprietary rights are not claimed. Ex-proprietary rights according to the law arise in certain circumstances whether they are claimed or not and when these circumstances occur, the land in which ex-proprietary rights have accrued ceases to be *sir* under provision (12) to section 4 of the Land Revenue Act, which states what was regarded as the law before the present Revenue Act came in force. The land in question ceased to be *sir* when respondent acquired proprietary rights in it.

There remains the question whether in spite of this fact the continuous record has maintained the character of *sir*. I do not think that it can be regarded as the intention of the Act that it should do so. It would be open to appellant to have asked at any time that the record should be corrected and that the land should cease to be recorded as *sir*. It is similarly open to him now to deny the correctness of the record. I hold that the land having ceased to be *sir* when respondent purchased it and respondent not having cultivated for twelve years since, it is now not *sir*.

There remains one other point. The land was, in a partition carried out a year after respondent purchased it, recorded as respondent's *sir* and appellant was at the time a co-sharer in the *mahal* and a party to the partition. It is urged that he is estopped from denying that the land is *sir*. He is estopped only if it appears that respondent's possession was in any way injuriously affected by appellant's omission to deny that the land was *sir* at the time of the partition. I cannot see that respondent's possession has been in any way affected. The land might have been recorded as non-occupancy land if appellant had objected at the time, but respondent is now in no way worse off than if the land had been at partition recorded as non-occupancy. I do not think that an estoppel has taken place.

It is further claimed that the land is *sir* under clause (*c*) of the definition, inasmuch as it was admitted as *sir* at partition. Respondent has never cultivated this land and I cannot hold that it has been shown to be recognised by village custom as his special holding. I think that the appeal should be allowed and the decision of the Court of first instance restored. The land is not *sir* and appellant has, therefore, occupancy rights. Costs on respondent.

BROUN, J. M.—It is clear that the *sir* rights could not be transferred by purchase, but the land was recorded as *sir* at Settlement and has been recorded as such ever since. Moreover in a partition in which both parties were parties, the appellant being then a co-sharer, the land was recognised by the co-sharers as *sir* and was as such allotted to the respondent's *mahal*. Since then the appellant has become a tenant of it and now in the face of the entries at Settlement and at the partition in which he was himself a party, he claims that the land is not *sir* and that he is an occupancy tenant of it.

I regret that I am unable to agree with the senior member. The matter is open to different constructions, but it appears to me that it would be altogether inequitable if the claim of the appellant were now allowed. I would dismiss the appeal with costs.

BY THE COURT.—The appeal stands dismissed with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1774 OF 1913.

December 13, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

GOLAM ABDIN SARKAR AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

HEM CHANDRA MOJUMDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Evidence Act* (*I of* 1872), *s.* 115—*Minor—Estoppel—Contract by minor, if binding by means of estoppel—Contract Act* (*IX of* 1872), *s.* 11.

No question of estoppel arises where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. [p. 390, col. 2.]

The law of estoppel must be read subject to other laws such as the Indian Contract Act. [p. 390, col. 2.]

Therefore, a minor cannot be made liable upon a contract by means of an estoppel under section 115 of the Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract. [p. 390, col. 2.]

*Dharmo Dass Ghose* v. *Brahmo Dutt*, 25 C. 616; 2 C. W. N. 330, followed.

*Surendra Nath Roy* v. *Krishna Sakhi Dasi*, 9 Ind. Cas. 110; 13 C. L. J. 228; 15 C. W. N. 239, referred to.

FACTS of the case appear from the judgment.

Babu *Broja Lal Chakravarty*, for the Appellant. The plaintiff No. 2 was 20 years and some months old when he sold the property to defendants Nos. 1 and 2. The fact that the minority of plaintiff No. 2 had

been extended by reason of the appointment of a guardian under Act VIII of 1890 was not known either to plaintiff No. 2 or to the defendants. The minority of plaintiff No. 2 certainly made the contract void in law, yet as the defendants had no reason to suspect that plaintiff No. 2 was a minor and the conduct of the latter amounted to a misrepresentation upon which the former acted, the principle of estoppel applied. Knowledge on the part of plaintiff No. 2 was not necessary to give rise to the estoppel. See *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1). The principle of estoppel has been applied to the case of minors. See *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (2) and *Ram Charan Das* v. *Joy Ram Majhi* (3).

[N. R. CHATTERJEA, J.—There was no fraudulent misrepresentation as in *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (2) and the law of estoppel does not apply to minors. The opinion of Jenkins, J., in *Dhurmo Dass Ghose* v. *Brahmo Dutt* (4) and of the Appellate Court in *Brohmo Dutt* v. *Dharmo Dass Ghose* (5) had not been overruled by the Judicial Committee in *Mohori Bibee* v. *Dharmodas Ghose* (6).]

The Judicial Committee left the question open. If the view of the High Court upon that point had been accepted, the case could have been disposed of on that short ground. Section 115 of the Evidence Act does not make an exception in favour of a minor as the Contract Act does. There are other provisions of the Evidence Act which clearly apply to minors, all that is needed is that the person should be of mature understanding. All persons above 18 years are *prima facie* possessed of a mature intellect, and there is no reason why section 115 should not apply to one of that age simply because in his case a certificate had been granted under Act VIII of 1890. In any case the plaintiff No. 2 before he could recover the property must refund the purchase-money. See Specific Relief Act section 41.

Babu *Kumar Sankar Roy*, for the Respondent.—A contract entered into by a minor is void and you cannot get round it by invoking the aid of the doctrine of estoppel. The law of estoppel cannot override the positive law laid down by the Statutes.

That the doctrine of estoppel does not apply to a minor has been laid down in several cases. *Vide Dharmo Dass Ghose* v. *Brahmo Dutt* (4) and *Brohmo Dutt* v. *Dharmo Dass Ghose* (5).

There is also an observation of Mr. Justice Mookerjee in *Ram Charan Das* v. *Joy Ram Majhi* (3), which supports my contention.

The other side might rely upon the case of *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (2), but in that case their Lordships remanded the case for a finding whether there was intention to defraud. When fraud is practised by the minor, he gets no relief, not because he is estopped but because on equitable principles such a minor should not derive benefit from his own fraud. *Vide Jagar Nath Singh* v. *Lalta Prasad* (7).

Babu *Brojalal Chakravarti* replied.

JUDGMENT.—The question involved in this appeal is whether plaintiff No. 2 is entitled to have the *kabuliyat* executed by him, while he was a minor, declared void so far as he is concerned and to recover possession of his share in the property in dispute. The Court of Appeal below has decided this question in his favour and the defendants have appealed to this Court. It appears that the plaintiff's mother obtained certificate of guardianship in respect of his person and property, and the plaintiff, therefore, was a minor until he attained the age of twenty-one years. The conveyance was executed by him when he had not attained that age. There can be no doubt, therefore, that the conveyance was void. See the case of *Mohori Bibi* v. *Dharmodas Ghose* (6).

It is contended on behalf of the appellant that the minor is estopped from pleading invalidity of the *kabuliyat* under

(1) 20 C. 296 (P. C.); 19 I. A. 203.
(2) 9 Ind. Cas. 110; 15 C. W. N. 239; 13 C. L. J. 228.
(3) 16 Ind. Cas. 825; 17 C. W. N. 10; 16 C. L. J. 185.
(4) 25 C. 616; 2 C. W. N. 330.
(5) 26 C. 381; 3 C. W. N. 468.
(6) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441 (P. C.); 30 I. A. 114.
(7) 1 Ind. Cas. 562; 31 A. 21; A. W. N. (1908) 267; 5 A. L. J. 674.

section 115 of the Indian Evidence Act. The lower Court has found that the plaintiff had no knowledge that a certificate of guardianship had been obtained and that his minority had been extended. In fact that Court has found that there was no misrepresentation by plaintiff No. 2. It has, however, been contended on behalf of the appellant that even if plaintiff No. 2 had no knowledge that his minority had been extended the fact that he sold the property as if he was of age was a representation upon which the defendants have acted and the plaintiff was, therefore, estopped.

The question whether the law of estoppel applies to a minor was considered in the case of *Dhurmo Dass Ghose* v. *Brahmo Dutt* (4). Mr. Justice Jenkins (as he then was) held in that case that the general law of estoppel, as enacted by section 115 of the Indian Evidence Act, would not apply to an infant unless he has practised fraud operating to deceive, and observed that fraud on the part of an infant operating to deceive must be found as a fact and whether in any particular case there is such fraud must depend upon its own peculiar circumstances. On appeal Maclean, C. J., and Prinsep, J., held that section 115 has no application to contracts by infants. The learned Chief Justice observed as follows: "A minor cannot be estopped by a deed or by the recitals in a deed, and if he cannot be so estopped, it seems incongruous to say that he can be estopped by a parol declaration, for this is the contention. We must read the language of the Legislature if we can, so as to make it harmonise, and not conflict, with the general law, though remembering at the same time that the office of the Legislature by its Legislative Acts is to define, and even alter, the law. The term 'person' in section 115 is amply satisfied by holding it to apply to one who is of full age, and competent to enter into a contract. and I cannot bring myself to think that it could have been the intention of the Legislature, by such a general expression, to institute such a grave change in the law of estoppel in relation to minors." Mr. Justice Ameer Ali also was of opinion that when the law declares that an infant shall not be liable upon a contract, he cannot be made liable upon the same contract by means of an estoppel under section 115. See *Brohmo Dutt* v. *Dharmo Dass Ghose* (5). When the case went up to the Privy Council their Lordships did not think it necessary to deal with the question of estoppel, because the vendee in that case was fully aware that the vendor was a minor; and no question of estoppel arises where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. But there is nothing to show that their Lordships did not approve of the view taken by this Court on the question of estoppel as is contended by the learned Vakil for the appellant.

It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under section 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract. We see no sufficient reason for differing from the view taken in the case of *Dhurmo Dass Ghose* v. *Brahmo Dutt* (4).

In the recent case of *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (2), it was held that if there was misrepresentation by a minor operating to deceive, and if the vendees were deceived by it, the minor would be bound by the transaction. In this case, as we have already stated, the Court found that there was no fraudulent representation on the part of the minor. We are, therefore, of opinion that the plaintiff No. 2 is not estopped.

The only other question for consideration is whether the circumstances of this case require that the plaintiff No. 2 should return the money received by him from the defendants. The lower Appellate Court apparently thought that the purchase-money should be set off as against the amount of *wasilat* which the defendant might be directed to account for if the plaintiff was ordered to refund the purchase-money to the defendant. The share of plaintiff No. 2 was purchased by the defendant for

Rs. 150 and the value of the suit in respect of his share is Rs. 1,250. In these circumstances we do not think that we should order a refund of the purchase-money.

The result is that this appeal is dismissed with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 92 OF 1914.

November 2, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

K. SESHAGIRI RAO AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

TANGATURI JAGANNADHAM *alias* HANUMANTHA ROW—PLAINTIFF—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *O. XXXII, rr.* 12, 13—*Decree against minor—Judgment-debtor attaining majority before execution—Proceedings in execution against guardian* ad litem, *validity of—Suit to set aside sale—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 12.

Where a Court takes proceedings wholly without jurisdiction a defendant, who is not before the Court, can treat them as a nullity and remain unaffected by them. [p. 392, col 1.]

*Malkarjun* v. *Narhari*, 25 B. 337 (P. C.); 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368, referred to.

In a suit to set aside a sale in execution of a decree brought after one year from the date of sale it appeared that the defendant was a minor at the date of the passing of the decree but had attained majority when proceedings in execution were taken and notice of such proceedings was served not on him, but on the guardian *ad litem*:

*Held*, (1) that the decree could not be treated as passed without jurisdiction and that the execution proceedings were not void but merely irregular; [p. 393, col. 1.]

(2) that the suit to set aside the sale in execution not having been brought within one year from the date of the sale was barred by Article 12 of the first Schedule of the Limitation Act. [p. 393, col. 1.]

*Ramachari* v. *Duraisami Pillai*, 21 M. 167, *Powys* v. *Mansfield*, 6 Sim. 637; 58 E. R. 732; *Snow* v. *Hole*, 15 Sim. 161; 10 Jur. 347; 60 E. R. 578; *Davis* v. *Dowding*, (1838) 2 Keen 245; 7 L. J. Ch. (N. S.) 169; 48 E. R. 622, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 400 of 1911, preferred against that of the District Munsif of Ongole, in Original Suit No. 464 of 1908 (pauper).

Messrs. *A. Krishnaswami Aiyar* and *K. Krishnaswamy Aiyangar*, for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.

NAPIER, J.—This is an appeal by the defendant against the decree of the lower Appellate Court, holding that the sale of item 13 in the suit is not binding on the plaintiff on the ground that he was a major when the execution proceedings were taken against him. The *first* point taken is that a purchaser is entitled to assume that when an interest is sold everything has been done to make it available, and reliance is placed on the well-established doctrine that a *bona fide* purchaser at a sale under a Court decree which is subsequently reversed is not affected by the reversal [*Vide* the case quoted in *Krishna Chandra Mandal* v. *Jogendra Narain Roy* (1)] and also on the principle that where an estate has been represented by a person *bona fide* believed to be the true representative, the decision will (in some circumstances) bind the true representative [*Vide General Manager of the Raj Durbhunga* v. *Maharajah Coomar Ramaput Singh* (2)]. The latter principle has, in my opinion, no analogy for there is no question of legal representatives here. While the former doctrine is founded not on any question of parties but on the right of a stranger to assume that a decree given between parties is conclusive of their rights, it cannot be extended to cases where the proper parties have not been before the Court. The real question is—was the plaintiff a party to the suit at the time that the decree was given and if not, was it the fault of the decree-holder that he was not? I lay stress on the position "at the time of the decree", because I am satisfied that if the majority of the plaintiff had occurred after the decree we could have treated the notice of the execution proceedings to the guardian, instead of to the plaintiff, as a mere irregularity on the authority of the Privy Council in *Malkarjun* v. *Narhari* (3) and the suit would have to be dismissed under Article 12 of the Limitation

(1) 27 Ind. Cas. 139; 20 C. L. J. 469; 19 C. W. N. 537.

(2) 14 M. I. A. 605; 17 W. R. 459; 10 B. L. R. 294 (P. C.); 2 Suth. P. C. J. 575; 3 Sar. P. C. J. 117; 20 E. R. 912.

(3) 25 B. 337; 27 I. A. 216 (P. C.); 2 Bom L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368.

Act. But the same case is authority for the proposition that where a Court took proceedings wholly without jurisdiction a defendant, who was not before the Court, could treat them as a nullity and remain unaffected by them. He would, therefore, not have to set aside the sale and so Article 12 would not operate in limitation. We are asked by Mr. Prakasam to apply the analogy of a minor being sued as a major or of a minor being represented by a person not competent to act as a guardian *ad litem* [as to the latter *Vide Sham Lal* v. *Ghasita* (4) and *Ganesha Row* v. *Tulja Ram Row* (5), a decision of the Privy Council]. In my opinion we should not do so. Courts are always jealous of the rights of minors and insist on the most scrupulous care being taken to see that they are properly represented. (Compare the English practice of giving a minor an opportunity of attacking a judgment of foreclosure or on a Will obtained against him on attaining majority). The question in this case must be decided on other considerations. Now it is noticeable that Order XXXII, which deals with suits by or against minors, is silent on this point. Rules 12, 13, 14 provide the course to be followed by a minor plaintiff on attaining majority but nothing is said about a minor defendant in the same position. Rule 12 provides that the minor plaintiff *shall* on attaining majority elect. The only assistance to be gained from this rule is that it suggests that the suit cannot proceed in the name of a next friend after the minor has attained majority. I do not think, however, that this rule is based on a law of procedure as to parties. In my view, it arises out of the right of a major to exercise his own discretion as to whether he will continue the suit. Turning to the English practice we find that Order XVI, part III, which deals with persons under disability is also silent on this point: and I cannot find in any book on practice any reference to procedure by way of alteration of the record where a minor defendant attains majority or a lunatic becomes sane pending the disposal of the suit, though the practice permits a minor defendant on coming of age to apply to amend his defence (*Vide* Daniel's Chancery Practice, page 114).

Turning to the English cases, the earliest bearing directly on the point is *Powys* v. *Mansfield* (6). There the minor came of age on February 8th. Judgment was given against him on February 23rd and a decree was drawn upon April 27th treating him as an infant and giving a day after majority to show cause. The fact of his majority was not disclosed, till he made a motion in accordance with the permission. The Vice-Chancellor after reserving the point held that the decree having been passed when he was a major, he had no right to show cause. It was never even suggested in argument that the decree was without jurisdiction. The next case is *Davis* v. *Dowding* (7), where a decree was given in a mortgage suit in which an infant was a defendant but with a direction for an enquiry whether it would be for the benefit of the infant that the property should be sold. It was subsequently ascertained that the infant had attained majority sometime previous to the date of the decree. The mortgagee then asked for a sale without an enquiry. The Master of the Rolls held that it was the defendant's own default that he did not on attaining age make a new defence or apply for leave to redeem: he, therefore, ordered a sale as prayed. Here again it was never argued that the decree was a nullity. The case of *Snow* v. *Hole* (8) does support the respondent's contention for there, where judgment was given in terms against a minor whereas in fact she had attained majority, the Vice-Chancellor uses the phrase "I must consider there was no decree against her", but in that case notice had been served on the Solicitor for the minor to hear judgment: he had returned it to the plaintiff's Solicitor stating that his client had attained majority and that he had no instructions, so the notice was bad. In spite of that, the decree was drawn up as if she had been properly served. The Vice-Chancellor gave

(4) 23 A. 459; A. W. N. (1901) 147.

(5) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150 (P. C.); 40 I. A. 132.

(6) 6 Sim. 637; 58 E. R. 732.

(7) (1838) 2 Keen 245; 7 L. J. Ch. (N. S.) 169; 48 E. R. 622.

(8) 15 Sim. 161; 10 Jur. 347; 60 E. R. 578.

her leave to make a new defence but on paying costs "as it was in the nature of an indulgence." I cannot but regard his order as inconsistent with the view that there was no decree against her, and it is further to be noted that he did not refer to his decision in *Powys* v. *Mansfield* (6) clearly taking the other view—the report also may be inaccurate. There is, therefore, ample authority in England for holding that the decree is not without jurisdiction.

The only Indian case is *Ramachari* v. *Duraisami Pillai* (9). There one of the defendants was treated as a minor in the mortgage suit though he was a major at his institution. The lower Court having returned a finding that he was aware of the suit from its beginning and allowed it to proceed against him, he was bound by the decree and could not impeach the sale on the decree. That is strong authority against the theory of nullity.

In the light of the above decisions I am satisfied that whatever rights the respondent had to apply to set aside the decree, he cannot treat it as made without jurisdiction and in consequence his suit is barred by Article 12. This appeal will, therefore, be allowed with costs.

SADASIVA AIYAR, J.—I am also of opinion that the decree in Original Suit No. 145 of 1904 and the execution sale held therein were not passed and held without jurisdiction so far as the plaintiff's interests were concerned. I further agree that the present suit to set aside the sale is barred by limitation and I concur in the order proposed by my learned brother.

*Appeal allowed.*

(9) 21 M. 167.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 879 OF 1914.

December 21, 1915.

*Present*:—Mr. Justice Holmwood and Mr. Justice Mullick.

MOHABARSHA BANKAPUR - PLAINTIFF —APPELLANT

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Railways Act (IX of 1890), s. 72, cl. (2)—Risk note in Form Y, signing of, proper way of—Risk Note not properly signed, effect of—Railway Company, liability of—"Signed," meaning of—Bailment, law of, derogation from, effect of.*

The signing of the name of a principal by his agent, who consigned the goods to a Railway without signing his own name as agent in a risk note in Form Y, is not a sufficient compliance with the provisions of section 72, clause (2), of the Indian Railways Act (IX of 1890). [p. 394, col. 1.]

The word "signed" in law means the writing of the name of the person who signs it either by his own hand or by the hand of an agent, who must be disclosed and have authority. [p. 394, col 2.]

The liability of a Railway Company cannot be escaped by reason of a risk note in Form Y signed not in accordance with the provisions of the law. [p. 394, col. 2.]

*Semble*:—In contracts (such as risk notes) which derogate from the ordinary law of bailment, parties cannot be too careful to carry out the exact provisions of law. [p. 394, col. 2.]

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 15th December 1913, confirming that of the Munsif, first Court, Berhampur, dated the 31st May 1910.

Babus *Dwarka Nath Chakerbutty* and *Hemendra Nath Sen*, for the Appellant.

Babu *Ram Chandra Mitra*, for the Respondent.

JUDGMENT.

HOLMWOOD, J.—This second appeal arises out of a suit brought by a *mohajan* of the Bombay Presidency against the Secretary of State for India in Council in respect of certain goods which were lost in transit on one of the connected Railways, which carried the goods from Beldanga to Benares. The goods were silk goods of the value of Rs. 500 and the principal defence of the Railway Company was that they came under section 75 of the Railways Act, IX of 1890, and as they were not insured, the Railway was free from all liability under the said section. There was a further defence that the sender of the consignment executed a risk note in Form Y speci-

ally absolving the Railway Company from all liability and the package was, therefore, booked and carried at owner's risk.

The Court of first instance found as a fact on the first point that the value of the contents of the parcel was declared at the time of booking as required by section 75 and that no insurance charge was demanded on behalf of the Railway. On these findings of fact no appeal was made as regards section 75, but an appeal was preferred as regards the execution of this risk note Y under section 72 of the Act. The Subordinate Judge, who first heard the appeal, held that the Railway Company could not succeed and he gave the plaintiff Rs. 500 compensation. His decision was apparently based on the contention that the Railway Administration must show that notwithstanding its proper care the goods were *bona fide* lost or destroyed by causes over which they had no control. That is to say, without any reference to the risk note Y he appears to have been prepared to treat the Railway Company under the ordinary law of bailment without any exception even by contract. But the matter coming before this Court in second appeal Mr. Justice Chapman remanded the case, holding that the Subordinate Judge ought to have come to a definite finding whether the risk note was genuine or not. He does not appear to have noticed that the risk note was not signed by anybody and he appears to have thought that the name of the Marwari, the principal, who was all the time in Bombay is the signature required by the law.

It was argued before the Subordinate Judge on remand and has been also argued before us, and we think rightly argued, that in the present case the agent Kundan Mal who consigned the goods to the Railway did not sign his own name on the risk note, Exhibit C, but the plaintiff's name, hence there was not sufficient compliance with the provisions of section 72, clause (2). We think that this must prevail on the wording of the section, "An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it is in writing signed by or on behalf of the person sending or delivering to the Railway Administration the goods". The form which has been approved by the Governor-General in Council is a printed form and, therefore, there is no binding act of the person sending the goods or his agent except the signature, and when there is no signature it cannot be said that there is a binding agreement to limit the responsibility. In this case it is obvious that there is no signature. The agent Kundal Mal, instead of signing his own name and stating that he signed on behalf of Mohabarsha Bankapur, his principal, simply wrote Maharana Sha. It is not even the correct name of his principal. Supposing agency had in the meantime determined, it would have been impossible for the principal to prove that the agency had ceased inasmuch as the agent's name does not appear and he could only have been held liable because his own name appeared. He could have at once rid himself of the liability by showing that he did not sign the document. In contracts of this nature which derogate from the ordinary law of bailment, the parties cannot be too careful to carry out the exact provisions of the law. When the law says "signed", it means the writing of the name of the person who signs it either by his own hand or by the hand of an agent, who must be disclosed and have authority. In this case the writing was not executed at all in our opinion, and the result is that the Railway Company's liability cannot be escaped by reason of this alleged risk note in Form Y.

The decree of the Subordinate Judge must be set aside and the plaintiff's suit must be decreed for the amount allowed by the first Subordinate Judge, namely five hundred rupees, with costs in all Courts.

MULLICK, J.—I agree that in the circumstances of this case there was not a sufficient and proper signing of the risk note.

*Appeal allowed.*

IBAD-UN-NISSA BIBI *v.* DALGANJAN SINGH.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 18 OF 1912-13 OF ALLAHABAD DISTRICT.

July 24, 1913.

*Present*:—Mr. Baillie, S. M.

*Musammat* IBAD-UN-NISSA BIBI—PLAINTIFF—APPELLANT

*versus*

DALGANJAN SINGH—DEFENDANT—RESPONDENT.

*Agra Tenancy Act* (*II of* 1901), *ss.* 58, 34—*Ejectment, suit for—Grove—Land.*

A suit for ejectment under section 58 of the Tenancy Act does not lie against a grove-holder who pays no rent for the grove nor does section 34 apply to such a suit, as it applies only to *land* and a grove is not *land* within the meaning of the Act.

Second appeal from the order of the Commissioner of the Allahabad Division, dated the 30th October 1912, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

JUDGMENT.—The land in question has been found to be grove and to have been held without payment of rent. These findings of fact are not now open to dispute. In these circumstances I do not consider that the suit for ejectment under section 58 can lie. Such a suit lies against a tenant and a person may be a tenant either by holding under a contract to pay a rent or by being liable for rent under section 34. Section 34 does not apply to the area in question, as it is grove and not "land" within the definition of the Act and there is no contract in regard to rent. The Commissioner's decision is correct.

The appeal is dismissed with costs on appellant.

*Appeal dismissed.*

MOHESH CHANDRA ADDY *v.* PANCHU MUDALI.

## CALCUTTA HIGH COURT.

RULE *Nisi* No. 662 OF 1915.

December 22, 1915.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

MOHESH CHANDRA ADDY—PLAINTIFF—PETITIONER

*versus*

PANCHU MUDALI—DEFENDANT—OPPOSITE PARTY.

Vakalatnama, *acceptance of, if endorsement necessary—Civil Procedure Code* (*Act V of* 1908), *O. III, r.* 4—*Calcutta High Court Rules and Circulars of* 1910, *r.* 45 (*e*)—*Pleader, appearance by, without endorsing acceptance on* vakalatnama *effect of—Affidavit in qualified form, value of—Special power-of-attorney, presumption of genuineness of—Evidence Act* (*I of* 1872), *s.* 85—*Registration of special power-of-attorney, if necessary.*

Per *D. Chatterjee, J.*—Though there is no provision in the Registration Act which makes registration of a special power-of-attorney compulsory, a Court is not bound to presume its genuineness unless it is registered. [p. 396, col. 1.]

Order III, rule 4, of the Civil Procedure Code, 1908, does not require that the acceptance of a *vakalatnama* should be in writing. [p. 397, col. 1.]

*Shama Prosad Ghose* v. *Taki Mallik*, 5 C. W. N. 816, followed.

Therefore, an appearance or act by a Pleader named in the *vakalatnama*, if allowed by the Court expressly or by implication, is valid and operative. [p. 397, col. 1.]

Rule 45 (*e*) of the Calcutta High Court Rules and Circulars published in 1910 should be fully complied with by a Pleader in the Mofussil who first accepts a *vakalatnama*, and all subsequent acceptances must be made by endorsements made in the presence of the Court or the *sheristadar* or the Bench Officer and dated, provided, all the Pleaders so accepting a *vakalatnama* are named in it. [p. 397, col. 1.]

Per *Beachcroft, J.*—Rule 45 (*e*) of the High Court Rules and Circulars published in 1910 has not the effect of making acceptance in writing obligatory by a Pleader accepting a *vakalatnama*. [p. 398, col. 1.]

There may be an acceptance, as between party and Pleader, other than in writing, but the Court before which the Pleader practises ought to insist on the rule 45 (*e*) being observed, before it allows him to plead. [p. 398, col. 1.]

An affidavit in the qualified form "the facts stated are true to the best of my knowledge" without any information as to the source of the knowledge, is useless as evidence of any particular fact stated. [p. 398, col. 2.]

Rule against the order of the Court of the Munsif, second Court, Puri, exercising the powers of a Court of Small Causes.

Babu *Satya Charan Sinha*, for the Petitioner.

MOHESH CHANDRA ADDY *v.* PANCHU MUDALI.

JUDGMENT.

D. CHATTERJEE, J.—The whole trouble in this case is due to a misunderstanding and some uncertainty of practice in the acceptance of *vakalatnama* in the *moffusil*.

The facts are that the petitioner filed a suit in the Small Cause Court at Puri in charge of the Second Munsif and engaged three Pleaders, Babus Purna Chandra Addy, Raj Kishor Das and Jogendra Chandra Mitra. Babu Purna Chandra accepted the *vakalatnama* by endorsing his name on its back as usual. The two other Pleaders did not sign the *vakalatnama*. On the date of hearing Babu Jogendra Chandra signed the *hajira* of witnesses and Babu Raj Kishor attempted to conduct the case by offering to examine the witnesses. There is some difference between the petitioner and the learned Munsif as to what then took place. The learned Munsif says he asked Raj Kishor Babu to accept the *vakalatnama* on the record, the petitioner says Raj Kishore was asked to file a fresh *vakalatnama*. I take the facts as stated by the learned Munsif to be correct, especially as there is no affidavit by the Pleader and the *karpardaz*, who swears the affidavit, does not know English and could not have understood what was said. But I cannot conceive why Raj Kishor Babu should have allowed the case to be dismissed for default, unless he misunderstood the order of the Court and thought that he was required to file a fresh *vakalatnama* which he could not do as his client was absent. As it is, I think there was some such mistake and the case was dismissed for default and Babu Jogendra Nath who had filed the *hajira* without signing the *vakalatnama* was given a notice to show cause why he should not be proceeded against under the Legal Practitioners Act. There was then an application for re-hearing, but that also ultimately failed as on the date of hearing an application for postponement was made by the agent of the client acting under a special power-of-attorney which was not registered. There is no provision in the Registration Act which makes the registration of a special power-of-attorney compulsory, but the Court is not bound to presume its genuineness unless it is registered; see section 85 of the Evidence Act, and the learned Munsif was within his rights in refusing to act upon the application of the agent. As regards the acceptance of *vakalatnamas* the practice in the High Court is that one or more Vakils endorse their acceptance on the *vakalatnama* before it is filed, and if any other Vakil named in the *vakalatnama* wants to accept it later, he makes his endorsement before the Deputy Registrar or his assistant and the endorsement is initialled by the said officers and dated. Vakils who are engaged later generally endorse their acceptance when the record is in the Bench, but many Vakils work without endorsing their acceptance unless the omission is brought to their notice.

Order III, rule 4, of the Civil Procedure Code, does not expressly say that the acceptance of the *vakalatnama* should be in writing and it was held by Banerjee, J., in 1911 in the case of *Shama Prosad Ghose* v. *Taki Mallik* (1), that under similar provisions of section 39 of the old Code, no writing was necessary for the acceptance of a *vakalatnama* and it was sufficient if the Vakil acting was named as one of those authorised in the body of the *vakalatnama*. This matter came before the English Committee of this Court in April 1910 upon a reference from the District Judge of Khulna and the learned Judges (Sir Lawrence Jenkins, C. J., Harington, J., Brett, J., Mookerjee, J., and Carnduff, J.,) directed the Registrar to say that Order III, rule 4, does not require the acceptance of a *vakalatnama* to be in writing. The matter came up again in 1914 upon a reference from the District Judge of Tipperah and the same answer was given. The letter of the Registrar in that case is printed in 19 C. W. N. xxvi. The file shows that Rule 45 (*e*) of the High Court Rules and Circulars published in 1910 was referred to by the District Judge. It appears, however, from enquiries made from the Registrar of the Appellate Side that the answer was given in accordance with the precedent in the Khulna case, without placing the matter before the English Committee again. The next reference was

(1) 5 C. W. N. 816.

by the District Judge of Cuttack in 1915, made in consequence of a representation from the Puri Bar Association objecting to an order of the 2nd Munsif of Puri directing that every acceptance of *vakalatnama* must be in compliance with rule 45 (*e*), Chapter XI, page 301, Volume 1, General Rules and Circular Orders (Edition 1910), whether it is before or after the *vakalatnama* is filed, and the same answer was given directing that in case of a subsequent acceptance by a new Pleader of a *vakalatnama* previously filed by another Pleader, the date of the acceptance should be added. This answer was also given by the Registrar on the authority of the Khulna case without any fresh consideration by the English Committee. All these references, however, deal with the case of several acceptances of the same *vakalatnama* by several Pleaders at different times, and none of them deals with the case of a Pleader acting without accepting the *vakalatnama* in writing. I think that Order III, rule 4, Civil Procedure Code, does not require that the acceptance of a *vakalatnama* should be in writing.

An appearance or act, therefore, by a Pleader named in the *vakalatnama* would, if allowed by the Court expressly or by implication, be valid and operative. The High Court Rule, however, was made to be followed and is a salutary rule prescribed for safeguarding the interests of litigants and should certainly be followed in the *moffusil* in the manner indicated by the construction placed on the same in the answers to the several references. It must be fully complied with by the Pleader who first accepts the *vakalatnama* and all subsequent acceptances must be made by endorsements made in the presence of the Court or the *sheristadar* or the Bench Officer and dated, provided, of course, all the Pleaders so accepting a *vakalatnama* are named in it. Courts in the *moffusil* must be specially careful in enforcing this rule in cases of compromise and withdrawal of cases and withdrawal of money and documents.

There was evidently a misconception in this case. Raj Kishor Babu retired as he probably thought he was required to file a fresh *vakalatnama* which he was not in a position to do and the learned Munsif held that "Babu Jogendra Nath who had filed the *hajira* had no authority from the plaintiff to file the same." As I have shown above Babu Jogendra Nath had been duly authorised by the *vakalatnama* to represent the plaintiff and had signified his acceptance of the same by acting as aforesaid and would presumably have put down his signature on the *vakalatnama* if the omission had been brought to his notice. I, therefore, make the Rule absolute and direct that the case be restored to the file and tried in due course of law.

BEACHCROFT, J.—The petitioner obtained this Rule mainly on the strength of allegations in the affidavit to the effect that the learned Munsif sitting as Judge of the Small Cause Court would not allow his Pleader Babu Raj Kishor Das to examine his witnesses, as the Pleader had not accepted the *vakalatnama* already filed, and directed the Pleader to file a fresh *vakalatnama*, which the Pleader was unable to do in the absence of the petitioner, in consequence of which the suit was dismissed for default. In support of the Rule it has been argued that Order III, rule 4, of the Civil Procedure Code does not require the acceptance of the Pleader to be in writing. In addition to the opinion expressed by Banerjee, J., in *Shama Prosad Ghose* v. *Taki Mallik* (1), to the effect that acceptance need not be in writing reliance was placed on an article in volume XIX of the Calcutta Weekly Notes, page xxvi, in which it was alleged, quoting the letter of the Registrar of the Appellate Side of this Court, that the High Court refused to accept a recommendation of the District Judge of Tipperah that all the Pleaders who wished to appear in a case must sign the *vakalatnama* before it is filed in Court. In fact it appears that the recommendation of the District Judge of Tipperah was not brought to the notice of the Judges, but was dealt with by the Registrar on the precedent of an answer given to the District Judge of Khulna in 1910. On that occasion an enquiry by the District Judge was considered by the English Committee and an answer was sent based on the opinion expressed by Banerjee, J. It does not appear, however, that any reference was made to rule 45 (*e*) in Chapter XI of the Court's General Rules and Circular Orders, a rule which had been made subsequently to the decision of *Shama Prosad Ghose* v. *Taki Mallik* (1).

That rule requires that a Pleader accept-

ing a *vakalatnama* shall note on it the name of the person from whom it has been received, with an endorsement to the effect that he is satisfied that the person from whom he received it is either the party himself or a certificated *mukhtar* or one who has been authorised by the party to deliver it to him, as the case may be. The learned Munsif appears to be of opinion that the introduction of this rule has had the effect of making acceptance in writing obligatory by a Pleader accepting a *vakalatnama*. I do not think that that is the effect of the rule. I am of opinion that there can still be an acceptance by the Pleader other than in writing. But if the Court has, in the exercise of its powers, framed certain rules which must be observed by Pleaders, a Pleader who does not conform to those rules ought not to be heard. Although there may be an acceptance, as between party and Pleader, other than in writing, if the rules require that a Pleader is to sign the *vakalatnama* or make any particular endorsement on it, the Court before which the Pleader practises ought to insist on the rule being observed, before it allows him to plead.

Coming to the facts of this particular case I am certainly not prepared to accept the allegation that the Munsif asked the Pleader to file a fresh *vakalatnama*. The learned Munsif has sent an account of what happened, *viz.*, that he asked the Pleader if he had accepted the *vakalatnama* already filed, the Pleader replied that he had not, the Munsif then told the Pleader that if he accepted it he might appear, otherwise not, and the Pleader did not accept the *vakalatnama*. I will assume in favour of the petitioner that when the Munsif speaks of acceptance he refers to the making of such endorsements as are required by rule 45 (*e*) already referred to.

The Munsif's account of what happened concludes the matter. But in any case even if the Munsif had not denied the allegation in the affidavit, there would be nothing before us to justify the view that the Munsif had asked for a fresh *vakalatnama*. The affidavit is sworn by a person who does not know English, while the conversation in Court took place in English, and the affidavit is in the qualified form "the facts stated are true to the best of my knowledge," without any information as to the source of the knowledge. Affidavits thus qualified are constantly being made and it is as constantly pointed out that the qualification renders the affidavit useless as evidence of any particular fact.

Nor am I prepared to take the view that the Pleader misunderstood what the learned Munsif said. The Pleader himself does not say so. I know that there is a general objection among the members of the profession to swearing affidavits, an objection for which in many cases there is no justification. I can well understand a Pleader objecting to swear an affidavit if that involves his alleging facts which throw discredit on the conduct or work of a judicial officer in whose Court he has to practise, but I do not see what considerations can stand in the way of his saying, if true, that he was mistaken in what the judicial officer said. Now far from there being any misunderstanding in this case, there is every reason for thinking that the Munsif wanted the Pleader to make the endorsement required by rule 45 (*e*) and that the Pleader deliberately refused to make it.

It is clear from the papers before us that the Munsif has been trying to enforce the complete observance of the rule not only by the first Pleader accepting a *vakalatnama*, but by those appearing on the strength of the original *vakalatnama* at subsequent stages of the case, while the members of the Bar have maintained the position that after the first endorsement, a mere endorsement of acceptance is sufficient in the case of Pleaders subsequently appearing and there is no doubt that there was, for I understand that the learned Munsif has been transferred, considerable friction between him and the members of the Bar. It is not necessary, nor have we the materials, to attempt to apportion the blame for this state of affairs, but apparently both sides held their ground, and I believe the present incident was merely an outcome of this difference of opinion. Incidentally I may observe that this state of things led to a reference by the District Judge to this Court, which was

unfortunately disposed of by the Registrar on the authority of the reply given to the District Judge of Khulna, though the point referred was an entirely new one.

It is not necessary in the present case to decide which of the two views of rule 45 (*e*) advanced is the correct one, though there is something to be said in favour of both.

What does concern us in the present case is whether we ought to interfere with the order dismissing the suit. It is true, no doubt, that we have on the one hand an affidavit giving a garbled account by a person who was not in a position to understand what actually took place-perhaps he was misled. On the other hand it is hardly fair to make the litigant suffer for a difference of opinion between the Court and the Pleader as to the latter's duties.

I, therefore, agree to the order proposed by my learned brother.

*Rule made absolute.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 40 OF 1914-15 OF ETAWAH DISTRICT.

August 23, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J M.

HARGOBIND AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

TULSI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Ayra Tenancy Act (II of 1901), s. 11—Sub-lease continued for two years—Occupancy rights, acquisition of—Period, if included.*

A sub-lease was originally given for one year and then continued for another year:

*Held*, that the whole period should be considered to be the time for which the land was sub-let in contravention of the provisions of the Tenancy Act and, therefore, should be excluded from the period of twelve years necessary for rights of occupancy.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 4th February 1915, reversing that of the Assistant Collector, Etawah District, in a case of ejectment.



JUDGMENT.

HOLMS, S. M.—(*August 22nd*, 1915.)—The Additional Commissioner has not referred to *Musammat Kishan Devi* v. *Ram Kishan* (1), which probably had not been published when he wrote his judgment.

In the present case both sides admit that the only evidence is the *patwari's* statement, who says that Dinanath was sub-tenant in 1320 *Fasli* for two years. A sub-tenant is ordinarily a tenant from year to year, and on the *patwari's* statement alone I am not prepared to hold that Dinanath was given the sub-tenancy from the beginning of 1319 originally for two years. The Additional Commissioner makes a distinction between a case in which a definite sub-lease for two years was given originally and a case like the present in which a sub-lease for one year was given originally and then continued for another year. It seems to me that in the latter case also the whole two years during which the land was sub-let should be considered to be the time for which the land was sub let in contravention of the provisions of the Act, and should accordingly be excluded under the second proviso to section 11 from the period of twelve years necessary for rights of occupancy.

I would set aside the order of the Additional Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

*Appeal allowed.*

(1) Selected Decision No. 15 of 1914.

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 199 OF 1914.

December 15, 1915.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

JASPAT RAI AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

DEVI DAYAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Evidence Act (I of 1872), s. 65 (c)—Secondary evidence—Loss of document—Duty of Court in admitting secondary evidence.*

JASPAT RAI *v.* DEVI DAYAL.

A Court should be very strict, before admitting secondary evidence, in insisting on strict proof of the loss of a document like a mortgage-deed or a special power-of-attorney authorising the creation of a mortgage. [p. 400, col. 1.]

First appeal from the decision of the Additional Subordinate Judge of Benares, dated the 28th February 1914.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage dated the 31st of January 1901. The mortgage is alleged to have been executed by one Jiwan Mal as special attorney of Diwan Duni Chand in favour of Tara Chand. The plaintiffs are the sons of Tara Chand and one Nihal Chand (a cousin), who claims to be interested in the mortgage as having belonged to the same family as Tara Chand. The defendants are the minor sons of Duni Chand. The Court below has granted a decree. The defendants have appealed. Three points have been taken: *first*, that the plaintiffs have failed to prove the loss of the special power-of-attorney in such a way as to justify the Court in receiving secondary evidence; *secondly*, that even if secondary evidence was admissible the evidence produced was insufficient to prove a power in Jiwan Mal of mortgaging property in suit, and *thirdly*, that the property being *waqf* neither Duni Chand nor his attorney Jiwan Mal were entitled to mortgage or charge the property.

Sufficient care is in many cases not taken to produce original documents, and, in our opinion, the Courts should be very strict before admitting secondary evidence in insisting on strict proof of the loss of a document like a mortgage or a special power-of-attorney authorising the creation of a mortgage. The desirability of insisting as far as possible on production of the originals of such documents is obvious. However, after a careful consideration of the evidence we are not prepared to disagree with the Court below in its finding that the original power-of attorney was lost and could not be produced.

Nihal Chand himself purported to give secondary evidence of the contents of the document. He says he was present when it was executed, that it gave power to Jiwan Mal to mortgage the house and shops at Benares to secure the sum of Rs. 7,307. He states that he read and saw the power-of-attorney and knew the conditions laid down in it. Nihal Chand is, no doubt, an interested witness; and if his evidence stood alone we might find some difficulty in acting upon it. The scribe Amir Chand was also produced—he had a register which he keeps under the Rules of the Punjab Chief Court, which shows that a power-of-attorney was executed at the time alleged by Duni Chand in favour of Jiwanmal and that it authorised the attorney to make a mortgage of property in Benares and also power to have the mortgage-deed registered. Muhammad Sharif, who was a clerk of a Pleader in Benares, deposes to having seen the power-of-attorney before the draft of the mortgage in suit was prepared. His master was Pleader for Duni Chand at the time of the mortgage and he is now Pleader for his sons, the defendants. A clerk in the office of Sub-Registrar of Wazirabad in the Punjab was examined on commission and he produced an extract which shows that a special power-of-attorney was presented for authentication on a Tuesday in November in the year 1900. The extract of the nature of the document is as follows· "This special power-of-attorney was executed as special power-of-attorney for the production of a mortgage-deed in respect of a house and shops for registration in the office of the Sub-Registrar of Benares, dated the 27th of November 1900." At first sight this extract seems rather against the plaintiffs than in their favour. A power-of-attorney authorising a donee to register a document is a very different thing from a power-of-attorney authorising the donee to hypothecate property. At first sight also it would seem that this extract is somewhat inconsistent with the oral evidence. Further consideration, however, shows that the evidence is not necessarily inconsistent. The chief object of getting the power-of-attorney authenticated at Wazirabad was that the Sub-Registrar of Benares would act upon it when the mortgage was presented for registration. It must be remembered that in respect of this mortgage and in respect of this power-of-attorney no mortgage of property was intended to be registered in Wazirabad. There are three other documents on the record which we think are strong corroboration of the plaint-

iff's case. For the purposes of consideration of the evidence to which we are about to refer, we may state the issue to be whether or not Jiwan Mal had power to mortgage the property in Benares. It is common case that there was about the date of this mortgage a decree against Duni Chand in the Punjab Court for Rs. 14,232. It is also the common case of both sides that there was about the same time as the alleged mortgage another mortgage of property in the Punjab. On the 25th of November a receipt was filed in the Punjab District Judge's Court in which it is stated that the decree (to which we have just referred) to the extent of Rs. 7,000 had been discharged by the judgment-debtor (*i.e.*, Duni Chand) by making a mortgage of seven houses and six shops. This clearly refers to the mortgage of the Punjab property. On the 26th of February 1901 there is a similar receipt filed in the Punjab District Judge's Court, in which it is stated that the balance of the decree amounting to Rs. 7,232 has been discharged by the judgment debtor mortgaging a house and shops at Benares. It thus appears that Duni Chand's decretal debt was discharged by a mortgage about 26 days after the date of the mortgage now in suit. It is not contended that Duni Chand made any other mortgage. If Duni Chand's debt was discharged by the mortgage that Jiwan Mal purported to make as special attorney, the strong probabilities are that Duni Chand had authorised the making of the mortgage which satisfied his debt. Duni Chand got the benefit of the money advanced. Considering the evidence as a whole and in particular the documents to which we have referred, we think that the secondary evidence of the power-of-attorney is sufficient.

On the last question, namely, the nature of the property and the power of Duni Chand to mortgage it, we agree with the finding of the Court below as well as with his reasons.

The result is that the appeal fails and is dismissed with costs, including in this Court fees on the higher scale. We extend the time to six months from this date.

*Appeal dismissed.*

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 200 OF 1915.

November 12, 1915.

*Present*:—Mr. Justice Srinivasa Aiyangar

GOPALA AIYAR AND ANOTHER—DEFENDANTS—PETITIONERS

*versus*

SANNASI—PLAINTIFF—RESPONDENT.

*Specific performance—Contract to sell lands—Decree fixing time for payment of purchase-money—Confirmation of decree by Appellate Court, effect of—Appellate Court, whether can extend time—Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 33.*

A Court which passes a decree for specific performance of a contract to sell lands has no power to extend the time fixed for payment of the purchase-money nor can an Appellate Court do so either under section 151 or under Order XLI, rule 33, Civil Procedure Code. [p. 401, col. 2; p. 402, col. 1.]

*Ramaswami Kone* v. *Sundara Kone*, 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26; *Moideen Kuppai* v. *Ponnuswamy Pillai*, 26 Ind. Cas 63; 1 L. W. 882; 16 M. L. T. 430, followed.

A confirmation by an Appellate Court of an original decree for specific performance does not extend the time fixed for payment in that decree. [p. 402, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Trichinopoly, in Civil Miscellaneous Petition No. 245 of 1914, in Appeal Suit No. 402 of 1913, preferred against the decree of the Court of the District Munsif of Srirangam, in Original Suit No. 52 of 1912.

Mr. *T. V. Muthukrishna Aiyar*, for the Petitioners.

Mr. *A. Srirangachariar*, for the Respondent.

JUDGMENT.—In this case the Subordinate Judge has extended the time for the payment of the price of certain lands, in respect of which specific performance had been asked for by way of a conveyance from the defendant to the plaintiff. The only two sections to which he refers as giving him the power are sections 151 and Order XLI, rule 33, of the Civil Procedure Code. I do not think that either of the two sections can apply to a case of this sort. In *Ramaswami Kone* v. *Sundara Kone* (1) where the decree was practically in the same terms as

(1) 31 M. 28; 17 M. L. J. 495; 3 M. L. T. 26.

the present one, this Court held that the Court which passed the decree had no power to extend the time, much less any Appellate Court. A similar decision was arrived at in *Moideen Kuppai* v. *Ponnuswamy Pillai* (2). It is contended for the respondent that, because the original decree was confirmed in appeal, the plaintiff had one month's time from the date of the appellate decree. I am unable to agree with this proposition, because the confirmation by the Appellate Court of the original decree is a confirmation of all its terms, and does not mean that the plaintiff has one month from the date of the confirmation of that decree by the Appellate Court. It is also to be noted that the first Court's decree fixed a particular date before which the money is to be paid. In this case, as is further pointed out, the money was not offered till long after one month from the date of the appellate decree. The respondent relies on *Satvaji Balajirao Deshmukh* v. *Sakharlal Atmaram Shet* (3) for the position that the confirmation of the original decree by an Appellate Court, as a matter of course, extends the time which is fixed for payment in that decree. If that is the effect of that decision, I am unable to agree and I prefer to follow the decisions of this Court in *Ramaswami Kone* v. *Sundara Kone* (1) and *Moideen Kuppai* v. *Ponnuswamy Pillai* (2). The order of the lower Court is, therefore, reversed and the application for extension of time must be dismissed. The petitioners are entitled to their costs both here and in the lower Court.

*Petition allowed.*

(2) 26 Ind. Cas. 63; 1 L. W. 882; 16 M. L. T. 430.
(3) 26 Ind. Cas. 754; 16 Bom. L. R. 778; 39 B. 175.

## CALCUTTA HIGH COURT.

RULE *Nisi* No. 902 OF 1914.

January 17, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

UPENDRA CHANDRA DE—DEFENDANT—PETITIONER

*versus*

GIRISH CHANDRA DE—PLAINTIFF—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit, order for—Plaint not defective, effect of.*

Where a lower Appellate Court made an order allowing an appellant to withdraw his suit with liberty to bring a fresh suit on a petition alleging that some persons not named in the petition were necessary parties but had not been made parties, and it could not be shown from the record that the plaint was, in reality, defective:

*Held*, that the order could not be sustained as it was not justified upon the record.

Rule against the order of the Sub-Judge, 2nd Court, Mymensingh, in Appeal No. 911 of 1913.

Babu *Birendra Kumar De*, for the Petitioner.

Babu *Biraj Mohun Mojumdar* (for the Deputy Registrar) and Babu *Jatindra Mohan Chowdhury*, for the Opposite Party.

JUDGMENT.—At the hearing of an appeal in the lower Appellate Court an application was made by the appellant to withdraw from the suit on the allegation that other persons not named in the petition were necessary parties. The respondent was not found upon being called and the learned Judge at once made an order allowing the appellant to withdraw the suit with liberty to bring a fresh suit.

It is contended before us that the order was without jurisdiction as there was no evidence upon which the Court could have acted and the learned Vakil for the opposite party has not been able to show from the record that the plaint was, in reality, defective. We think that the order was not justified upon the record and must be set aside.

The Rule is made absolute and the case is sent back to the lower Appellate Court so that the appeal may be heard in due course of law.

The petitioner is entitled to his costs in this Court. We assess the hearing fee at one gold *mohur*.

*Rule made absolute.*

## PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 26, 1915.

*Persent*:—Viscount Haldane (Lord Chancellor), Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

NAGINDAS BHUGWANDAS—PLAINTIFF —APPELLANT

*versus*

BACHOO HURKISSONDAS—DEFENDANT —RESPONDENT.

*Hindu Law—Adopted son, status of.*

Under the Hindu Law an adopted son occupies the same position in the family of the adopter as a natural-born son, except in matters relating to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. [p. 408, col. 1.]

Authorities on the position of an adopted son according to the Hindu Law reviewed. [p. 407, col. 1.]

*Raghubanund Doss* v. *Sadhu Charan Doss*, 4 C. 425; 3 C. L. R. 534; 2 Shome L. R. 113, dissented from.

*Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia*, 9 W. R. 423; *Dinonath Mukerjee* v. *Gopal Churn Mukerjee*, 8 C. L. R. 57 at p. 62; 9 C. L. R. 379; *Raja* v. *Subbaraya*, 7 M. 253; *Sumboo Chunder Chowdhry* v. *Naraini Debeh*, 3 Knapp 55 at p. 60; 12 E. R. 568; 1 Suth. P. C. J. 25; *Padmakumari Debi* v. *Court of Wards*, I. A. 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148 and *Kali Komul Mozumdar* v. *Uma Shunker Moitra*, 10 I. A. 138; 13 C. L. R. 379; 10 C. 232; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458, reviewed and approved.

Appeal from a judgment and decree of the Bombay High Court, dated February 2, 1914, varying those of the High Court on its original jurisdiction, dated November 13, 1913.

FACTS.—One Nagardas Shobhagdas died in 1893 leaving him surviving two sons, Bhugwandas Nagardas and Hurkissondas Nagardas, who remained joint. Hurkissondas died on September 14, 1900, leaving him surviving only his widow, Gangabai, who was then pregnant. Bhugwandas Nagardas died on December 17, 1900, leaving him surviving one daughter, Navalbai, and his widow, Mankorebai, to whom he gave express authority to adopt. On December 18, 1900, the said Gangabai gave birth to a posthumous son, the respondent, and on February 17, 1901, the said Mankorebai adopted the appellant. The validity of the said adoption was contested on behalf of the respondent, but the appellant's status was finally established upon appeal to the Privy Council [*Bachoo* v. *Hurkisondas Mankore Bai* (1).] A question then arose as to what share the appellant would be entitled to. The High Court original side, where a suit for the determination of the said right was instituted, held that adoption made no difference and that he was entitled to half the estate. On appeal this decision was reversed in part only. It was held that as an adopted son he was entitled to a reduced share of one-fourth. An appeal was preferred to His Majesty in Council in due course.

Sir *Robert Finlay*, *K. C.*, Messrs. *De Gruyther*, *K. C.*, and *Dunne*, for the Appellant.—An adopted son takes the share in ancestral property that his father would have taken. He does not take by descent but by survivorship. It is a condition precedent that one should be without issue at the time of adoption and the adopted son is in the same position as a natural-born son, as he ceases to be a member of his own family.

[LORD PARMOOR: If a grandson is the adopted son of a legitimate son, then the case would be different.]

[LORD HALDANE: He could not take more than the share of his father.]

See Stoke's Hindu Law, page 657, Dattaka Chandrika.

[LORD PARMOOR:—The adopted son of legitimate son will have his share.]

The Dattaka Mimansa lays down the rule that the adopted son takes $\frac{1}{4}$th, but it does not lay down the rule with regard to successive generations. Mitakshara, Chapter 1, paragraphs 2 and 3 (2), deal with the method of effecting partition. If one were to adopt a brother's son, his share would be cut down to 1/5th. If a legitimate son adopts, the adopted grandson takes his father's share. Reference was made to *Raja* v. *Subbaraya* (2); *Raghubanund Doss* v. *Sadhu Churn Doss* (3); *Baramanund Mahanti* v. *Chowdhry Krishna Charan Patnaik* (4); *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (5);

(1) 34 I. A. 107; 11 C. W. N. 769; 9 Bom. L. R. 646; 31 B. 373; 6 C. L. J. 1; 2 M. L. T. 295; 17 M. L. J. 343.
(2) 7 M. 253.
(3) 4 C. 425; 3 C. L. R. 534; 2 Shome L. R. 113.
(4) 12 Ind. Cas. 6; 14 C. L. J. 183 at p. 187.
(5) 9 W. R. 423.

NAGINDAS BHUGWANDAS v. BACHOO HURKISSONDAS.

*Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (6); *Gurulingaswami* v. *Ramalakshmamma* (7); *Bhagwan Singh* v. *Bhagwan Singh* (8); *Puttu Lal* v. *Parbati Kunwar* (9).

Messrs. *J. A. Clyde*, *K. C.*, and *Raikes*, for the Respondent.—The question is a question of construction to be determined by the Mitakshara. A Hindu family is a complex whole. There is *imperium in imperio*. There is no equality among all sons under Mitakshara.

[LORD HALDANE:—Is there any authority to say that a properly adopted son is not of the same class?]

Stoke's Hindu Law, page 440, Chapter II, section 11, paragraphs 21 and 22. Apart from Vasistha's text an adopted son would not come in at all. Mitakshara, Stoke's Hindu Law, page 422.

[SIR JOHN EDGE:- There is no such thing as right to a share, but only to share.]

The question was whether the text of Vasistha was limited to the particular case.

[MR. AMEER ALI referred to *Kaily Churn* v. *Dukhee Bibee* (10) affirmed in *Kali Komul Mozumdar* v. *Uma Shunker Moitra* (11).]

There were cases in which an adopted son was as good as a natural-born son, but in partition it was different. Their rights were established in their own person (1) by birth and (2) by adoption. According to Mitakshara an adopted son was not taken in co-parcenary; he was let in by paragraph 24 and by construction and analogy.

[LORD WRENBURY: A natural son displaces an adopted son; but here the competition is between two *stirpes*.]

In Gujerat Mitakshara and Mayukha were authorities and in case of difference between Chandrika and Mitakshara, the latter prevails. A natural grandson would offer funeral cakes to the grandfather, whereas an adopted grandson to his father only.

[MR. AMEER ALI: What is your authority for it?]

Saravadhikari's book, page 23.

Reference was made to *Raghubanund Doss* v. *Sadhu Charan Doss* (3); Mayne's Hindu Law, paragraph 104; Sarcar's Hindu Law of Adoption (1891), page 399; West and Buhler, pages 10 and 11; Stoke's Hindu Law Books, Mitakshara, page 422; Dattaka Chandrika, sections 29 and 30.

Sir *Robert Finlay*, in reply.—The respondent relied on the text of Vasistha, which Mitakshara showed was restrictive. He was dealing with the case where the adopted son was adopted after the birth of the natural son.

[SIR JOHN EDGE: Mr. Raikes says that if a member of a family has a natural son, no other member has a right to adopt.]

An adopted son acquires the whole right of a natural-born son [*Suraj Bunsi Koer* v. *Sheo Proshad Singh* (12)] and he is in the same position. Section 11 of Mitakshara has been referred to; but both the Dattakas lay down that only natural-born and adopted sons existed; other sons did not exist since 200 B. C. In Mitakshara, sections 30 and 31, the question was decisive that the adopted son took as one of the birth.

[SIR JOHN EDGE: Before Manu who existed before the Kali age.]

All these rules applied to sons who took *per capita*. *Sumboo Chunder Chowdhry* v. *Naraini Debeh* (13), *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee* (14).

[SIR JOHN EDGE: That has been constantly followed since 1833.]

By *Padmakumari Debi* v. *Court of Wards* (15) an adopted son succeeds collaterally as well as lineally; he succeeds in preference to great nephew [*Uma Sunker Moitro* v. *Kali Komul Mozumdar* (16)]; he inherits in the same way as a natural son [*Kali Komul Mozumdar* v. *Uma Shunker Moitra* (11)].

[LORD HALDANE: If you take the text quoted in the case, then it is different; but we cannot take a text quoted in the case which is ambiguous.]

[LORD PARMOOR: It means "adopted son of an adopted son."]

*Dattaka putra* means adopted son of an adopted son. It is consistent with my view. The

(6) 8 C. L. R. 57 at p. 62; 9 C. L. R. 379.
(7) 26 I. A. 113; 22 M. 398; 21 A. 460; 3 C. W. N. 427; 9 M. L. J. 67.
(8) 26 I. A. 153; 3 C. W. N. 454; 1 Bom. L. R. 211.
(9) 29 Ind. Cas. 617; 42 I. A. 155; 19 C. W. N. 841; 13 A. L. J. 721; 17 Bom. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 62; 22 C. L. J. 190; 37 A. 359; 2 L. W. 881.
(10) 5 C. 692; 5 C. L. R. 505; 3 Shome L. R. 81.
(11) 10 I. A. 128; 13 C. L. R. 379; 10 C. 232; 7 Ind. Jur. 553; 4 Sar. P. C. J. 458.
(12) 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242.
(13) 3 Knapp 55 at p. 60; 12 E. R. 568; 1 Suth. P. C. J. 25.
(14) 5 C. 615 at pp. 625, 626; 2 Shome L. R. 229.
(15) 8 I. A. 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148.
(16) 6 C. 256; 7 C. L. R. 145.

Hindu Law enjoins that one should adopt a brother's son by preference; but according to my friend's argument he would take less.

JUDGMENT.

SIR JOHN EDGE.—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerati Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child, was born on the 18th December 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the defendant relied upon paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (3).

This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural-born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

On appeal Sir Basil Scott, C. J., and Batchelor, J., holding, as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of section 5 of the Dattaka Chandrika as these paragraphs were construed by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (3), adopted the construction of Markby and Prinsep, JJ., of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod, J., in this suit had before them Sutherland's translation of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (3) and a translation made by Sir Ramkrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep, JJ., in *Raghubanand Doss* v. *Sadhu Churn Doss* (3), and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his Hindu Law and Usage, is as follows:—

Paragraph 24.—"Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsman, the adopted son of the same description obtains his due share. And in the event of the ancestor having other sons, a grandson by adoption whose father is dead obtains the share of an adopted son. Where such son may not exist, the adopted son takes the whole estate even."

Paragraph 25.—"Since it is a restrictive rule that a grandson succeeds to the appropriate share of his own father, the son given, where his adopter is the real legitimate son of the paternal grandfather, is entitled to an equal share even with a paternal uncle, who is also such description of son: therefore, a grandson who is an adopted son may (in all cases) inherit an equal share even with an uncle. This must not be alleged (as a general rule). For there would be this dis-

crepancy where the father of the grandson were an adopted son, he would receive a fourth share, but the grandson; if he were such son (of him) would receive an equal share (with an uncle in the heritage of the grandfather) and accordingly, whatever share may be established by law for a father of the same description as himself, to such appropriate share of his father does the individual in question (*viz.*, the adopted son of one adopted) succeed. Thus, what had been advanced only is correct. The same rule is to be applied by inference to the great-grandson also."

The translation which was made by Sir Ramkrishna Bhandarkar is as follows:

"It should be understood by this that an adopted son acquires the ownership wherever possible of his proper share by a relation similar to the relation, brotherhood, etc., by which a natural-born son acquires a right to the property of his brothers, etc. Similarly, an adoptive grandson whose adopting father is dead acquires the ownership of the share proper for an adopted son when the owner of the property has got another son or other sons and of the whole when he has got no son or sons. It should not be argued that because a grandson is necessarily the owner of the share proper for his father, the taker (in adoption) of theadoptive son being a natural-born son of the grandfather and entitled to a share equal to that of the uncle similarly born, the adoptive grandson should take a share equal to that of the uncle; for it involves impropriety, inasmuch as the adopted son gets one-fourth and the adoptive grandson an equal share. Therefore that share is proper for a son's father which he would get by law if he were of the same description (adopted or natural-born) as the son. This way should be followed in the case of great grandsons also."

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the Dattaka Chandrika other than that at which their Lordships have arrived.

The author of the Dattaka Chandrika was, in paragraphs 24 and 25 of section 5 of his Commentary, relying upon the text of Vasistha according to which "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part." That text of Vasistha is quoted by Nanda Pandita in paragraph 1 of section 10 of the Dattaka Mimansa, who added, "on the death of him (the naturally born son) he (the adopted son) is entitled to the whole." It is obvious that Vasistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally born son of a brother or a nephew of the adoptive father.

The author of the Dattaka Chandrika expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of section 5 of his Commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his Commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son shares a fourth part," and in paragraphs 24 and 25 of section 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally born son of his adoptive father, subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the Dattaka Chandrika, applying the well-established rule of Hindu Law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive

father's adoptive father, in other words his uncle through the adoption of his adoptive father. In the first case, as the author of the Dattaka Chandrika pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally born member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of section 5 of the Dattaka Chandrika, those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1 of section 10 of the Dattaka Mimansa. To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (3) would bring them into conflict with what are now well-established principles of Hindu Law. The attention of Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* (3) which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (5) which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ., held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (5) the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grandfathers were the first cousins of the collateral and their respective fathers were his first cousins once removed. Loch and Hobhouse, JJ., were pressed in argument to put a construction upon paragraph 25 of section 5 of the Dattaka Chandrika adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ., were governed by the Law of the Dyabhaga, but that fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* (5) was followed in 1881 by McDonell and Field, JJ., in *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* (6). In *Raja* v. *Subbaraya* (2) which was, however, a case relating to Sudras, Sir Charles Turner, C. J., and Muttusami Ayyar, J., in 1883 doubted that paragraph 25 of section 5 of the Dattaka Chandrika had been correctly construed in *Raghubanund Doss* v. *Sadhu Churn Doss* (3). Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep, JJ., of paragraphs 24 and 25 of section 5 of the Dattaka Chandrika has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property, are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a co-parcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of

section 5 of the Dattaka Chandrika or upon the position and rights of an adopted son. Hindu Law and customs have not stood still, and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboo Chunder Chowdry* v. *Naraini Debeh* (13) considered that according to Hindu Law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi* v. *Court of Wards* (15) approved of the decision of this Board in *Sumboo Chunder Chowdhry* v. *Naraini Debeh* (13) and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances which are accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. Those excepted instances relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozumdar* v. *Uma Shunker Moitra* (11). In the last-mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that—

"According to Hindu Law an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter, as the legitimate son, except in a few specified instances, which have been clearly and carefully noted and defined by writers on the subject of adoption. The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born both in respect to the paternal and the maternal line, and his complete substitution into the adopter's family as if he were born in it."

With that statement as to the Hindu Law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored

The respondent must pay the costs of this appeal and of the appeal in the High Court.

*Appeal allowed.*

Solicitors for the Appellant: Messrs. *Hughes & Sons.*

Solicitors for the Respondent: Messrs. *Latteys & Hart.*

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MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 60 OF 1914.

November 30, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Phillips.

THE MADRAS TIMES PRINTING AND PUBLISHING CO., LTD.—DEFENDANT—APPELLANT

*versus*

C. H. ROGERS—PLAINTIFF—RESPONDENT.

*Libel—Writer of newspaper article, how far protected—Fair comment—Animadversion on conduct of public men, when justifiable—Well-founded criticisim, meaning of.*

In the course of public discussions on matters of public interest proceeding in the press from day to day, it is too much to expect that a writer in each article should set out all the facts upon which his comment is based, including admitted facts which are within the knowledge of every one interested in the question. [p. 410, col. 1.]

Where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a Jury shall say that the criticisim was not only honest but also well-founded, an action is not maintainable. [p. 412, col. 1.]

*Campbell* v. *Spottiswoode*, (1863) 3 B. & S. 769 at pp. 776, 777; 32 L. J. Q. B. 185; 9 Jur. (N. S.) 1069; 8 L. T. 201; 11 W. R. 563; 3 F. & F. 421; 122 E. R. 288; 129 R. R. 552; *Wason* v. *Walter*, 3 Q. B. 73 at p. 93; 8 B. & S. 671; 38 L. J. Q B. 34; 19 L. T. 499; 17 W. R. 169, followed.

The statement that criticisim must be well-founded means no more than that a fair-minded man might upon those facts *bona fide* hold that opinion. [p. 412, cols. 1 & 2.]

*Walker* v *Hodgson*, (1909) 1 K. B. 239 at p. 253; 78 L. J. K. B. 193; 99 L. T. 902; *Ramakrishna Pillai* v. *Karunakara Menon*, 21 Ind. Cas. 625; 25 M. L. J. 476, followed.

Where, therefore, at a time when a Railway strike was impending, an article appeared in the defendant's newspaper imputing selfish motives to the plaintiff and accusing him of having fomented the strike and prevented a conference for the amicable settlement of the dispute, on a suit being brought to recover damages for libel:

*Held*, that the article was intended as a comment on facts which were common knowledge and the writer was well-warranted in forming and expressing the opinion that the plaintiff had endeavoured to stop the conference and to foment the strike. [p. 412, col. 2.]

Appeal from the decree of the Hon'ble Mr. Justice Sankaran Nair, in the ordinary original civil jurisdiction, dated the 30th March 1914, in Civil Suit No. 119 of 1913.

Messrs. *C. P. Ramaswami Aiyar* and *Duraiswami Aiyar*, for the Appellant.

Messrs. *Short* and *Bewes & Co.*, for the Respondent.

JUDGMENT.—This is an appeal against the judgment of Sankaran Nair, J., giving the plaintiff a decree for Rs. 3,000 as damages for an alleged libel published by the defendant, the *Madras Times*, concerning the plaintiff. The learned Judge held that the published matter was defamatory of the plaintiff, that the justification pleaded was not proved, and that the defendant was not protected by the plea of fair comment. It is with regard to this last point that this case has been mainly argued on appeal and it will, therefore, be as well to set out the passage in which the learned Judge may be said to have directed himself as to the way in which this plea was to be dealt with: "This rule of fair comment itself indicates its limitations. The defendant was only entitled to express his opinion on facts which are true. His assertion of facts on which his comments are founded must be correct, for instance, in this case he must prove this statement that the plaintiff fomented the strike and tried to stop the conference. The plea of fair comment protects only what purports to be a comment on facts and not those statements of facts.

"Nor was the defendant entitled to make any imputation on the plaintiff's moral character unless he is prepared to justify it by proving it to be true. Imputation of sordid and dishonest motives has to be justified. The writer's opinion must be shown to be well founded, and a correct inference from the facts commented on. For the decision in this case it is necessary to keep this in mind. If the defendant had truly set forth in the article what the plaintiff or the Society had done and then stated that such conduct shows him to be dishonest or mischievous or that it shows that he must have been actuated by sordid motives, the defendant would be within his rights to make the imputation. He has only to prove, if it is denied, that the plaintiff has committed the act alleged to have been done by him. The reason is that if the defendant's opinion is erroneous the article carries with it the antidote, as it enables the reader to form his own conclusion. But if, without giving his reasons, he only says that the plaintiff has been actuated by sordid motives, then he has to prove the facts from which such inference might be reasonably drawn. He has to prove in fact that the inference is correct. It is not enough for him to prove facts which might raise a suspicion, or plead that it was a conclusion which an honest person might arrive at; because he has already done the mischief. If the facts were capable of suggesting two inferences, he should have stated the facts on which his comment was based and the statement must only appear as an expression of opinion on the facts. As stated by Lord Atkinson in *Dakhyl* v. *Labouchere* (1), 'A personal attack may form part of a fair comment upon *given* facts truly *stated*, if it will be warranted by *those*f acts... Whether the personal attack in any given case can reasonably be inferred from the *truly stated facts upon which* it purports to be a comment...' See also Odgers on Libel, page 203, where he points out that where the defendant only states a bare inference without the facts on which it was based, that inference will have to be treated as an allegation of fact which will have to be proved. It will not be treated as a comment."

Now with all respect it seems to me that the learned Judge has laid down the law applicable to the present case somewhat too strictly. In saying that the defendant's assertion of facts on which his comments are founded must be correct and that he must prove that the plaintiff fomented the strike and tried to stop the conference, he does not appear to have sufficiently considered that though in form statements of facts, such statements may in the circumstances of the case amount to no more than comments.

(1) (1908) 2 K. B. 325 at p. 329; 77 L. J. K. B. 728; 96 L. T. 399; 23 T. L. R. 364.

Further, when the learned Judge says that to justify the imputation of motives, it is necessary that the defendant should set out in the article all the facts upon which the imputations are founded, that I think is going too far. It is clear, as said by Kennedy, J., in a passage which has since been cited with approval, "that the defendant must not mis-state facts and then proceed to comment on facts so untruly stated." But in the course of public discussions on matters of public interest proceeding in the press, from day to day, it would be obviously too much to expect that the writer in each article should set out all the facts upon which his comment is based, including admitted facts which are within the knowledge of every one interested in the question. That would be carrying the law further than it has ever been carried, and I do not think Dr. Blake Odgers intended to go to these lengths in the passage referred to by the learned Judge; such a view would not be consistent with an earlier passage in his treatise in which he sets out what I believe to be the law: "Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. *So if without setting it out, he identifies the conduct on which he comments by a clear reference.* In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded, and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth." The distinction is well brought out in one of the cases quoted by Dr. Odgers, *O'Brien* v. *Marquis of Salisbury* (2), which belongs to the same class of cases as the present case. Field, J., there laid down the law as follows :—

"It seems to me—as indeed I suggested during the argument—that comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed and from which his conclusion may be reasonably inferred. If a statement in words of a fact stands by itself naked, *without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed,* there would be little, if any, room for the inference that it was understood otherwise than as a bare statement of fact and then, if untrue, there would be no answer to the action but if, although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment, and comment only, and, if honest and fair, excusable; and whether it is to be regarded as fact or comment is a question for the Jury, to be determined by them upon all the circumstances of the case," and in the very case of *Dakhyl* v. *Labouchere* (1), cited by the learned Judge, where the defendant in his paper had described the plaintiff as "a quack of the rankest species," but had failed to prove it at the trial, the House of Lords set aside the verdict for £1,000 damages and ordered a new trial, because the Jury had not been directed to consider whether the statement did not exceed the limits of fair comment.

To come now to the facts of the present case, the article in question was published during the course of a dispute between the Madras and Southern Maharatta Railway and its employees at a time when a strike was threatened but had not yet taken place. Sometime previously the plaintiff, who till then had no connection with Railways, had become the salaried General Secretary of the Amalgamated Society of Railway Servants, India and Burma, Limited, which had its headquarters at Bombay. The bulk of the

(2) 6 T. L. R. 133 at p. 137.

Madras and Southern Maharatta workmen were admittedly subscribers to the Association, which was designed to promote the interests of Railway servants in India and to provide them with strike pay in the event of a strike being considered necessary. The plaintiff, in the course of the dispute, had come to Madras and had endeavoured to represent the men in the dispute with the Railway, an interference which the Railway refused to allow. On the 10th April 1913 he delivered a speech at Royapuram, Exhibit XII, in the course of which he stated among other things that the Agent would not consent to his leading the deputation and to the fact that the men had in consequence refused to meet the Agent. He said he was thoroughly in agreement with the men, and went on to suggest that the best solution of the difficulty would be to ask the Agent to receive a written petition which they could have written by any one they chose.

On the 24th of April the Madras and Southern Maharatta Railway issued a statement, Exhibit VII, which was published in the press, in which they set out a telegram which they had received from the plaintiff on the 22nd April in the following terms: "Am directed by trustees to request you be good enough to grant definite reply to men's petition before 1st May and to inform you that unless wages of traffic department are enhanced and brakesman Rangasami re-instated a general strike will result. Men have suffered for years and their formal petition has been in your hands since 10th instant." On the afternoon of the 24th, the plaintiff delivered a speech to the men, Exhibit XXVI, in which he said: "Lapse of time has proved that the Agent is unyielding and this fact, coupled with the overtlattempts by the officials to bring the Society into discredit, has forced the Society to support the members' desire to strike if the Agent does not give a definite reply to their petition before the 1st May 1913 and if the wages of the traffic department are not enhanced and if brakesman Rangasami is not reinstated." The speaker then proceeded to urge the men to stand by the Association.

It was on the following morning of the 25th April that the defendants published the alleged libel in their paper. It was in the following terms: "Wisely conducted, it is possible that Trade Unions sometimes serve a useful purpose. When, however, they fall into the control of born agitators, like the Mr. Rogers who has lately been so prominent in connection with the Madras and Southern Maharatta Railway dispute, their influence becomes purely mischievous. Men of the same type who have no inherent sympathy for the class they mislead, but who turn agitators purely for what it brings them in the shape of money and notoriety—such men were once fairly familiar as Trade Union Officials at home, but latterly, they have been the subjects of a general clearance. The real purpose of the attempt to foment a strike is fairly clear, *viz.*, to advertise the Trade Union, and particularly its Secretary. But what good has the agitation brought to the men? The conference called by the Agent was called on his own initiative. Why did Mr. Rogers try to stop it? For two reasons, the first being because it seemed likely to settle the men's grievances which would have deprived the Society of its *raison d'etre* and secondly because this admirable accomplishment would have been brought about without Mr. Rogers being able subsequently to proclaim that 'alone I did it.' The overweening egotism of the man has been made evident in his speeches, and we can only say that if the men of the Madras and Southern Maharatta Railway allow themselves to be led into rash conduct by such a person they will command little public sympathy. As a pretext for a strike, the case of the man Rangasami is the most trivial we remember coming across. The only possible explanation is that Mr. Rogers and his Society have come here to use the Madras and Southern Maharatta employees for their own purpose."

We have next to determine as laid down by Field, J., upon all the circumstances of the case, whether the several statements are to be considered as consisting of fact or comment. The question of the impending strike was one of great public interest affecting not only the Railway and its employees but also the whole public of Madras and was such as to invite and justify the fullest and freeest discussion. The fact that the article began with a reference to the prominent part taken by the plaintiff in the dispute indicates to my mind that it was intended as comment on facts, which were

common knowledge, and in view of the speech of the 10th, Exhibit VII, which had been published in the paper, it seems to me that the writer of the article was well warranted in forming and expressing the opinion that the plaintiff had endeavoured to stop the conference; and in view of the plaintiff's telegram to the Agent of the 22nd, Exhibit VII, which was then before the public, I think he was also well warranted in forming and expressing the opinion that the plaintiff was fomenting the strike, and that both these statements are covered by the plea of fair comment. As regards the other statements in the article, while the plaintiff, though previously unconnected with Railway work, was fully entitled to accept the well-paid post of Managing Secretary of this Association and as such to champion the interests of the servants of the Madras and Southern Maharatta Railway and to give them such advice as he thought proper, it must also be borne in mind that in so doing, he necessarily made himself a public character exposed to public criticism and invited the fullest canvassing of his conduct and his aims in such matters as his advice to the men not to meet the Agent without him and to strike unless their demands were conceded. In a well-known passage in *Wason* v. *Walter* (3), Cockburn, C. J., speaks of "the full liberty of public writers to comment on the conduct and motives of public men," and in *Campbell* v. *Spottiswoode* (4), the same learned Judge lays down that "where the public conduct of a public man is open to animadversion, and the writer, who is commenting upon it, makes imputations on his motives which arise fairly and legitimately out of his conduct so that a Jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." And as I have already pointed out in *Ramakrishna Pillai* v. *Karunakara Menon* (5), where the more recent cases are collected, the statement that the criticism must be well founded has been held in *Walker* v. *Hodgson* (6) to mean no more than that "a fair-minded man might upon those facts *bona fide* hold that opinion."

Applying these tests to the present case, I think the writer of the article was warranted as a matter of comment in stating in effect that Mr. Rogers' recent action in connection with the Railway dispute showed him to be a born agitator, if that is defamatory. The next sentences refer to the fact, which was well known, that Mr. Rogers had no connection with Railways until he joined the Association, and what follows appears to me to amount to comment on Mr. Rogers' action, which was well within the knowledge of the public, in advising the men not to meet the Agent in conference unless he was allowed to represent them and in subsequently advising them to strike if their demands were not conceded. It is true that the article as a whole imputes to Mr. Rogers that he was actuated by regard more for his own interests than for the interests of the men. This is a stock accusation against all persons in the position of Mr. Rogers, and may be paralleled by the equally hard things which are usually said of the employers on such occasions by those who sympathise with the men. Such statements, so far as I know, have never been held actionable. The language, no doubt, is strong; but if the writer believed that Mr. Rogers' activities were mischievous, he was entitled to express himself forcibly with a view to dissuading the men from following him and so averting a strike. In the result I cannot say that the bounds of fair comment have been exceeded and we must, therefore, reverse the decision of the learned Judge and dismiss the suit with costs throughout. The money paid into Court will be paid out to the defendants.

PHILLIPS, J.—I agree.

*Appeal allowed*; *Suit dismissed.*

(3) 4 Q. B. 73 at p. 93; 8 B. & S. 671; 38 L. J. Q. B. 34; 19 L. T. 409; 17 W. R. 169.

(4)(1863) 3 B. & S. 769 at pp. 776, 777; 32 L. J. Q. B. 185; 9 Jur. (N. S.) 1069; 8 L. T. 201; 11 W. R. 569; 3 F. & F. 421; 122 E. R. 288; 129 R. R. 552.

(5) 21 Ind Cas. 625; 25 M. L. J. 476.

(6) (1909) 1 K. B. 239 at p. 253; 78 L. J. K. B. 193; 99 L. T. 902.

ABDURAHIM HAJI *v.* HALIMABAI.

## PRIVY COUNCIL.

APPEAL FROM THE COURT OF EASTERN AFRICA.

December 3, 1915.

*Present*:—Earl Loreburn, Viscount Haldane, and Lord Wrenbury.

ABDURAHIM HAJI ISMAIL MITHU—DEFENDANT—APPELLANT

*versus*

HALIMABAI—PLAINTIFF—RESPONDENT.

*Memons—Cutchi Memons—Emigration to East Africa—Succession—Custom—Muhammadan Law—Principle.*

The Memons who have emigrated from Cutch in India to Mombasa in East Africa are governed in point of succession by Muhammadan Law rather than by custom. [p. 415, col. 1.]

*Semble.*—At Mombasa in East Africa the succession to Muhammadans is in general governed by Muhammadan Law, although it is open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession. [p. 414, col. 1.]

Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country and being themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined is one that should be much more readily made. In such a case all that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. [p. 414, col. 2.]

In case of emigration of Memons from Cutch in India to East Africa the analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. [p. 414, col. 2.]

Appeal from a judgment and decree of the Court of Appeal for Eastern Africa, dated March 6, 1914, reversing those of the High Court of East Africa at Mombasa, dated September 16, 1913.

FACTS.—The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir *E. Richards*, *K. C.*, and Mr. *Austen Cartwell*, for the Appellant.—Among Memons the original and ordinary Law by which a succession *ab intesto* was governed was, and had always been, the Hindu Law The presumption would be that even at Mombasa they would be governed by the Hindu Law and could only be replaced by a special custom or usage modifying or rebutting this presumption. This custom must be ancient and invariable and established by clear and unambiguous evidence. The onus of proving that the parties were governed by the Muhammadan Law was on the respondent and had not been discharged.

Reference was made to *Khoja and Memon's case* (1); *Moosa Haji Joonas Noorani* v. *Haji Abdul Rahim Haji Hamed* (2); *Hirbai* v. *Gorbai* (3) followed in *Cassumbhoy Ahmedbhoy* v. *Hubibhoy and Rahimbhoy* (4); *Soorendronath Roy* v. *Musammat Heeramonee Burmoneah* (5); *Abraham* v. *Abraham* (6).

The respondent did not appear.

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal from a judgment of the Court of Appeal for Eastern Africa reversing a judgment of the High Court of East Africa at Mombasa. The question to be decided is whether the succession to the estate of one Haji Ismail Mithu, deceased, is governed, as the appellant, who is a son, claims, by Hindu Law, or whether such succession is governed by Muhammadan Law, as the respondent, who is the widow, asserts. This question arose in an action brought by the respondent against the appellant claiming administration and a declaration that she was entitled, on the footing that Muhammadan Law applied, to an eighth of her husband's estate. On the appellant's contention the respondent, as widow of the deceased, became entitled to no more than maintenance.

The deceased was a merchant who had settled at Mombasa, and was a member of the Indian sect known as Memons. According to the case as stated by the appellant's Counsel, some 400 or 500 years ago the "Luwanas," a sect of Hindus located in Scinde, became converted to the Muhammadan faith and took the name of Memons. A century or so later they migrated to Cutch, where they settled. There were two migrations. Those who first migrated, and their descendants became known as Cutchee Memons, while those who migrated on the second occasion, and their descendants, were called Nassapooria Memons. Both sets of migrants held to religious tenets and customs which

(1) (1847) Perry, O. C. 110; 2 Morley's Dig. 432; 4 Ind. Dec. (o. s.) 100

(2) 30 B. 197; 7 Bom. L. R. 447.

(3) 12 B. H. C. R. 294.

(4) 12 B. 280.

(5) 12 M. I. A. 81; 10 W. R. 35 (P. C.); 1 B. L. R. 26 (P. C.); 2 Suth. P. C. J. 147; 2 Sar. P. C. J. 372; 20 E. R. 271.

(6) 9 M. I. A. 195; 1 W. R. 1 (P. C.); 1 Suth. P. C. J. 501; 2 Sar. P. C. J. 10; 19 E. R. 716.

are common to the Memon community, and for the purposes of the present appeal, the distinction between the two sets is immaterial.

Upon their conversion to Muhammadanism the Memons did not adopt the Muhammadan Law as to succession, but retained the Hindu Law of succession as a customary law which remained binding upon the entire Memon community at Cutch. Over half a century ago Memons began to migrate from Cutch to East Africa, and there are now, so it is stated, at least a hundred Memon families at Mombasa.

The deceased's father was a Nassapooria Memon who about half a century ago, with his wife and children, including the deceased, migrated to Mombasa, where they settled. At Mombasa the succession to Muhammadans is in general governed by Muhammadan Law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

The action was tried before Hamilton, C.J. The appellant and respondent both called evidence. It was shown that in some cases, of which eleven appear to have been fully proved, succession among the members of the Memon community at Mombasa had taken place according to Muhammadan Law. The only documentary evidence was also in accordance with this view. On the other hand oral evidence was given for the appellant and accepted by the learned Judge who tried the case, which showed that in a few cases distribution in accordance with Hindu Law had taken place. It was also established that there had been a custom, or at least a practice, that ornaments given to a wife in her husband's life-time were allowed to remain with the widow only during her life or until re-marriage, a custom or practice more nearly resembling the rule which obtains among Hindus than any which regulates such cases among Muhammadans. Upon consideration of the evidence Hamilton, C. J., decided in favour of the appellant. He took the view that the burden of proof lay on the respondent to show that there was a Muhammadan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration.

The Court of Appeal were of a different opinion. They held that Hamiltion, C. J., had, having regard to the facts as established, wrongly stated the character of the burden of proof. They took the view that if the present respondent simply produced sufficient evidence to show that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa, that was sufficient to entitle her to succeed, if the other side failed to bring forward sufficient evidence in answer. They commented on the indications, adverse to the present appellant, furnished by the documentary records, and on what they considered to be on the whole the preponderance in trustworthiness of the oral evidence against him. That on certain occasions females should have been proved to have preferred maintenance to a share of a very small estate they regarded as in the circumstances inconclusive; nor was the special custom or practice as to oranaments enough to displace the presumption that the general rule was that of Muhammadan Law.

Their Lordships are in agreement with the conclusions reached by the Court of Appeal for Eastern Africa. It seems to them that the learned Judge who tried the case misconceived what, having regard to the circumstances of the Memon migration to Mombasa, was the real question for the Judge who had to try the case.

Where a Hindu family migrate from one part of India to another, *prima faice*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Muhammadans settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it

does not appear that the Memons in Mombasa have at any time established any distinctive political or social organisation for themselves. Such organisation as has been formed appears to have been formed mainly, if not entirely, for purposes of worship. There seems to be no sufficient reason in what has been brought before the Courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Muhammadans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion, and so prevails among the Muhammadans at Mombasa. Their Lordships have examined the oral evidence brought forward on behalf of the appellant. It relates to very small estates and is of an inconclusive character. There is lacking in it indication of intention to assert a principle. A good deal of the evidence for the respondent is open to the same observation. But several of the documentary records distinctly support the contention that some at least of the Memon families had treated themselves as governed in point of succession by Muhammadan Law, and the balance of the oral testimony appears to be on this side. Under these circumstances their Lordships think that the presumption which arises from the facts proved, and the weight of evidence, are both in favour of the conclusion reached by the Court of Appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the Appellant: Messrs. *Harrison, Powle & Tulk,*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 274 OF 1914-15 OF BARABANKI DISTRICT.

July 22, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

*Khan Bahadur Mir* BUNYAD HUSAIN—APPELLANT

*versus*

RAM SAHAI SINGH AND OTHERS—RESPONDENTS.

*Oudh Rent Act (XXII of* 1886*), s.* 33—*Enhancement of rent, suit for—Land held by way of* kabzadari *at low rent—Nature of tenure.*

In a suit between the parties, it was held by a Settlement Officer that the respondents were entitled to hold the land in question by way of *kabzadari* at the former low rent of Rs. 29 and odd:

*Held*, that these rights were not rights of occupancy under section 5 of the Rent Act and that the rent was liable to enhancement under section 33 of the Rent Act. [p. 416, col. 1.]

*Azim Ali Khan* v. *Shankar Singh*, Selected Decision No. 3 of 1893; *Baldeo Bakhsh Singh* v. *Chaudhrain Sahib-un-nisa*, Selected Decision No. 11 of 1912; *Bindha Singh* v. *Sammat Ilahi Khanam*, Selected Decision No. 23 of 1892, considered.

Second appeal from the order of the Commissioner of Fyzabad Division, dated the 5th January 1915, confirming that of the Assistant Collector of Barabanki District in a case of enhancement of rent under section 108 (8) of Act XXII of 1886.

JUDGMENT.

HOLMS, S. M.—(*July 22nd*, 1915.)—I have examined the Settlement decision and decree under which the appellant holds part of the land in suit in the present appeal As regards the other part of the land in suit, the respondent's case is that the appellant admitted it was held under a similar decree. The appellant's Pleader says he does not know. The appellant has not shown under what terms the other land was held if it was not held under a similar decree. Before the Settlement Court there was a claim to *sir*. It was found that the claimants were former proprietors who had parted their proprietary rights aud retained land, which was formerly their *sir*, at what is called a low rent (*naram lagan*). It was decided that they should hold this land by way of *kabzadari*, being "a right something between *sir* and *kabzadari*", at the former low rent of Rs. 29-11-6 on similar terms to the land mentioned in Fi-

ancial Commissioner's Selected Decision No. 6 of 1870. It is clear then that the rights of occupancy which were decreed were not rights of occupancy corresponding to those under section 5 of the present Rent Act. Under *Azim Ali Khan* v. *Shankar Singh* (1) the operation of section 33 is not confined to tenants with a right of occupancy under section 5.

Two other Selected Decisions are in point. The first is *Baldeo Bakhsh Singh* v. *Chaudhrain Sahib-un-nisa* (2), in which it was held that the word *kabzadari* did not necessarily mean occupancy rights. The circumstances of the particular case were examined, and it was found that the decree was for *kabzadari* with rights of inheritance, not at a rent fixed at $12\frac{1}{2}$ per cent. below the rates paid by statutory tenants of the same clause but at the old rent, as in the present case. But it also appeared that it was held that a previous proceeding in which the rent of the predecessor-in-interest had been enhanced was *najaiz* and that only the rent *mukarrara shahi* was payable. This was held to be a decree that the claimant was entitled to hold at a fixed rent only re-adjustable under section 79 of the Land Revenue Act at Settlement.

*Bindha Singh* v. *Sammat Ilahi Khanam* (3) also discussed the particular facts of the case, in which the right was held to be an under-proprietary right. Now, in the present case, it is true that a definite rent was fixed without any reference to the rent of a statutory tenant, and it is true that it was stated to be a low rent, but there is no indication whatever that it was intended that any permanency was intended, as in the other case referred to.

I see no reason, then, why the present case should be differentiated in respect of the fixity of the rent from that of a right of a tenant with a right of occupancy under section 5, and why section 33 should not be applied. I would, therefore, set aside the orders of the lower Courts and direct that the suit be tried under section 33. In the circumstances parties will bear their own costs in all the Courts so far.

CAMPBELL, J. M.—I agree.

*Appeal allowed.*

(1) Selected Decision No. 3 of 1893.
(2) Selected Decision No. 11 of 1912.
(3) Selected Decision No. 23 of 1892.

## MADRAS HIGH COURT.

CIVIL APPEAL No. 79 OF 1909.

November 9, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

LAKSHUMANAN CHETTIAR AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

BOMMACHI NAICKER AND OTHERS— DEFENDANTS—RESPONDENTS.

*Contract Act (IX of 1872), s. 2 (d)—Consideration —Abstention from taking legal proceedings, whether sufficient consideration.*

Where at the instance of a debtor, a creditor abstains from taking legal proceedings against an estate which is likely to come into the hands of the former on a future date, that is sufficient consideration for a promise to pay a debt due to the latter under section 2 (*d*) of the Contract Act. [p. 418, col. 2; p 416, col. 2.]

*Oldershaw* v. *King*, 2 H. & N. 517; 27 L. J. Ex. 120; 3 Jur. (N. S.) 1152; 5 W. R. 753; 115 R. R. 673, followed.

*Sivasubramania Naicker* v *Krishnammal*, 18 M. 287; *Ramasami Naick* v. *Ramasami Chetti*, 30 M. 255; 17 M. L. J. 201; 2 M. L. T. 167, referred to.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura, in Original Suit No. 77 of 1908.

Messrs. *S. Srinivassa Aiyangar* and *C. Krishnamachariar*, for the Appellants.

Messrs. *M. O. Parthasaradhy Aiyangar* and *S. Gopalasami Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The main question argued before us in this appeal is as to whether the deed, Exhibit A, is without consideration in so far as it imposes a personal liability upon the 5th defendant, who was then in the line of succession and subsequently in 1905 succeeded to the *zemindari* of Ammayanaickanoor. The peculiar tenure of the *zemindari* was established in *Sivasubramania Naicker* v. *Krishnammal* (1) and the inability of the reversioners to mortgage their chance of succession in *Ramasami Naik* v. *Ramasami Chetti* (2), subsequently to the date of the plaint mortgage. Under the decision in *Sivasubramania Naicker* v. *Krishnammal* (1) each *zemindar* takes a life-estate and as pointed out in *Ramasami Naik* v. *Ramasami Chetti* (2), this fact creates considerable difficulties in the way

(1) 18 M. 287.
(2) 30 M. 255; 17 M. L. J 201; 2 M. L. T. 167.

of mortgaging the *zemindari*. In that case it was held that the mortgage executed by the present 5th defendant and other reversioners was not binding on him after he succeeded to the *zemindari* but that he was bound by the personal covenant to pay after he succeeded and that the covenant had been specially inserted to meet the difficulties in the way of enforcing creditors' claims against the *zemindari* which arose in consequence of the decision in *Sivasubramania Naicker* v. *Krishnammal* (1), owing to the fact that at the date of that decision and for some time afterwards the holder of the *zemindari* was not liable for the debt which it was sought to recover. That case arose out of a consent in Original Suit No. 43 of 1894 which was brought upon another mortgage and to which the present 5th defendant was a party, whereas the present claim arose out of a mortgage of other properties not included in the *zemindari* which was the subject of Original Suit No. 33 of 1893, in which the present 5th defendant was impleaded as the 6th defendant and in which it was sought to recover the amount due under the mortgage by sale of the mortgaged properties and also on the liability of the *zemindari*. The defendants Nos. 3 to 6 in that suit were *ex parte* and the contesting defendants Nos. 1 and 2 entered into a *razinama*, by which it was provided that the amount due should be paid by defendants Nos. 1 and 2 in 12 months with compound interest and that the mortgaged properties and the *zemindari* should be held liable therefor and that if the *zemindari* should come into the possession of defendants Nos. 1 to 6, each of those defendants should pay this amount on getting possession of the *zemindari* from out of the income, and that in default the plaintiff should recover the same by means of a precept of the Court. The reason for and effect of similar provisions were considered in *Ramasami Naick* v. *Ramasami Chetti* (2). The decree which was drawn up on this *razinama* provided that the mortgage debt should be paid by the defendants Nos. 1 and 2 and that the mortgaged properties and the *zemindari* and the assets of the fathers of defendants Nos. 1 to 5 should be liable and that if the 1st or 2nd defendant should succeed to the *zamindari*, he should pay at once the decree-debt from the income of the *zemindari* and that in default the plaintiff should proceed to recover it by process of Court and that the defendant (the 5th defendant here and the present *zemindar*) should be exempted from liability for the decree-debt. Thus effect was not given in the decree to the provisions of the *razinama* as to defendants Nos. 3 to 6 being liable if the *zemindari* should come into their possession, probably because they were *ex parte* and their consent had not been obtained.

A year later, on 29th January 1895, the plaintiff put in a petition for execution by sale of the mortgaged properties and for the appointment of a Receiver of the *zemindari*, and on 19th August 1895 the 6th defendant, 5th defendant here, put in a counter-petition pleading that he had been exempted from liability and that he was not a party to the mortgage sued on and opposing the appointment of a Receiver.

On 27th August 1895 the appointment of a Receiver was postponed by consent until 18th July and when on 9th August 1895 an order was passed appointing a Receiver, it was mentioned in the order that the defendants Nos. 1 and 6 had promised to pay Rs. 5,000 before that date and that the plaintiff had undertaken not to press for the appointment of the Receiver if they did so. At this time the 1st defendant Siva Subramania had succeeded to the *zemindari* and the present 5th defendant was apparently the next in succession.

Subsequently the 1st, 2nd and 5th defendants in this suit executed two documents, Exhibits E and E1, on 10th March 1897 and a third document on 26th November 1897, Exhibit E2. Exhibit E recited that certain villages of the *zemindari* had been sold for the decree-debts due under Original Suits Nos. 34 of 1894, 43 of 1894 and 33 of 1893 (the decree now in question) and provided that these villages should be reconveyed to the 1st defendant for Rs. 30,000 subject to the said mortgages, and hypothecated the *zemindari* for this amount. Exhibit E1 of the same date recited that the decree holders in the three suits first mentioned had advanced Rs. 75,000 to the 1st defendant to enable him to give security to get possession of the *zemindari* pending the appeal to the Privy Council from the decision in *Sivasubramania*

*Naicker* v. *Krishnammal* (1) and had usufructuarily mortgaged the *zemindari* to them for this amount providing that any balance should go in reduction of those decree-debts.

On 27th October 1897, as appears from Exhibit E2, the appeal to the Privy Council was compromised and by that document, Exhibit E2, dated 26th November 1897, Sivasubramania, the then *zamindar*, and the present 5th defendant and others executed in favour of the plaintiffs and other creditors a further usufructuary mortgage for a fresh advance of Rs. 20,000 in connection with the compromise. This deed to which the 5th defendant was a party expressly provided that the *zemindari* was liable for the decree-debt under Original Suit No. 33 of 1893, by which it will be remembered the present 5th defendant had been exonerated from the debt.

It would appear from the recitals in the execution petition of 1899, Exhibit D series, that nothing was done on the order appointing a Receiver in August 1895, and it was alleged for the defendant that in March 1896 an arrangement was come to under which the three decree-holders divided proportionately the net collections of the *zemindari* without bringing the property to sale and that this agreement had been acted on until the presentation of the further execution petition in 1899.

It was apparently in this state of things that the creditors considered it desirable to get the 5th defendant, who as 6th defendant had been exonerated by the decree in Original Suit No. 33 of 1893, to undertake the liability to pay in the event of his succeeding to the *zemindari*, as was provided in the *razinama* itself though not in the decree and it was apparently for that purpose Exhibit A, the document now sued on, was executed by the 5th defendant on the 28th January 1898. As already mentioned the 5th defendant in Exhibit E2 had already confirmed hypothecation of the *zemindari* for the decree-debt but he had not entered into a personal covenant to pay on succeeding to the *zemindari*, such as had been given by defendants Nos. 1 and 2 under the compromise decree.

There were legal difficulties in the way of bringing the whole *zemindari* to sale, and both the creditors and the family appear to have been anxious to avoid doing this by making the successive heirs liable to pay as from the date of succeeding to the *zemindari*. In 1898 it had not been decided that the 5th defendant's mortgage of his interest under Exhibit E2 was not binding on him.

It has now to be considered whether the consideration recited in Exhibit A is sufficient. Under section 2 (*d*) of the Indian Contract Act there is consideration when, at the desire of the promisor, the promisee has done or abstained from doing something as well as when he does or abstains from doing something, or promises to do or abstains from doing something. Exhibit A after reciting that the amount payable under the decree in Original Suit No. 33 of 1893 upto date was Rs. 28,212-1-4 proceeds, "Inasmuch as you paid the said amount for the benefit of the said *zemindari* without discount and rendered assistance at the proper time, and as we are liable to discharge the obligation if we succeed to the *zemindari*, we agree that either of us who at any time or in any manner obtains the *zemindari*, should pay that amount with interest as provided in the instrument." Although it may not appear that the assistance referred to was rendered at the desire of the promisor so as to make it good past consideration under the section, the reference to the promisor's liability to pay is, I think, sufficient to raise an inference that the real consideration for the promise to pay with interest at the stipulated rate was forbearance on the part of the creditors to take further proceedings against the *zemindari* and as the decree-holders did abstain for some time taking further proceedings that would, I think, be sufficient consideration. *Oldershaw* v. *King* (3). With reference to the contention that the promisor had been exempted from liability by the decree in Original Suit No. 33 of 1893, it appears sufficient to point out that by Exhibit E2 he had purported to charge his interest in the *zemindari* when he should succeed to it with the decree amount, and it was not then decided that such a charge was void as the transfer of an expectancy; and it was to the interest of the promisor that the decree-holder should

(3) 2 H. & N. 517; 27 L. J. Ex. 120; 3 Jur. (N. S.) 1152; 5 W. R. 753; 115 R. R. 673.

not feel obliged to take proceedings at once for the enforcement of his security.

Further, the recital as to the promisor's liability for Rs. 28,212-1-4 is followed by the recital of a further advance tc the promisors of Rs. 29,000 and there is a stipulation that it is to carry compound interest at Re. 1-4 per cent. per mensem, and I do not see why this further advance should not itself be treated as sufficient consideration for the whole promise and indeed it appears to me to form part of the consideration for the whole agreement recited in the document. Although following *Ramasami Naick* v. *Ramasami Chetti* (2) we hold Exhibit A was void as a mortgage by the 5th defendant of his reversionary interest, the covenant to pay is enforceable and we must reverse the judgment of the Subordinate Court so far as the 5th defendant is concerned and remand the case on the question of the amount due by the 5th defendant in the Exhibit A. Costs incurred upto date to abide. The appeal as regards the other defendants is dismissed without costs.

SESHAGIRI AIYAR, J.—I agree. The Subordinate Judge has not applied his mind to the real point arising in this case. The reason for the 5th defendant undertaking liability was because the plaintiff saved the *zemindari* for the family. This is referred to in Exhibit A. It was on that account that the 5th defendant who had only a presumptive title agreed to mortgage his expectancy and stipulated for exemption from personal liability. Now that this expectancy is out of the reach of the creditor, the question is whether Exhibit A creates no liability on him. The exemption from personal liability only means that he is not to be arrested in execution. His moveable properties other than the *zemindari* also are exempt from attachment. Nonetheless I am of opinion that any income which may accrue to him from the *zemindari* is liable, although as a result of the decided cases, no charge is created on the *zemindari* or its income.

On the question of consideration, I would have preferred to send the case down for a revised finding as the lower Court has not dealt with it properly. It was suggested by Mr. Parthasaradhy Aiyangar that there was a failure of consideration; but this was not pleaded in the suit. Under these circumstances, I agree that the case should be disposed of on the materials placed before us. The consideration for the promise, in my opinion, is that the *zemindari* to which the 1st defendant had a prospective right of succession was saved by the act of the plaintiff. I agree in the order proposed by the learned Chief Justice.

*Appeal allowed; Case remanded.*

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## PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

December 16, 1915.

*Present*:—Viscount Haldane (Lord Chancellor), Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

THE BANK OF BENGAL—PLAINTIFFS—APPELLANTS

*versus*

RAMANATHAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Principal and agent—Money-lending business—Chetty firm—Power-of-attorney, construction of—Principal pledging credit, power of—Principal, liability of—Practice.*

The defendant who carried on the business of banker and money-lender in Rangoon appointed one *R* as his attorney for the general management of his said business and empowered him "to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things" in which the defendant was "in any wise interested and concerned and for that purpose to use or sign" his name and "to borrow money from any Bank or Banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons." *R* pledged the firm's credit with the plaintiff bank to enable one *E* to have a cash credit account opened in his name. *E* drew considerable sums of money on the cash credit account thus opened and thereafter became insolvent and his assets vested in the Official Assignee. The plaintiff bank sued the defendant for the amount due from *E*. The defendant denied *R*'s authority to enter into the transaction so as to bind his firm:

*Held*, that the agent's authority to enter into transactions of the nature in dispute was to be found in the power-of-attorney itself by necessary implication from the nature of the business with the general management of which the agent was entrusted, inasmuch as without such authority it was hardly possible to carry on the business of a money-lender and financier. [p. 422, col. 2.]

*Bryant* v. *La Banque du Peuple*, (1893) A. C. 170 at p. 177; 62 L. J. P. C. 68; 1 R. 336; 68 L T. 546; 41 W. R. 600, applied.

*Held*, also, that the mere fact that the principal did not receive any benefit did not rid him of his liability [p. 423, col. 1.]

BANK OF BENGAL *v.* RAMANATHAN CHETTY.

Among Chetty money-lending firms it is the practice for an agent to pledge the credit of his principal to secure an advance to a borrower. [p. 422, col. 2; p. 423, col. 1.]

Appeal from a judgment and decree of the Lower Burma Chief Court on its Appellate Side, dated March 26, 1914, reported as 23 Ind. Cas. 516, reversing those of the same Court on its Original Side, dated August 16, 1912.

FACTS of the case are sufficiently set forth in their Lordships' judgment.

Sir *E. Richards*, *K. C.*, and Mr. *Coltman*, for the Appellants.—The respondents were clearly liable on the contract of guarantee. The agent had power to endorse the promissory note and execute the guarantee agreement. He need not have had express power to act in that way. It was sufficient if he could not carry on his duties without such powers. In other words, he might have had the power by necessary implication. The firm was a money-lending firm and, therefore, guaranteeing loans and overdrafts would fall within the scope of its business. The presumption by the non-production of the account books after due notice was that the said agent had acted on more than one occasion as a guarantor and his action was ratified by the firm. In fact the respondents held out their agents as having authority to enter into guarantees and ratified their action in so doing.

Reference was made to *Bryant* v. *La Banque du Peuple* (1); Indian Evidence Act, section 114; Indian Contract Act, section 187; Presidency Banks Act, XI of 1876, Chapter 8, section 36 (*a*) (*c*), amended by Act I of 1907, section 37, clause (*e*).

Mr. *Newbolt*, *K. C.*, and Mr. *Sanders*, for the Respondents.—The respondents never authorised Chockalingam by the power-of-attorney or otherwise to enter into the guarantee on behalf of Ebrahim. There was no evidence on record that guaranteeing accounts fell within the scope of a Chetty money-lender and even then such evidence would not have been admissible. There was no evidence that Chockalingam ever gave a guarantee for any other person than Ebrahim or that the respondents knew that the agent aforesaid ever gave a guarantee for any debtor or subsequently ratified the same.

(1) (1893) A. C. 170 at p. 177; 2 L. J. P. C. 68; 1 R. 336; 68 L. T. 546; 41 W. R. 630.

Reference was made to *Jacobs* v. *Morris* (2); *Jacobs* v. *Morris* (3); *Bryant* v. *La Banque du Peuple* (1).

No reply.

JUDGMENT.

MR. AMEER ALI.—This is an appeal from the Chief Court of Lower Burma, and the sole question for determination is whether the agent in Rangoon of the original defendant to the action, Lutchmanan Chetty, since deceased, now represented by the respondents, had authortity to enter into the transaction with the plaintiff Bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchmanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under the name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1904 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power-of-attorney, dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May 1905, Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as the attorney and agent" of the defendant. And since his appointment Chockalingam admittedly has managed the entire money-lending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingam had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should

(2) (1902) 1 Ch 816; 71 L. J. Ch. 353; 50 W. R. 371; 86 L. T. 275; 18 T. L. R. 384.

(3) (1904) 1 Ch. 261; 70 L. J. Ch. 183; 49 W. R. 365; 84 L. T. 112.

pledge the firm's credit with the plaintiff Bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the Bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due re-payment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingam on his side should endorse over to the Bank.

It is to be observed in this connection that under the provisions of the Presidency Banks Act [XI of 1876, section 37, clause (*e*)], the bank is precluded from opening cash credits on the security of any negotiable instrument of: —

"any individual or partnership firm . . . which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership."

It was in view of this provision of the law, and the practice of the Bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual Bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the Bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the plaintiff Bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms:—

"In consideration of the Bank of Bengal having agreed at our request to grant to Hassum Ebrahim (who is hereinafter referred to as the borrower) accommodation by way of cash credit to such an amount from time to time as the Bank in its discretion shall think proper upon condition that such cash credit shall to the extent of Rs. 50,000 and interest be secured by the promissory note hereinafter mentioned we the undersigned A. R. L. Chockalingam Chetty (guarantor) have delivered to the Bank of Bengal a promissory note dated 23rd May 1908 for Rs. 50,000 and interest payable on demand made by the said borrower in favour of us and endorsed by us to the said Bank or order (the said promissory note being intended as a guarantee to the extent of Rs. 50,000 and interest of the balance from time to time due to the said Bank from the said borrower on account of the said cash credit) on the understanding that the Bank shall be at liberty to take steps to enforce payment of the said promissory note at any time after notice in writing demanding payment thereof posted to us at our usual or last known address and default being made in payment for three days after the posting of such notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the Official Assignee. He himself is said to have absconded.

The plaintiff Bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burma in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the defendant's firm.

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond, J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The defendant, besides putting in the power-of-attorney and the instrument substituting Chocaklingam in place of Ramaswamy, adduced no evidence, and Robinson, J., held in substance that, although there was no express authority to the agent to enter into a transaction of this nature, the defendant subsequently ratified and confirmed the act, and was, therefore, clearly liable. He accordingly decreed the plaintiffs' claim. The Appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be regarded as "a necessary incident of the business, it would not be so much a

money-lending business as an insurance business."

They accordingly dismissed the suit.

In their Lordships' opinion this judgment cannot be supported. The learned Judges seem to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the agent, or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and moneylenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with:—

"To transact, conduct, and manage all and every or any of the affairs, concerns, matters, and things in which I, the said L. A. R. L. Lutchmanan Chetty, now am or hereafter may be in any wise interested and concerned, and for that purpose to use or sign my name to all and every or any documents or document writings or writing whatsoever. To borrow money from any Bank or Banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare:—

"To make draw sign accept endorse negotiate and transfer all and every or any bills of exchange promissory notes *hundis* cheques drafts bills of lading and all and every other negotiable securities whatsoever to which my signature or endorsement may be required or which my said attorney may in his absolute discretion think fit, to make draw sign accept endorse negotiate and transfer in my name and on my behalf."

It is to be borne in mind that the defendant's business was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the Bank, on the pledge of the firm's credit, to advance the money to the borrower.

Applying to the power in the present case the canon of construction laid down in *Bryant* v. *La Banque du Peuple* (1), *viz.* —"that where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication," their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908 Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms it is the practice for the agent

to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not *rid* him of his liability. But it is to be observed that the case of the plaintiff Bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson, J., should be restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors for the Appellants: Messrs. *Arnould and Son.*

Solicitors for the Respondents: Messrs. *Bramall* and *White.*

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## MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 3 OF 1915.

November 24, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

MAHALINGAM, MINOR, BY HIS MOTHER AND NEXT FRIEND—PLAINTIFF—APPELLANT

*versus*

C. NATESA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Letters Patent (Mad.), s.* 12—*Discretion, exercise of, by High Court on Original Side—High Court, interference by—Jurisdiction—Property situated in different jurisdictions—Leave to bring suit for partition refused—Separate suits, if maintainable—Order refusing leave to amend plaint, if appealable.*

A High Court on appeal would not interfere with the exercise of its discretion on the Original Side in refusing leave to sue for partition of properties situated in different jurisdictions. [p. 423, col. 2.]

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable as a judgment. [p. 423, col. 1.]

Where immoveable property is situated in different jurisdictions, a separate suit lies in each jurisdiction for the partition of the property there situated. [p. 424, col. 1 ]

*Subba Rau* v. *Rama Rau*, 3 M. H. C. R. 376; *Balaram Bhaskerji* v. *Ramchandra Bhaskerji*, 22 B 922 and *Punchanun Mullick* v. *Shib Chunder Mullick*, 14 C. 835, followed.

Per *Seshagiri Aiyar, J.*—A plaint presented on the granting of a provisional leave loses vitality the moment the leave is withdrawn. Therefore, an order refusing leave to amend such a plaint on the withdrawal of the leave is infructuous and is not appealable. [p. 424, col. 1.]

*Tuljaram Row* v. *Allagappa Chettiar*, 8 Ind. Cas. 340; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1; 35 M. 1, followed.

*Abdul Karim Sahib* v. *Badrudeen Sahib*, 28 M. 216, distinguished.

Appeal from the order of the Hon'ble Mr. Justice Bakewell, in the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 220 of 1914.

Messrs. *C. P. Ramaswami Aiyar* and *M. Subbaraya Aiyar*, for the Appellant.

Messrs. *E. V. R. Sarma* and *A. V. Seshayya*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—In so far as this is an appeal from the order of the learned Judge refusing leave to sue under clause 12 of the Letters Patent, we are not prepared to interfere with the exercise of the learned Judge's discretion. In so far as it can be regarded as an appeal against his further order on the same day refusing leave to amend the plaint by excluding the joint family lands outside the jurisdiction, I am of opinion that such an order is not appealable as a judgment. In *Tuljaram Row* v. *Allagappa Chettiar* (1) it was held by the Full Bench that an interlocutory order refusing to frame a particular issue was not a judgment within the meaning of the Letters Patent, although the effect of the order was to shut out one of the defences relied upon, and that the refusal could only be questioned on an appeal from the final decree. That ruling appears to me to govern the present case. In *Abdul Karim Sahib* v. *Badrudeen Sahib* (2), the facts of which were somewhat

(1) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

(2) 28 M. 216.

similar to the present, it is expressly stated in the foot-note that there was an appeal against the decree as well as against the order refusing to amend the written statement, whereas there is no appeal against the decree in the present case. I may say, however, that I am unable to agree with the view that there was no power to give leave in such a case, as it appears to be well settled that where the immoveable property is situated in different jurisdictions a separate suit lies in each jurisdiction for the partition of the property there situated. *Subba Rau* v. *Rama Rau* (3), *Balaram Bhaskerji* v. *Ramchandra Bhaskerji* (4) and *Punchanun Mullick* v. *Shib Chunder Mullick* (5). In the result the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J. - I agree. In my opinion, the application to amend the plaint and the order passed thereon were both incompetent. After the cancellation of the order granting leave to sue, the plaint originally presented became incapable of being proceeded with. As contended for by Mr. Ramaswami Aiyar, the jurisdiction "to receive, try, and determine suits" in the case of claims to property situated partly within and partly outside the jurisdiction of the High Court is dependent on the leave of the Court. A plaint presented on the granting of a provisional leave loses vitality the moment the leave is withdrawn. It cannot be said that it is valid to some extent and invalid only to the extent of the property outside the jurisdiction of the Court. The party will not be precluded from pursuing his remedies in respect of the properties within the jurisdiction by filing a fresh suit in that behalf. As the order was infructuous and could not affect the rights of the plaintiff to litigate his claim, the plaintiff had no right of appeal against it.

I entirely agree with the learned Chief Justice in holding that where properties are in different jurisdictions, the rule that a suit for partition should embrace all the family properties has no application. The enabling section in the Civil Procedure Code has not deprived parties of the right to bring successive suits in respect of properties situated in different jurisdictions. As the plaintiff unnecessarily invoked the aid of the Court, I agree in the order as to costs against him.

*Appeal dismissed.*

(3) 3 M. H. C. R. 376.
(4) 22 B. 922.
(5) 14 C. 835.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 72 AND 73 OF 1914.
August 17, 1915.
*Present*:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

RAGHUNANDAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS
*versus*
JAGESHAR SINGH—PLAINTIFF AND MATAI SINGH—DEFENDANT NO. 3—RESPONDENTS.

*Pre-emption—Oudh Laws Act (XVIII of 1876)—Pre-emption, right of, if heritable—Personal right—Ownership of land—Inheriting property, effect of, on right of pre-emption.*

The right of pre-emption created by the Oudh Laws Act is a personal right in the owner incident on the ownership of land and is heritable [p. 427, col. 2.]

A person who had no right of pre-emption at the date of sale but who inherited the property, by reason of the ownership of which the right of pre-emption arose, from a person who had such a right, can claim pre-emption. [p. 426, col. 2; p. 427, col. 1.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 27th November 1913, reversing that of the Munsif, Purwa, dated the 15th March 1912.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Bisheshar Nath*, for Respondent No. 1.

ORDER.

STUART, A. J. C.—A decree was passed in favour of Sheo Charan on the 18th August 1906 for the foreclosure of 9 *bighas* 19 *biswas* under-proprietary land in Malona, Unao District.

A decree was passed in favour of Sheo Charan on the 14th of May 1907 for the foreclosure of 6 *bighas* 14 *biswas* 19 *biswansis* in the same district.

Sheo Charan is now represented by Raghunandan and Bans Gopal, defendants Nos. 1 and 2, and appellants in Appeals Nos. 72 and 73. On 16th August 1912 Jageshar Singh filed Suit No. 299 to enforce a right

of pre-emption with respect to 9 *bighas* 19 *biswas*. On 19th September 1912 Jageshar Singh filed Suit No. 241 to enforce a right of pre-emption with regard to 6 *bighas* 14 *biswas* 19 *biswansis*. These suits were dismissed by the Munsif but decreed by the learned Subordinate Judge on appeal. Jageshar Singh based his right of pre-emption on the fact that he had succeeded as reversioner to a certain Madho Singh, the owner of under-proprietary land in Malona. Madho Singh had died without issue and his widow *Musammat* Jhogara had succeeded to a widow's estate in respect of his property. She was alive in 1906 and 1907. On the death of *Musammat* Jhogara she was succeeded by Dilraja, her daughter and the daughter of Madho Singh, and on Dilraja's death Jageshar Singh succeeded. Jageshar Singh has no property in the village of Malona with the exception of the property which he inherited as reversioner of Madho Singh. At the time that the decree for foreclosure was passed, Jageshar Singh had thus no proprietary or under-proprietary right in the village. The appellants pleaded that in those circumstances Jageshar Singh had no right of pre-emption. They further pleaded that the suits were barred by limitation, that they themselves had acquired under-proprietary land in Malona in 1907, and that Jageshar Singh's title was no better than theirs.

The appeal raises these three points again. I do not propose to discuss the last two. I note with regard to the first point that a similar question came before a full Bench of the Allahabad High Court in 1909 and on that occasion there was a difference of opinion between the learned Judges composing the Bench. Richards and Tudball, JJ., decided that where a right to claim possession of property by pre-emption was at the date of the transfer with a person who preferred no claim, that person's heir could make a claim within the period of limitation allowed. Banerji, J., took a different view. He held that the right of pre-emption being a right of substitution, the heir of pre-emptor, not having himself a right of pre-emption at the date of the transfer, could not maintain a suit. The view taken by the majority of the Judges in that case, *Wajid Ali* v. *Shaban* (1), is to a certain extent the view taken by Wells, J. C., in *Musammat Muna Kuer* v. *Abdhut Singh* (2). This was a single Judge case and the reasons given by Mr. Wells are not detailed. It has been suggested to me by the learned Counsel for the appellants that, in view of the importance of the legal point involved, these appeals should be decided by a Bench of this Court. I think that he is right on this point. The Allahabad decision is an interesting one, and the reasons given by the dissenting Judge deserve careful consideration. The point is not easy and, although I am averse to adding to the work of the Bench by references, I think that the importance of the point involved distinctly justifies a reference in this case. As I propose to refer the case to a Bench it is advisable for me to express no opinion on any of the points involved in the appeals.

I, therefore, refer Appeals Nos. 72 and 73 of 1914 to a Bench for decision.

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JUDGMENT.—The facts of the cases, out of which these appeals arise, are given sufficiently in the order of reference. We need not repeat them. The learned Counsel for the appellants has conceded that he cannot succeed on the two latter points, that is to say, he does not now contend that the suits were barred by limitation, or that the appellants had acquired under-proprietary rights in Malona in 1907, and had as good a title as that of Jageshar Singh.

The only point for determination is thus the point which was referred, that is, whether a right of pre emption created by the Oudh Laws Act of 1876 devolves by inheritance. In the case of *Sheo Narain* v. *Hira* (3) a Full Bench of the Allahabad High Court decided, in a case where there was a right of pre-emption under the *wajib-ul-arz* which a share-holder could claim and enforce in respect of a sale of property, that a person purchasing the said share-holder's interest in the village subsequently to the sale could not claim and enforce pre-emption as his vendor might have done. This decision was with reference solely to the validity of a transfer of a right of pre-emption, and was based to a considerable extent on a consideration of the inconvenience

(1) 3 Ind. Cas. 820; 31 A. 623; 6 A. L. J. 887; 6 M. L. T. 352.

(2) 7 O. C. 158.

(3) 7 A. 535, A. W. N. (1885) 142.

to co-sharers arising from the introduction of a stranger into the co-parcenary body. The learned Judges composing the Full Bench were of opinion that it would be contrary to the fundamental principle of the right of pre-emption, whether it existed under the Muhammadan Law or under a custom, to permit a stranger to oust a person who was not a stranger at the time of sale. Thus the reasoning from which this decision resulted would not have application to the case of an heir of a pre-emptor who would not ordinarily be considered a stranger to the members of the co-parcenary body. In *Muhammad Yusuf Ali Khan* v. *Dal Kuar* (4) a Bench of that Court decided that the daughter of a Hindu mother in whose favour her mother had relinquished her interests in her late husband's property had a right to pre-emption, although the sale which she sought to set aside had occurred before the date of the relinquishment. The Bench here decided that the daughter was entitled to this right, although she had obtained her position in the village through a transfer, because she was not a stranger. In *Kaunsilla Kunwar* v. *Gopal Prasad* (5) a Bench of that Court decided that the heir of a person entitled to pre-emption inherited the right in respect of a transfer made prior to his succession. In that case, it was argued that a right of pre-emption was a purely personal right, and inasmuch as the deceased was alive at the date of the transfer and had not chosen to exercise his right of pre-emption, that right, being personal to him, became exhausted. The Bench decided against this contention, holding that a right of pre-emption is a right which is incident to or arises out of the ownership of land, and that the persons who are for the time being entitled to the land to which the right is incident may exercise the right, so long as it is not barred by limitation or by conduct or circumstances which would render it inequitable on their part to enforce the right. This decision carried the point somewhat further and suggested that a right of pre-emption passed on transfer with the ownership of land. The question came again on a reference before a Full Bench of the Allahabad High Court in *Wajid Ali* v. *Shaban* (1). The point raised in that appeal was exactly similar to the point now before us. There the property was sold on the 8th of July 1905. Bakht Ali was entitled to exercise a right of pre-emption. He did not do so. He died before the period for filing such a suit had expired, and was succeeded by his grandson, Ali Ahmad, who previous to his succession had no proprietary right in the village. The question was, whether Ali Ahmad, who had no right of pre-emption at the date of sale, but who inherited the property, by reason of the ownership of which the right of pre-emption arose, from a person who had such a right, could claim pre-emption. The case first came before a Bench, which considered that there was a conflict between the principles enunciated in *Sheo Narain* v. *Hira* (3) and those enunciated in *Kaunsilla Kunwar* v. *Gopal Prasad* (5). The determination of the appeal was accordingly referred to a Full Bench. The Full Bench consisted of three Judges. The majority decided that, where a right of pre-emption existed by custom as recorded in the village *wajib-ul-arz*, the right having once accrued did not of necessity lapse by the death of the pre-emptor before making a claim, and that in those circumstances the right descended along with the property in virtue of which it subsisted to the heir of the pre-empter, though it would not pass to a stranger to whom the property was transferred. The learned Judge, who dissented from this decision, considered that, the right of pre-emption being a right of substitution, the heir of a pre-emptor, not having himself a right of pre-emption at the date of the sale, could not maintain a suit.

We have had the advantage of hearing the question argued carefully from both points of view. We have only to decide the question with regard to inherited rights, and on that point we concur with the decision of the majority of the High Court of Allahabad in *Wajid Ali* v. *Shaban* (1). It was noted by Tudball, J., at pages 637 and 638 that a right of pre-emption based on custom is not always a right which is incident to or arises out of the ownership of land. In many cases the custom gives the right to a blood relation independently of the question as to

(4) 20 A. 148; A. W. N. (1897) 226.
(5) 28 A. 424; A. W. N (1906) 73; 3 A. L. J. 191.

whether he is a co-sharer or not. The right of pre-emption, with which we are concerned in the present case, is according to the conditions of the Act of the Legislature which has created it of the nature of a personal right, which at the same time is incident to the ownership of land. While making this distinction we accept, however, the decision of the majority. Our conclusion to that effect is supported by two decisions of the Punjab Chief Court. The conditions in the Punjab resemble closely the conditions in Oudh. Whereas the right of pre-emption in the Province of Agra is created by custom, the right in the Punjab and in Oudh is created usually by the provisions of an Act of the Legislature. In *Fateh Khan* v. *Muhammad* (6) it was decided that where a plaintiff in a pre-emption suit had died *pendente lite*, his heirs and representatives could continue the suit. In *Faqir Ali Shah* v. *Ram Kishen* (7) a Full Bench of the Punjab Chief Court decided that a right to sue for pre-emption upon a cause of action which accrued to a person in his life-time passes at his death to his successor who inherits the property through which the right has accrued. It was contended in that case that under sections 13 and 16 of the Punjab Laws Act the right to pre-emption was a personal right. The Court found that in the Punjab the right was to some extent a personal right but decided that it could be inherited. In the judgment of the Chief Judge at page 641 he lays down: "The right was no doubt a personal one in the father based on his land, but I can see no reason why such right cannot be inherited by the son. If the father had waived or otherwise disposed of his right this would no doubt be binding on the son, as the father was representing the whole estate.

"Where, however, the father has done nothing of the kind, but has simply taken no steps in the matter, there seems to me no reason why the son should not step into the shoes of his father and take the same action as the father could have done."

We consider that the words used in that decision as to the right of pre-emption in the Punjab apply equally to the right of pre-emption in Oudh, in so far as it is created by the provisions of Chapter II of Act XVIII of 1876. The right in Oudh is also a personal right in the owner incident on the ownership of the land. There is no reason why such a right should not be inherited. If the notice required by section 10 be not served on the holder, his heir is entitled to bring a suit under the provisions of section 13. This decision of ours refers only to the cases of transfers by inheritance. We have not to interpret the law with reference to transfers by a voluntary act of the owner.

For the above reasons we dismiss Appeals Nos. 72 and 73 of 1914. The appellants will pay their own costs in each appeal and those of the contesting respondent.

*Appeal dismissed.*

(6) 98 P. R. 1898.
(7) 133 P. R. 1907 p. 636; 88 P. L. R. 1908; 84 P. W. R. 1907.

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 339 OF 1913.

December 6, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

RAMANATHAN CHETTY—PLAINTIFF—APPELLANT

*versus*

YEGAPPA CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Partnership -Joint Hindu family—Manager—Member of firm—Family, if also member—Death of manager, effect of—Suit for dissolution—Limitation Act (IX of 1908), Sch. I, Art.* 106.

Where the Manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm. The partnership terminates on his death though the family continues to exist and a suit for dissolution of partnership brought more than three years after his death is barred by limitation. [p. 428, col. 1.]

*Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*, 28 M. 344, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 57 of 1912.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Messrs. *C. P. Ramaswami Aiyar* and *A. Krishnasami Aiyar*, for the Respondents.

## JUDGMENT.

COUTTS-TROTTER, J.—This was a suit for dissolution of partnership. The partnership was entered into in 1902 or 1903 between plaintiff, the 1st defendant, the 5th defendant and one Subramaniam Chetty. The sole question we have to determine is whether this suit for dissolution, which was launched on the 12th March 1912, is or is not barred by limitation, the period of limitation in such cases being three years. Various points of the time were suggested when it was said that the plaintiff's cause of action arose, but in my opinion it is sufficient to confine our attention to the year 1908 when Subramaniam Chetty died. It is clear that if, on his death, the cause of action arose, the plaintiff's suit cannot be in time. *Prima facie*, one would suppose that if a person who was a partner in a firm died, the partnership would stand dissolved. But it is contended on behalf of the appellant that the ordinary rule of law is not applicable to cases where the partner who dies is a member of an undivided Hindu family and where it is to be supposed that he enters into the partnership in his capacity as a member of the undivided family to which he belongs, with the intention of creating an interest in the partnership business for his family as a whole. One may take the case of a partner who is the managing member of his family. Then on this doctrine, the family as a whole becomes a member of the partnership firm. In that case the death of the particular individual who happened to join the partnership and take part in its affairs is quite irrelevant, because the family still subsists as an entity. It is a family partnership and, therefore, there is no alteration of the personæ composing the partnership. Such a doctrine would, of course, cause commercial inconvenience of the most extreme type. I do not think anybody would doubt that.

The question is whether it can be supported in law. Chief reliance was placed on a judgment of the Privy Council delivered by Lord Shaw reported as *Joopoody Sarayya* v. *Pulavarti Lakshmanaswamy* (1) in the middle of page 192. It appears from the report that the matter was not touched upon either in the argument of the appellant or that of the respondent. The decision of the Privy Council was one which confirmed the judgment of this Court on the facts and held that a certain partnership which was the subject of that case had been dissolved in the year 1891 and did not, as the appellant contended, subsist after that date. The main fact which appears to have carried weight with their Lordships was that in 1891, final accounts of the partnership were taken in a way in which they were never taken before and that after that date no partnership accounts of profits and losses were made up at all, and they also considered the fact that there was almost simultaneously a division of the family property which rendered it very likely that there had been at the same time a dissolution of the partnership. The particular passage in the judgment relied upon by the appellant's Counsel in support of his contention is, "different personæ had arisen in law and with these it was open to Venkanna to say whether he should be allied in partnership or not." It is said that this sentence suggests that whenever there is a partition as between the members of a joint Hindu family, *ipso facto* there is a dissolution of any partnership in which the family is interested by reason of the fact that it removes from the partnership a large number of persons and it is argued that conversely it must be held that so long as the family is not divided as long the partnership subsists. Mr. Krishnaswami Iyer, for the respondents, suggested various ways of interpreting the sentence so as to give it a different meaning from that suggested by the appellant's Counsel. I think it is quite wrong to take a sentence of the judgment and to build upon it so startling a doctrine as that of the appellant's. I do not think that there can be anything less likely to commend itself to their Lordships of the Privy Council than such a course. The matter was not necessary to be decided nor had it been argued. I do not think a casual sentence ought to be made the foundation of a whole legal doctrine. I should add that the matter so far as this Court is concerned is settled, because in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (2) Mr. Justice Subramania Iyer and

(1) 19 Ind Cas. 513; 36 M. 185; 11 A. L. J. 556; 18 C. L. J. 13; 15 Bom. L. R. 634; 14 M. L. T. 7; 17 C. W. N. 1006; (1913) M. W. N. 571; 25 M. L. J. 128 (P. C.)

(2) 28 M. 344.

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Mr. Jnstice Boddam definitely decided against this contention. I agree with their reasoning and I am not in the least prepared to say that this single sentence in the judgment of the Privy Council must be taken as impliedly overruling their considered judgment on this point. I am, therefore, of opinion that though doubtless when the manager of a joint Hindu family is a member of a trading partnership there may be many cases in which the family property may, in one way or other, be available to the creditors of the partnership, yet the family as such is not a trading partner, the partner being the person who entered into the agreement of partnership and conducted the partnership business as a partner. To my mind it is not only a misnomer but also a confusion of thought to argue that the joint family is a member of the partnership. The partner is the person who actually enters into an agreement with other persons. That being so and there being no evidence at all of any new partnership after the death of Subramaniam Chetti, because no business was done at all after the death of Subramania other than the taking of accounts, the partnership as I have already said terminated. I agree with the lower Court in holding that the suit is time-barred.

The appeal fails and is dismissed with costs.

SRINIVASA IYENGAR, J.—I agree that the appeal fails. The precise question in this case was decided in the case reported as *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (2). We are bound by that decision if I may respectfully say so and I entirely agree with the reasoning in that judgment. I do not think that an ambiguous sentence in the judgment of the Privy Council should be taken as overruling the considered judgment of this Court in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (2) which is not referred to in the case in the Privy Council. It is unnecessary to say anything more in this case, as I think we are concluded by that judgment.

*Appeal dismissed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 16 OF 1914.
EXECUTION OF DECREE APPEAL No. 26 OF 1914.
June 15, 1915.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

ACHAMBHIT LAL—CREDITOR

*versus*

CHHANGA MAL AND ANOTHER—CREDITORS AND *Chaudhri* SHAFIQUZZAMAN—JUDGMENT-DEBTOR.

*Insolvent—Sale in execution of decree before order of adjudication, effect of—Order of adjudication, effect of.*

Some creditors of a judgment-debtor applied for his adjudication as an insolvent. Subsequent to this application some property of the judgment-debtor was sold in execution of a decree for money held by another creditor. The sale-proceeds were realized by the Court executing the decree before the order of adjudication was passed, but the sale was not confirmed till sometime later:

*Held*, that the Receiver of the estate of the insolvent was not entitled to claim payment of the sale-proceeds for rateable distribution among the creditors of the insolvent. [p. 431, col. 1.]

*Held*, further, that, if the title of the insolvent to the property sold had determined by order of adjudication, it was of no consequence whether the money was paid to the creditor by set-off or was lying in Court awaiting confirmation of the sale. [p. 430, col. 2.]

Appeal against the order of the District Judge, Lucknow, dated the 10th March 1914.

Babu *Aditya Prasad*, for the Appellant.

Mr. *Zahur Ahmad*, for the Receiver.

JUDGMENT.—In this case some property was sold in execution of a decree for money obtained by Achambhit Lall against Chaudhri Shafiq-uz-zaman on the 19th December 1913. Prior to the sale some other creditors of the judgment debtor had applied for the adjudication of Chaudhri Shafiq uz zaman as an insolvent. The order of adjudication was made on the 27th January 1914. The sale proceeds were realized by the Court executing the decree before the order of adjudication was passed, but the sale was not confirmed till sometime later. The question for consideration in this appeal is whether the Receiver of the estate of Chaudhri Shafiq-uz-zaman is entitled under the circumstances to claim the payment of the sale proceeds for rateable distribution among the creditors of the insolvent.

Under the provisions relating to insolvency in the old Code of Civil Procedure, assets realized in execution of a decree prior to

the date of the order of adjudication were not liable to be seized by the Receiver, *Howatson* v. *Durrant* (1). Section 34 of Act III of 1907 reproduces that rule and prescribes the extent to which the rights of creditors under execution are restricted by the pendency of an insolvency proceeding. It lays down that where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication. The order of adjudication relates back and takes effect under section 16, clause (6), of the Act for the purpose of binding the insolvent and his creditors from the date of the presentation of the petition of insolvency, but it takes effect retrospectively only to the extent laid down in the Act. The question, therefore, is to what extent the Act permits the retrospective operation of the order to bind the right of the creditors. Section 16, clause (2), declares that on the making of an order of adjudication the whole of the property of the insolvent, excepting such particulars as are exempted from attachment and sale in execution of a decree, vests in the Court or in a Receiver appointed by it and that *thereafter*, except as provided for by the Act, no creditor is entitled during the pendency of the insolvency proceeding to any remedy against the property or person of an insolvent in respect of a debt provable under the Act, except with the leave of the Court and on such terms as it may impose. A sale effected after the order of adjudication is not, therefore, binding, *Jiwandas Jhawer, In the matter of* (2) and *Raghunath Das* v. *Sundar Das Khetri* (3). But where property has already been sold in execution of a decree before the date of the order of adjudication, the insolvent has no interest left which can vest in the Court or in the Receiver, and section 34 acordingly provides that the restriction of the rights of creditors under execution shall not extend to assets realized prior to the date of the order of adjudication. A similar protection has been extended by section 38 under certain circumstances to payments made by or to the insolvent and contracts or dealings with him for valuable consideration, provided such payment or transaction took place before the date of the order of adjudication. Sections 34 and 38 are thus in effect limitations of the general rule, contained in section 16, clause (6), of the Act, and as held in *Sri Chand* v. *Murari Lal* (4) and *Basarmal Awatmal* v. *Khemchand Daryanomal* (5) under similar circumstances, the Receiver is (not ?) entitled to seize the assets realized by sale in execution of a decree before the date of the order of adjudication.

It is not necessary for the purposes of section 34 that the assets should have reached the hands of the creditor before the adjudication was made, for if the title of the insolvent to the property sold determined by reason of the sale, and the purchase-money was paid by the purchaser in the manner required by law, it is of no consequence whether the money is paid to the execution creditor by set-off or is lying in Court awaiting the confirmation of the sale.

Under section 65 of the Code of Civil Procedure the confirmation takes effect from the date of the sale, and in the absence of any application for rateable distribution under section 73 of the Code, the money becomes the property of the execution creditor from the date of the sale, as soon as the sale is confirmed, to the extent needed to satisfy his decree. Anything realized by a Court at the instance of an execution creditor is realized by it on his behalf, and though its payment may be postponed till the sale is confirmed, neither the judgment-debtor nor the auction-purchaser, who paid it, can exercise any control over it to the prejudice of the execution creditor.

The same property cannot be sold again, because the rights of third parties are affected and the sale proceeds into which the property has been converted before the date of the

(1) 27 C. 351; 1 C. W. N. 610.
(2) 18 Ind Cas. 908; 40 C. 78.
(3) 24 Ind. Cas. 304; 13 A. L. J. 154; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 42 C. 72 (P. C.).

(4) 16 Ind. Cas. 183; 34 A. 628; 10 A. L. J. 252.
(5) 11 Ind. Cas. 433.

order of adjudication cannot be seized, because section 34 restricts the extent to which the retrospective operation shall go.

It is a principle of interpretation that a Statute should be construed so as to give a meaning to every word. If the date of the order of adjudication referred to in sections 34 and 38 be deemed to mean the date of the presentation of the petition of insolvency, sections 34 and 38 would become redundant and out of place, for, outside sections 36 and 37, there is no law under which a Receiver can claim the benefit of realizations or payments made in execution or otherwise before the application for the adjudication of insolvency was presented. It is noteworthy that section 35 allows an execution creditor the costs of his execution, where a sale is prevented, but section 34 contains no such provision, though on the view taken by the Court below the need for it was greater. The omission indicates that the assets realized in the course of execution by sale or otherwise before the date of the order of adjudication are treated by section 34 as outside the purview of the Insolvency Court.

We allow the appeals accordingly and, setting aside the orders passed by the Courts below, direct that barring any surplus sale proceeds, to which the insolvent may be entitled, the money realized by the Insolvency Court in pursuance of the said orders should be refunded. No order is made under the circumstances as to the costs.

*Appeals allowed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1949 OF 1914.

December 2, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

VEERAKUTTY KOUNDAN AND ANOTHER —DEFENDANTS NOS. 3 AND 4—APPELLANTS

*versus*

RAMASAMI ASARI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 2 AND 5—RESPONDENTS.

*Registration Act (XVI of 1908), ss 47, 50—Mortgage-deed, effect of, from what date—Suit on unregistered mortgage-deed—Attachment of mortgaged properties, after execution but before registration of mortgage-deed, effect of—Priority.*

A mortgage-deed takes effect from the date of its execution, and not from the date of its registration, under section 47 of the Registration Act. [p. 431, col. 2.]

Where, therefore, between the dates of execution and registration of a mortgage-deed another unregistered mortgage is sued upon and the mortgaged properties attached, that mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment order obtained in that suit. [p. 431, col. 2.]

Second appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 395 of 1913, preferred against that of the District Munsif of Nammakkal, in Original Suit No. 809 of 1912.

Mr. *K. S. Ganesa Aiyar*, for the Appellants.

Mr. *S. Subramania Aiyar* for Mr. *V. Balamukunda Aiyar*, for the Respondents.

JUDGMENT.—The first point argued before us is that, because the plaintiff's mortgage was registered after the 3rd defendant had instituted his suit and obtained an order of attachment against the property on which he held a prior but unregistered mortgage, the registration, though made within the time allowed by law, was invalid and section 47 of the Indian Registration Act did not apply. Section 47 of the Registration Act says "that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration," and it is absolutely definite. The result of that is that the mortgage of the plaintiff operates as from the date of the execution. It was executed before the institution of the suit by the 3rd defendant on his unregistered mortgage. That being so, the plaintiff's mortgage has priority over the mortgage of the 3rd defendant.

Then, it is contended that section 50 of the Registration Act says that though the plaintiff's mortgage may have priority over the mortgage of the 3rd defendant, it would be infructuous against him because he obtained a decree on his unregistered mortgage. But the plaintiff was not a party to that suit and it is difficult to understand how the decree would bind him.

AIJAZ HUSAIN v. MUHAMMAD SAJJAD.

Another question is raised before us and that is, because the 3rd defendant's mortgage failed, the plaintiff must pay compensation to him. Such a contention does not require any answer. The second appeal is dismissed. The 1st respondent is entitled to costs in this Court and the costs in the lower Appellate Court.

The memorandum of cross-objections is allowed with costs.

*Appeal dismissed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 72 OF 1915.

September 10, 1915.

*Present*:—Mr. Lindsay, J. C.

AIJAZ HUSAIN—PLAINTIFF—APPLICANT

*versus*

*Mirza* MUHAMMAD SAJJAD AND ANOTHER —DEFENDANTS—OPPOSITE PARTY.

*Promissory note, failure of consideration of—Endorsement of promissory note by payee after maturity, effect of.*

The payee of a promissory note, the consideration of which has failed, cannot, by endorsing it after maturity, give any rights to the endorsee as against the maker or his representatives.

Appeal against the order of the Judge, Small Cause Court, Luknow, dated the 5th March, 1915.

Syed *Ali Mohammad*, for the Applicant.

Mr. *M. N. Chak*, for the Opposite Party.

JUDGMENT.—The question in dispute in this case is with regard to the right of the plaintiff to recover a sum of Rs. 500 alleged to be due in respect of a promissory note. The facts of the case are as follows. On the 19th of September 1908, the note in question was made by one Mirza Amir Hasan, father of the defendants Nos. 1 and 2 who is now deceased and husband of defendant No. 3. The note was executed in favour of one Shahul son of Saleh Bardun, a Jew of Baghdad, and the money was expressed to be payable to Shahul or order within three months after date. The document was registered. The history of the execution of this note is as follows. It appears that Shahul contracted to sell certain mortgagee rights to Amir Hasan for a sum of Rs. 3,000. When this contract was made Amir Hasan paid Rs. 200 in cash to Shahul and executed three promissory notes for the balance. One of the notes so executed is the note now in suit. In December 1908, Shahul executed a sale-deed of these mortgagee rights in favour of Amir Hasan. It was afterwards found that these mortgagee rights were secured by documents which had been executed in Arabia but which had not been registered at Barabanki, the place in which the property mortgaged was situate. The result was that the sale-deed which was executed in favour of Amir Hasan passed nothing at all and the consequence is that the promissory notes were, as found by the lower Court, executed without any consideration. In the year 1914 Shahul got rid of these promissory notes by endorsing them to the present plaintiff. The evidence in the case goes to show that the plaintiff paid Rs. 2,000 for the notes. The principal witness in this connection is one Mehar Ali who was acting as an agent for the payee of the promissory notes and in his evidence this witness stated that after the notes had arrived at maturity he demanded payment from Amir Hasan. He was unable to obtain payment from Amir Hasan who died shortly afterwards. Mehar Ali also states that he then applied to Amir Hasan's sons for payment but they refused to pay. The result of all this is that it must be found that the notes were dishonoured and that the plaintiff, who acquired the note in suit in October 1914, cannot in any sense of the term be considered to be the "holder in due course" with reference to the definition of that expression in section 9 of the Negotiable Instruments Act. The learned Judge of the Court below held that the plaintiff was not entitled to recover this money from the legal representatives of the maker of the note in suit. It has been argued here that the plaintiff was so entitled and the learned Counsel for the applicant has relied upon the provisions of section 43 of the Negotiable Instruments Act. That section lays down that a negotiable instrument, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction; but if

any such party has transferred the instrument with or without endorsement to a holder for consideration,such holder and every subsequent holder, deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto. It is quite clear from the terms of this section, and in view of the finding that no consideration for the note in suit has passed, that the payee, Shahul, could not enforce any obligation of payment as against the maker, Amir Hasan. But it is argued that under the latter part of the section the plaintiff, who has taken the note for consideration, is entitled to recover the amount due, not only from his transferor Shahul, but from the defendants as representing a prior party thereto. The fallacy of this argument seems to me to lie in the assumption that the maker of the note, Amir Hasan, was a prior party to Shahul, the payee, who transferred the note to the plaintiff. This cannot be the case, for the maker of the note is not a prior party to the payee, for both of them became parties to the transaction simultaneously, and obviously to enforce an obligation of payment against the maker or his representatives in favour of the present plaintiff would be to enforce an obligation which, the earlier portion to the section lays down, does not exist. I fail to see how it can be said that the transferor of this promissory note could by his transfer confer any higher rights upon the plaintiff than he had himself. Section 43, in my opinion, is no authority for the proposition here contended for, namely, that the plaintiff as an endorsee of the promissory note is entitled to recover from the representatives of the maker in the circumstances mentioned. The case seems to me to be covered clearly by the provisions of section 59 which lay down that the holder of a negotiable instrument, who has acquired it after dishonour, whether by non-acceptance or non-payment with notice thereof, or after maturity, has only as against the other parties the rights thereon of his transferor. According to the provisions of section 43 in the circumstances of this case, the transferor has no rights whatever to enforce payment as against the maker of the note. The position would have been different had the plaintiff been able to make out that he was the "holder in due course" but that position is, of course, untenable having regard to the fact that the note fell due three months after the date of its execution while it was endorsed to the plaintiff more than six years after the date of its execution. The Court below has come to a right decision in this case and I dismiss this application with costs.

*Application dismissed.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 41 AND 42 OF 1913.

December 15, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar.

GOPISETTI NARAYANASWAMI NAYUDU GARU, RECEIVER OF NIDADAVOLE AND MEDUR ESTATES—PLAINTIFF—PETITIONER IN BOTH

*versus*

IN C. R. P. No. 41 OF 1913

PANNALA RAMANANDAM—DEFENDANT—RESPONDENT.

IN C. R. P. No. 42 OF 1913

PANNALA RAMANADAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), ss.* 3 (11) (*a*), 61—*Rent, meaning of*—*Madras Local Boards Act* (*V of* 1894), *s.* 73 - *Local cess, claim for*—*Interest on arrears of such cess.*

Section 3 (11) (*a*) of the Madras Estates Land Act refers only to money recoverable from a *ryot* by the land-holder and does not include the "local cess" claimable by him from an intermediate landholder under section 73 of the Madras Local Boards Act. No interest can, therefore, be claimed on the arrears of such local cess under section 61 of the Madras Estates Land Act. [p. 434, col. 2.]

Petitions under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the District Munsif of Bezwada, in Small Cause Suits Nos. 1860 and 1862 of 1912 respectively.

Mr. *P. Nagabhushanam*, for the Petitioner.

Mr. *B. Narasimha Rao* (*amicus curæ*), for the Respondents.

These petitions coming on for hearing on the 3rd November 1915 the Court made the following

ORDER.—The question is whether the plaintiff is entitled to interest on the prin-

cipal amount claimed by and decreed to him.

Under section 3, clause 11 (*a*), of the Estates Land Act rent includes for the purpose of section 61 (among other sections) "money recoverable under any enactment for the time being in force as if it was rent." Under the 1st proviso to section 73 of the Local Boards Act, a land-holder is entitled to recover from an intermediate land-holder the whole of the local cess paid in respect of the lands held by the intermediate land-holder (less certain deductions).

This is a suit to recover the amount of such a local cess and is brought by a land-holder against an intermediate land-holder. Section 61 of the Estates Land Act says: "An arrear shall bear simple interest at the rate of one half per centum per mensem from the date on which the arrear fell due," Section 60 says: "An instalment of rent not paid on the day on which it falls due, becomes on the following day an arrear of rent."

Can the sum payable by the intermediate landlord under section 73 of the Local Boards Act be called an "arrear" of rent within the meaning of that word as used in section 61 of the Estates Land Act? Is it an instalment of rent falling due on some date (section 60) so as to become an arrear on the following day? Does section 3, clause (11) (*a*), refer only to the moneys recoverable under any enactment by a land-holder from a person who enjoys land for purposes of agriculture or does it refer generally to money recoverable under any enactment by any person from any other person as if it was rent? Does section 74 of the Local Boards Act, which relates to the right of a land-holder or an intermediate land-holder to exercise in collecting cess the like powers as he possesses in collecting rent, apply to the recovery of cess from an intermediate land-holder by a land-holder? As I feel much difficulty and diffidence in coming to a conclusion on these points owing to the respondent not being represented, I requested Mr. B. Narasimha Rao, Advocate, to act as *amicus curiæ* on behalf of the respondent to argue the case and he has kindly consented to do so. The case is adjourned for one week for further arguments.

This case coming on for final hearing to-day in pursuance of the above order the Court delivered the following

JUDGMENT.—After hearing further arguments (I am much indebted to Mr. Narasimha Rao for appearing as *amicus curiæ*) and after further consideration, I have come to the conclusion that section 3 (11) (*a*) of the Estates Land Act refers only to money recoverable from a *ryot* by the land-holder.

The lower Court's decree is right and the revision petitions are dismissed.

*Petitions dismissed.*

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## MADRAS HIGH COURT

FIRST CIVIL APPEALS NOS. 167 AND 215 OF 1914.

November 16, 1915.

*Present*:—Mr Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar

IN A. S. No. 167 OF 1914

S. M. CHIDAMBARAM CHETTIAR—DEFENDANT No. 1—APPELLANT

*versus*

SUBRAMANIA AIYAR AND ANOTHER—PLAINTIFF No. 2 AND DEFENDANT No. 2—RESPONDENTS

IN A. S. No. 215 OF 1914

MARIMUTHU NADAR—PLAINTIFF No. 1—APPELLANT

*versus*

S. M. CHIDAMBARAM CHETTIAR AND OTHERS - DEFENDANTS NOS. 1 AND 2 AND PLAINTIFF No. 2—RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 317—Civil Procedure Code (Act V of 1908), s. 66—"Certified purchaser," meaning of—Suit against auction-purchaser, maintainability of—Recognition of title of real purchaser, how made effective.*

A Court auction-purchaser must be treated as the real purchaser for all purposes, and the term "certified purchaser" in section 317 of the old Code of Civil Procedure means and includes also persons claiming under such certified purchaser. [p. 435, col. 2; p. 436, cols. 1 & 2]

*Hari Govind* v. *Ramchandra*, 31 B. 61; 8 Bom. L. R. 873; *Sowcar Kamaruddeen Sahib* v. *Noor Mohamad Usman Sahib*, 28 Ind. Cas. 205; 17 M. L. T. 158; (1915) M. W. N. 204; 28 M. L. J. 251; *Durga* v. *Bhagwan Das*, 23 A. 34; A. W. N. (1900) 190; *Bishan Dial* v. *Ghaziuddin*, 23 A. 175; A W. N. (1901) 44, followed.

Per *Coutts-Trotter*, J.—A recognition by a *benamidar* of the title of the real purchaser, in order to take the case out of the disability created by section 66 of the present Code of Civil Procedure, is

effective only when it takes the form of executing a sale-deed or gift-deed or any other act recognised by law as capable of transferring the ownership and not otherwise. [p. 435, col. 2.]

Per *Srinivasa Aiyangar, J.*—Section 66 of the new Code is, in this respect, merely declaratory of the true meaning of section 317 of the old Code and not an amendment of it. [p. 436, col. 1.]

Appeals against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 49 of 1912.

IN APPEAL SUIT NO. 167 OF 1914.

Mr. *T. R. Venkatarama Sastriar*, for the Appellant.

Mr. *V. Venkatachariar*, for the Respondents.

IN APPEAL SUIT NO. 215 OF 1914.

Messrs. *R. Sadagopachariar* and *V. Venkatachariar*, for the Appellant.

Mr. *T. R. Venkatarama Sastriar*, for the Respondents.

JUDGMENT.

COUTTS-TROTTER, J.—The plaintiffs have brought this suit to have it declared that they were entitled to the suit properties and that the defendants had no right in the properties at all. The properties in question originally belonged to one Ponnusami Nadar, and they were attached on the 25th February 1904 in execution of a decree obtained against Ponnusami Nadar in the District Munsif's Court of Kumbakonam, and in March 1905 they were sold, subject to a prior mortgage for Rs. 34,000, for a sum of Rs. 85 to the predecessor-in-title of the 2nd defendant. The 1st plaintiff had purported to buy these properties by a private sale-deed from Ponnusami Nadar in December 1904. That, of course, was subsequent to the attachment. The short point taken against the plaintiff at the trial, and on its failure at the trial reiterated in this appeal, is that his suit was out of Court by reason of section 317 of the old Civil Procedure Code corrresponding to section 66 of the present Code, on the ground that the plaintiff's suit seeks to have it declared that the purchaser in the Court auction, one Ramasami Nadar, was really acting *benami* for the 1st plaintiff. The contention put forward by the defendants is that to allow such suits as the present to be brought is a direct violation of the express prohibition in the Statute. The learned Judge rejected this contention on the ground that subsequent to the Court sale, the purchaser, Ramasami Nadar, recognized the title of the 1st plaintiff. It is not suggested that his recognition took the form of executing a sale-deed or a gift-deed, or doing any other act recognized by law as capable of transferring the ownership of the properties to the 1st plaintiff It is said there is a doctrine that section 317 does not apply to cases where the alleged *benamidar* has recognized the title of the person who asserts himself to be the real owner. For that a number of decisions alleged to enunciate that principle were cited. Speaking for myself I cannot see how such a principle, if it existed, would not be a direct contradiction of the words of the Civil Procedure Code and of the Transfer of Property Act. And I think that apart from the words of the Statute this case is completely covered by the authority of this Court in *Sowcar Kamurudeen Sahib* v. *Noor Mohamad Usman Sahib* (1) and is also indistinguishable from the cases of *Durga* v. *Bhagwan Das* (2) and *Bishan Dial* v. *Ghaziuddin* (3). I agree respectfully with these decisions, and to my mind that is sufficient to decide this case. I thought at one time that the point would possibly be taken that the Code of 1882 applied to this case and in that Code, section 317, the words "certified purchaser" ought to be construed strictly and did not include the heir or any other representative of the certified purchaser. For that, to my mind it is obvious there is some little authority in the Madras High Court, although there is authority exactly to the opposite effect in Bombay in *Hari Govind* v. *Ramchandra* (4). The view of the Bombay High Court has undoubtedly been adopted by the framers of the new Code, because there specific words are inserted to make it clear that persons claiming under a certified purchaser stand on the same footing as the certified purchaser himself. When I put it directly to the learned Vakil for the plaintiff as to

(1) 23 Ind. Cas. 205; 23 M. L. J. 251; 17 M. L. T. 158; (1915) M. W. N. 204.
(2) 23 A. 34; A. W. N. (1900) 190.
(3) 23 A. 175; A. W. N. (1901) 44.
(4) 31 B. 61; 8 Bom. L. R. 873.

whether he did or did not contend that the words "certified purchaser" in section 317 must be construed with literal strictness and confined to the original purchaser at the auction sale, he said that he did not feel able to contend that it should be so construed. The learned Vakil now says that he did not abandon that contention and it will, therefore, have to be dealt with. So far as I understand, the Madras High Court in the case I have cited, *Sowcar Kamurudeen Sahib* v. *Noor Mohamad Usman Sahib* (1), treats section 66 of the new Code as purely declaratory of the true meaning of section 317 of the old Code, and as not being an amendment of it at all as regards the first part of it with which we are concerned in this case. Whether that be so or not I do not know; and I hesitate to subscribe without further consideration to a view which assigns to the Legislature the interpretative functions of the Courts. All I can say is that if in construing section 317 of the old Code I am not permitted to look at section 66 (1) of the new Code, nevertheless I agree respectfully with the decision of the Bombay High Court in the interpretation put by them upon section 317 and I disagree with the Madras decisions to the contrary. I am, therefore, of opinion that the plaintiff's suit cannot succeed because of the express prohibition in the section. All that the section does is to prohibit a suit being brought with the object of getting such transactions as these declared *benami*. It does not affect any confirmation or validation of the title either of the defendant or of anybody else and, therefore, if the plaintiff had any other remedy beyond the one he has been ill-advised enough to seek to enforce in this suit, it will be unaffected by any decision pronounced by this Court, and his rights are unimpaired. Appeal No. 167 of 1914 is allowed with costs here and in the lower Court. Appeal No. 215 of 1914 is dismissed with costs. The memorandum of objections in Appeal No. 167 of 1914 is dismissed without costs.

SRINIVASA AIYANGAR, J.—I agree. I think that section 317 of the old Code meant what the new section 66 expressly says, and I have no doubt that the new section is merely declaratory of the real meaning of the old section 317. That is the view taken in *Manji Karimbhai* v. *Hoorbai* (5). In this Court there has been a conflict of opinion on the question whether the words "certified purchaser" in section 317 do not include persons claiming title under the certified purchaser. I also entertain a considerable amount of doubt as to whether the section applicable to this case is not the section 66 of the present Civil Procedure Code. That section does not purport to take away or affect any right which the real owner had, but similar to the Limitation Acts prevents a particular person from bringing a suit against the certified purchaser on certain grounds. I am inclined to hold that it is merely a regulation of procedure, and that, to this suit, the new section 66 must be applied. But as I hold that the meaning of the old section 317 is exactly the same, so far as this question is concerned, as that of the new, it is unnecessary to say anything more about it. As pointed out by my learned brother, this view has been adopted in *Sowcar Kamurudeen Sahib* v. *Noor Mohamad Usman Sahib* (1). In that case, as in this, the purchase was made while the old Act was in force and the suit was instituted after the new Act came into force.

There was another point raised by the learned Pleader for the respondent, that the 2nd defendant had executed what he called an agreement to release, namely, Exhibit H, and he having afterwards executed an actual release, Exhibit K, the plaintiff is now bringing the suit for the declaration of his title under that release and not as the real owner under the *benami* purchase by Ramasami Nadar. That, I might say, is not the ground of claim made in the plaint. In the next place, any release executed by the 2nd defendant would not adversely affect the rights of the 1st defendant who had acquired an interest in the property from the 2nd defendant prior to the date of Exhibit K. Exhibit K is not an agreement which creates any obligation which passes along with the property and enforceable against any transferee of the property. I have not considered the question whether Exhibit K is genuine or not. I am assuming it is.

(5) 8 Ind. Cas. 752;12 Bom. L. R. 1044 at p. 1050 38 B. 342.

A third point was taken that the plaintiff was entitled to rely upon his purchase pending the attachment under which the property was sold to Ramasami Nadar. The purchase by Ramasami would supersede any title which the plaintiff might have under his private sale from Ponnusami after the attachment. Further, the plaint does not seek for any declaratory relief on that basis. After all the plaintiff's substantive rights, if he has any, would not be affected by our decision if he is in possession. The certified purchaser would not be entitled to bring any suit against the real purchaser, who is actually in possession, by virtue of his sale certificate; and if the plaintiff continues to be in possession for over the limitation period, he can certainly acquire a statutory title under the Limitation Act, in which case he need not rely on the *benami* purchase by Ramasami Nadar on his behalf.

Under these circumstances I agree in the order proposed by my learned brother.

*Appeal No.* 215 *dismissed*;
*Appeal No.* 167 *allowed.*

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## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1914.

August 26, 1915.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

HEMENDRA NATH ROY—DEFENDANT—APPELLANT

*versus*

UPENDRA NARAIN ROY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Digwari tenure—Ghat Bharra—Ghatwal, position of—Civil Court, jurisdiction of, to reinstate a* Ghatwal *dismissed—Declaratory suit, maintainability of—Specific Relief Act (I of 1877), s. 42—Arguments from analogy, when to be made—Object or motive of party—Presumption—Plaint—Relief*

A Civil Court has no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But where a Commissioner decides against a claimant not in the exercise of his discretion, but upon an erroneous view of the relative title of his contestant, a Civil Court is competent to grant to the claimant relief by way of a declaratory decree under section 42 of the Specific Relief Act, so that he may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar. [p. 445, col. 1; p. 440, col. 2; p. 442, col, 1.]

If a bill (plaint) contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief. [p. 441, col. 1; p. 445, col. 2.]

*Per Jenkins, C. J.*—At Ghat Bharra the Digwari position is that of an office remunerated by the enjoyment of land and on the death of a Digwar holding office there is a general usage to appoint his heir in his place as the successor to his office but his claim and tenure of office are dependent on the approval of the Government. [p. 440, col. 1.]

*Per Mookerjee, J.*—An argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a Statute, reasons founded upon analogy are scarcely applicable. [p. 441, col. 2; p. 442, col. 1.]

A Civil Court is not concerned with the object or motive of a party who comes into Court in assertion of his alleged right and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue Authorities, unless the declaration sought can be based only on the investigation of a question which is by Statute or otherwise expressly excluded from the cognizance of the Civil Court. [p. 445, col. 1.]

The Digwars of Ghat Bharra always enjoyed certain lands attached to it and when a person was dismissed from the office of Digwar he was forthwith deprived of the lands. When dismissed, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities:

*Held*, that under the circumstances the presumption was that there was not a grant of lands burdened with a certain service but the grant of an office the performance of whose duties was remunerated by the use of lands. [p. 443, col. 2.]

*Held*, further, that the office was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto. [p. 443, col. 2.]

Letters Patent Appeal against the judgment of N. R. Chatterjea, J., dated the 27th March 1914, differing in opinion from that of Fletcher J., printed as 23 Ind. Cas. 849, in Appeal from Original Decree No. 298 of 1911, against the decree of the Subordinate Judge of Bankura, dated the 24th March 1911.

FACTS of the case appear from the judgment of Lawrence Jenkins, C. J., as well as from the judgments of Fletcher and N. R. Chatterjea, JJ., reported as 23 Ind. Cas. 849.

Sir *Rash Behary Ghose* and Babus *Joges Chunder De*, *Jyotis Chandra Sarkar* and *Sris Chunder De*, for the Appellant.

HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY.

Babus *Dwarka Nath Chuckerbutty*, *Karunamoy Bose*, *Lalit Mohan Ghose*, *Jyotis Chunder Hazra* and *Sarat Chunder De*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—The plaintiff, Upendra Narain Roy, has brought this suit to establish his claim to lands in Ghaut Bharra in the District of Bankura as held in Digwari *chakran* right. The defendants are his rival claimant, Hemendra Nath Roy, the Secretary of State for India in Council, and the Raja of Panchakote, the *zemindar*. There are also certain *pro forma* defendants of whom some are the plaintiff's brothers, and one is Darpanarain Roy, who is admittedly one of the two Digwars of Ghaut Bharra.

The Subordinate Judge has passed a decree in the plaintiff's favour and has directed that the plaintiff do recover possession of the land in suit, and effect has been given to this direction. From this decree an appeal to the High Court was preferred. It was heard by Fletcher and N. R. Chatterjea, JJ. They were divided in opinion and so the view of Chatterjea, J., who was for confirming the decree of the Subordinate Judge, prevailed.

From this judgment the present appeal has been preferred under clause 15 of the Letters Patent by Hemendra Nath Roy, who has been supported by the Raja of Panchakote, a respondent in this appeal. No one else has appeared except the plaintiff who has supported the decree in his favour.

There are two Digwars in Ghaut Bharra. The defendant Darpanarain is one and his position is not contested. The whole dispute is as to the other Digwar. It is common ground that the office of Digwar and enjoyment of the land go together, and this combination may be due either to a grant of land burdened with the service of the office or a grant of the office remunerated by enjoyment of the land.

Whichever of these two it may be, we know that the office was held and the property enjoyed by Kartic Roy, the defendant Hemendra's father, and seven generations of ancestors before him, and it is common ground that it was so enjoyed in a regular course of succession. Kartic, however, was dismissed in 1855 and Rasik Lal Upadhya, a stranger to the family, was appointed in his place. But he in turn was dismissed on the 14th April 1856 and Raja Ram Rai was appointed to the office. In 1861 Raja Ram Rai became incapable of performing the duties of the post and his nephew and heir presumptive, Mohendra, the plaintiff's father, was appointed.

In the meantime the dismissed Kartic had rendered good service and so on the 18th of August 1869 a promise was made that when any Sardari or Sadiali post became vacant, it should be offered to him in the first instance. In 1870 Mohendra was dismissed. In 1871 Kartic was confirmed in the vacancy caused by this dismissal and it was directed that possession should be given him of the Ghatwali lands.

This dismissal, however, was cancelled by order of the Lieutenant-Governor who reinstated Mohendra in the service and on the 19th June 1872 an order was made on the Sub-Inspector of Gangajalghati directing him to continue as before to get the work done by Mohendra and give him possession of the lands. From a report dated the 14th August 1872 it appears this was done.

On the 19th July 1904 the Magistrate made an order dismissing a number of Ghatwals, including Mohendra. The following month this dismissal was cancelled and Mohendra was reinstated.

In August 1907 Mohendra preferred a petition to the Magistrate praying for six months' leave on the score of ill-health and asking that his son Upendra, the plaintiff, should be appointed in his place in an acting capacity for six months. This was approved.

On the 9th October 1907 Mohendra died and his son Upendra asked to be appointed. The order was "Upendra Rai will continue to act in place of his dead father Mohendra Narain Rai, Sardar of Bharra, until further orders."

I may here state that though Upendra has brothers, they do not dispute the superiority of his sole claim to the office.

In the meantime Kartic had died in 1908 leaving him surviving his widow Karunamayi and his son, the defendant Hemendra. Karunamayi, on Mohendra's death, applied for the appointment of her minor son Hemendra as Sardar Ghatwal of Pergana Mahisara. The Daputy Collector reported that in his opinion the application should

be rejected and "that the present acting man Upendra Nath Rai (be) appointed in place of his deceased father specially when he appears to have been doing good work all along."

On the 16th of June 1908 the Magistrate-Collector made an order in which he said he thought Upendra should be affirmed. On the 14th August 1908 Mr. Maddox, the Officiating Commissioner, set aside the Magistrate's order, and directed that Hemendra, the minor son of Kartic, be appointed (as Sardar Ghatwal, and until he came of age a deputy must be appointed) in his place. This opinion was based principally on Mr. Maddox's reading of a decision reported as *Jogendra Nath Singh* v. *Kali Charan Roy* (1).

Upendra appealed to the Board of Revenue on the 21st September 1908, but the Board resolved that it had no jurisdiction. Thereupon Upendra appealed to the Lieutenant-Governor and in reply he was informed that the remedy for any grievance which he might have lay in the Civil Court. So this suit was instituted by Upendra in accordance with the reply given him by the Government.

Whether we have here to deal with an office remunerated by the possesion of land or land burdened with the service of an office is practically immaterial in the view I take.

But such materials as there are on the record, in my opinion, support the conclusion that we have here an office remunerated by the possession of land. Most of the information we possess relates to the period subsequent to Kartic's appointment, but it does appear that one of his predecessors was dismissed. Since that time there have been the repeated instances of appointment and dismissal which I have already mentioned, and what has given them the greater significance is that the corresponding possession of the land has apparently followed as a matter of course.

The oral evidence on this point is interesting. Thus Upendra says "From 1856 up to the time of my dismissal we have held the post of Sardar Digwar and held possession of the properties appertaining to the office. No person was appointed in my father's place and our possession did not cease."

Later he deposes "when a new Sardar is appointed, he has to take possession through the Police. When I was appointed acting Sardar, I did not apply to be put in possession. The possession was then with us." And according to him, it is the Magistrate who appoints and dismisses. Darpanarain declares that he took possession through the Police on his appointment, and that when a Sardar is appointed permanently or in an officiating post, he has to take possession through the Police.

Benimadhab, the Police Sub-Inspector at Gangajalghat, says that the Magistrates dismiss for misconduct or default in the performance of their duties and that the Police give possession to the person who is appointed. Rakhal Chandra Chattopadhya deposes to this power of dismissal.

Prasanna Kumar Rai, who looks after Hemendra's affairs, declares that the Magistrate appoints and dismisses and that he had never seen any Digwar or Sardar hold possession of the lands of his office after dismissal.

This view is borne out by the documentary evidence. The earliest document is the report submitted in 1799 by Kanji, Tahsildar of Chakla Pachet, but his covering letter shows that his sources of information were limited. The report throws no appreciable light on the question now under discussion, and it is probable that the distinction it involves was not present to his mind. But for what it may be worth, we find him stating that the Digwars enjoy their *jagir* villages without payment of rent in lieu of their wages.

The order of the 23rd May 1847 is much more explicit, and the *parwana* there reproduced states that Ghatwali lands are held merely for remuneration for labours of their services and that they are not entitled to make a permanent settlement of the lands to any one by giving up their rights thereto, that they can grant only a *potta* of *jote* right for the period of their incumbency.

Another document to which reference may usefully be made is Exhibit D, an attested copy of Isamnabisi or list of Ghatwals dated in the year 1849. It is expressed to be an Isamnabisi of Ghatwals who got their allowance in cash or got *jagiri* lands therefor. It refers to the

(1) 9 C. W. N. 663.

subject-matter of the present litigation and one of the columns is headed "whether the Sardar gets pay in cash or holds *chakran* lands." In another column we find the following statement: "In the year 1221 Aditya Rai was appointed in place of Madan Rai who was dismissed. Gour Mohan Rai was appointed on the 25th Bhadra 1238 in place of his deceased father Anand Rai. Jagat Sarkar was appointed in place of his deceased brother Ananda Sarkar on the 26th Bhadra 1235."

The conclusion then to which I come is that the Digwari position was that of an office remunerated by the enjoyment of land. So the next point for determination is, whether this office was hereditary or not. No *sanad* is forthcoming, but the history of this office establishes a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. Whether the office thus became hereditary in the strict sense of the term may be open to discussion, for even in the case of life grants, it is a common practice that they should be renewed to the heir of the grantee, so that there may be by usage an appearance of descent, and it must always be a matter of some doubt at what point the principle and practice of identification can be properly regarded as establishing heritability. Here the usage of the heir taking his predecessor's place can be traced back to the 17th century and so long a usage cannot be disregarded as an exponent of the Digwari right. On the contrary, I think we may safely ascribe to it the force of law subject to the qualification that the heir's claim and tenure of office is dependent on the approval of the Government. Mr. Maddox's determination recognises this, for he clearly thought that he was passing judgment on conflicting legal claims, and it is difficult to reconcile the Government's reply with any other view. In fact when analysed the contest would seem to be whether Mr. Maddox's legal pronouncement was correct or not, for if Mr. Maddox had not decided as he did, Upendra would not have been disturbed.

The Magistrate did approve Upendra's succession on his father's death, but this, as I have shown, was cancelled by the Commissioner with the result that the Board of Revenue resolved it had no jurisdiction and Government referred to the Civil Court. When the facts of the case are grasped this attitude of the Government is free from difficulty, for the Commissioner's determination was not limited to Upendra's conduct or fitness of office, but proceeded on that Officer's view of the rival of legal claims. The Commissioner's decision is based on *Jogendra Nath Singh* v. *Kali Charan Roy* (1) but that case has absolutely no application to the circumstances of this case: it dealt with a proposition that has no relevance here and determined no point that arises here. Apart from a personal promise in favour of Kartic, Hemendra Nath's only claim would be as the heir of Kartic, but after his dismissal 60 years ago, he can no longer be regarded with reason as a stock of descent. The last incumbent was Mohendra and Upendra Nath is his heir. Still it does not appear to me that we can uphold the unconditional decree that has been passed, for that disregards the qualification that the Government's approval is necessary, and we can do no more than express our conclusion that Mohendra was the incumbent of the office at his death, having been appointed thereto in succession to Raja Ram Rai whose heir he was, that Upendra was the heir of Mohendra, that Upendra's claim to succeed is subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law.

We cannot, therefore, affirm the decree as it stands, so that we have to see whether it is open to us to pass a decree which will embody what is essential in this conclusion. The plaint is not happily framed, but in view of all the circumstances of the case, I think we can make a declaratory decree defining the plaintiff's position, though it may be it is not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Courts, they would probably be prepared to give or withhold its approval in accordance with the view we have expressed, seeing that it invited recourse to the Civil Court. For the appellant, it is objected that we cannot make a declaratory decree on a plaint framed as the present is, and we

have been referred to the decision in *Walihan* v. *Jogeshwar Narayan* (2). But that decison does not appear to me to govern the present case which is peculiar in its circumstances. The prayers in the plaint are not limited to a claim for possession but seek declaration, and though the form in which these declarations are sought do not comply strictly with the provisions of section 42 of the Specific Relief Act, the prayers, more especially in view of Order VII, rule 7, are, I think, sufficiently comprehensive to permit the decree I think should be passed.

In dealing with this matter on broad lines we shall be acting in accordance with what has been done by their Lordships of the Privy Council in more than one case, when, to use an expression employed on one occasion, it was necessary out of a wreckage of procedure to construct the material for a just decision.

The principle adopted by their Lordships in *Cockerell* v *Dickens* (3) is this: "The rule is, that if the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed, and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief." And the same position was maintained in *Durga Prosad Sureka* v. *Bhajan Lal Lohea* (4) and *Gopi Narain Khanna* v. *Bansidhar* (5).

We must, therefore, modify the decree of the lower Court by substituting for the same a declaration that according to usage on the death of a Digwar of Ghaut Bharra holding office, his heir may be appointed in his place, if the Government approve, that Mohendra Narain Rai held the office of Digwar at his death and that the plaintiff is the heir of Mohendra Narain Rai. This Court cannot give relief either by appointing him to the office he seeks or delivering him possession of the land appertaining thereto. That relief must be sought elsewhere, and possibly for this purpose the declaration may be of service.

In the circumstances of this case, each party should bear his own costs throughout.

MOOKERJEE, J.—This is an appeal by the first defendant in a suit commenced by the plaintiff-respondent for recovery of possession of land on declaration of title thereto as Digwar of Ghat Bharra in the District of Bankura. The suit was decreed by the Trial Court. Upon appeal to this Court, the Judges of the Division Bench were equally divided in opinion. Fletcher, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. N. R. Chatterjea, J., was of opinion, on the other hand, that the decree should be confirmed. Consequently, the decree of the Subordinate Judge stood confirmed under sub-section 2 of section 98 of the Code of Civil Procedure, 1908. On the present appeal, under clause 15 of the Letters Patent, the decision of the Subordinate Judge has been assailed, principally on the ground that the plaintiff cannot claim as of right to succeed to the office of Digwar and that as the Executive Government have refused to appoint him as Digwar, the Civil Court has no jurisdiction to review the order of the Executive.

It is desirable at the outset to state that no useful purpose is likely to be served by a reference to the provisions of Regulation XXIX of 1814, which are applicable to Birbhum Ghatwals; nor can any analogy be safely drawn from the decisions in *Nilmoni Singh Deo* v. *Bakranath Singh* (6) and *Jogendra Nath Singh* v. *Kali Charan Roy* (1) which are mentioned in the judgments of the Division Bench. As was observed by their Lordships of the Judicial Committee in the case of *Ramchunder Dutt* v. *Jugeshchunder Dutt* (7), the argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the

(2) 35 I. A. 38; 35 C. 189; 12 C. W. N. 227; 7 C. L. J. 44 (P. C.); 10 Bom. L. R. 9; 17 M. L. J. 226; 2 M. L. T. 509; 14 Bur. L. R. 101.

(3) 2 M. I. A. 353 at p. 389; 3 Moo. P. C. 98; 1 Mont. D. & D. 45; Morton 407; 1 Sar. P. C. J. 203; 18 E. R. 334.

(4) 31 I. A. 122; 31 C. 614; 14 M. L. J. 196; 6 Bom. L. R. 498; 8 C. W. N. 489 (P. C.).

(5) 32 I. A. 123; 27 A. 325; 9 C. W. N. 577; 2 A. L. J. 336; 2 C. L. J. 173; 7 Bom. L. R. 427; 15 M. L. J. 191 (P. C.).

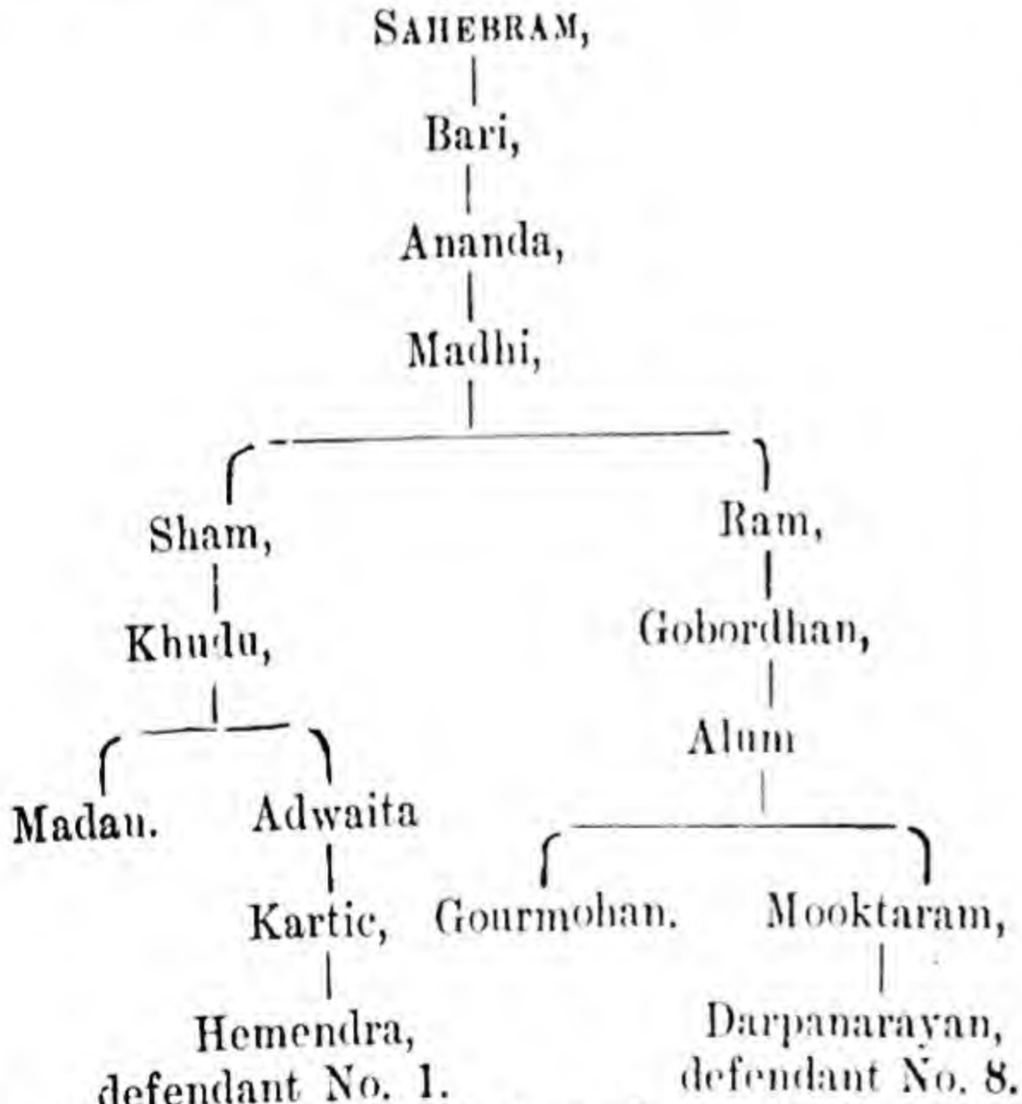
(6) 9 C. 187; 9 I. A. 104; 5 Shome L. R. 68; 4 Sar. P. C. J. 335.

(7) 12 B. L. R. (P. C.) 229; 19 W. R. 353.

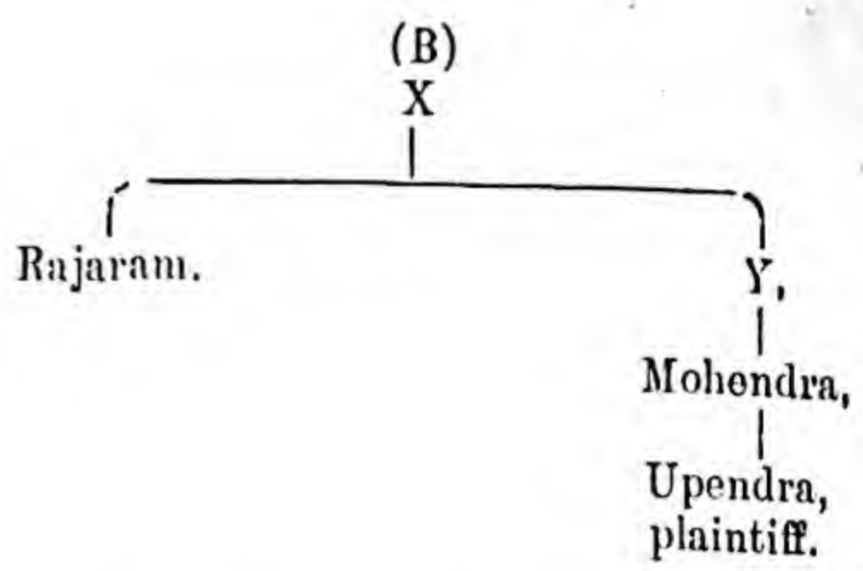
positive enactment of a Statute, reasons founded upon analogy are scarcely applicable. This observation is peculiarly weighty where the rights of the parties litigant depend in a great measure upon the nature of the particular tenure or the terms of the particular grant. The problem for investigation consequently is, what is the nature of the tenure, what are the terms of the grant in this case as indicated by its antecedent history. In the determination of this question, we must bear in mind the clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands. This fundamental distinction was emphasized by Jackson, J. in *Kooldeep Narain Singh* v. *Mahadeo Singh* (8) and has since then been recognised and approved by the Judicial Committee in *Forbes* v. *Meer Mahomed Tuquee* (9); *Lilanand Singh* v. *Munorunjun Singh* (10) and *Venkata Narasinha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (11).

In the investigation of the nature of the title, under which the lands in dispute have been held by successive occupants thereof, reference to the following genealogical tables will be found convenient:—

(A)




(B)




It is undisputed that the lands in suit were held by successive Digwars of Ghat Bharra, who were, up to the middle of nineteenth century, members of the family whereof Sahebram was the founder. The evidence indicates that Sham and Ram were Digwars in 1782. Since then, the lands have been enjoyed in equal halves by the two Digwars, one of whom came from the branch of Sham and the other from the branch of Ram. We are not concerned in this litigation with the lands enjoyed by the Digwars who belong to the latter branch; but the evidence indicates that Gourmohan was appointed Digwar in 1831 and that Darpanarayan succeeded him in 1865. When we turn to the history of the other branch, we find that Madan, who was Digwar in 1808, was dismissed in 1814 and was succeeded by Adwaita, who, in his turn, was dismissed in 1850. Kartic was appointed Digwar on the 28th March 1851 after the dismissal of his father, and was himself dismissed on the 10th May 1855, as the authorities were not satisfied with the manner in which he discharged his Police duties. On the dismissal of Kartic, a stranger to the family, named Rasik Lal Upadhya, was appointed Ghatwal, but his tenure of office was very brief, as he himself was dismissed on the 14th February 1856. On the dismissal of Rasik, Rajaram, the grand-uncle of the plaintiff, who belonged to a different family, was appointed Digwar on 14th April 1856. He was succeeded in 1861 by Mohendra, the father of the plaintiff. During the incumbency of Mohendra, Kartic, in 1869, made a successful attempt to get back the office when Mohendra was suspended. On the 13th October 1870 Mohendra and Darpanarayan were both dismissed, as their conduct was deemed unsatisfactory, and the opinion was expressed that it was improper to keep such men in Government service.

(8) 6 W. R. 199 at p. 209; B. L. R. Sup. Vol. 559.

(9) 13 M. I. A. 438; 5 B. L. R. 529; 14 W. R. (P. C.) 28; 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614.

(10) 13 B. L. R. 124 at p. 131; I. A. Sup. Vol. 181.

(11) 33 I. A. 46 at p. 52; 3 C. L. J. 1; 29 M. 52; 16 M. L. J. 1; 10 C. W. N. 161 (P. C.); 1 M. L. T. 3; 3 A. L. J. 55; 8 Bom. L. R. 1.

Kartic was re-appointed Digwar in place of Mohendra on the 11th January 1861, and one Khetternath was, at the same time, appointed in place of Darpanarayan. But, on the 30th May 1872, Mohendra and Darpanarayan were both reinstated by the Lieutenant-Governor in supersession of the order of the Commissioner who had confirmed the order of dismissal made by the Magistrate. This terminated the brief restoration of Kartic to the office which had been held by his ancestors for seven generations, but he obtained what may be described as a promise of reappointment on a future vacancy. Kartic, however, died in 1900 leaving an infant son, Hemendra, the first defendant in this litigation. On the 19th July 1904, Mohendra was dismissed again by the Magistrate along with a number of other persons similarly situated. On the 6th August 1904 this order was revoked and Mohendra and Darpanarayan were conditionally restored. The evidence points to the conclusion that they were allowed to continue in office and enjoy the lands, though the condition imposed does not appear to have been fulfilled. On the 20th August 1907 Mohendra obtained leave of absence on the ground of illness and his son Upendra was appointed to act for him; but Mohendra never returned to his work, as he died on the 9th October 1907. Upendra was thereupon directed to act until further orders. At this stage, an attempt was made by the guardian of Hemendra to secure the office and the lands for him, if possible. The Magistrate, however, on the 16th June 1908 appointed Upendra as Digwar on the strength of a report dated 27th April 1908 submitted by the Deputy Magistrate. But, on appeal to the Commissioner, the order of the Magistrate was reversed on the 11th August 1908 and Hemendra, the infant son of Kartic, was appointed Digwar. Upendra preferred an appeal to the Board of Revenue, which was dismissed on 21st September 1908. He then appealed to the Lieutenant-Governor; but on the 29th March 1909 he was informed that the remedy for any grievance which he might have, lay in the Civil Court. The result was the institution of this suit by him on the 16th August 1909.

From the facts thus briefly narrated, two points emerge as perfectly clear, namely, *first*, that the disputed lands have always been enjoyed by the Digwar of Ghat Bharra and *secondly*, that when a person has been dismissed from the office of Digwar, he has been forthwith deprived of the lands. There is, indeed, no trace in the evidence that there ever was an assertion by a dismissed Digwar that he was not liable to be deprived of the lands. As regards the dismissal itself, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities; but no one has ever suggested that if the Executive Government ultimately confirmed the order of dismissal, the Digwar had still a right to continue in possession of the lands. These circumstances, in my opinion, justify the inference that we have here, not a grant of lands burdened with a certain service, but the grant of an office, the performance of whose duties is remunerated by the use of lands. The land and the office went together; but the office was the primary concern, the occupation of the land was subsidiary thereto. I think the inference is also legitimate that we have here a case, not of property held by a man to himself and to his heirs, but of property held by a man to himself as holder of an office and his successors in that office. The office itself was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto.

The theory that the office was hereditary in character is inconsistent with incontrovertible facts disclosed in the evidence. Successive Digwars were dismissed by the Executive Government on the ground that they were not fitted to hold the office without any question or demur. In 1855 the office was granted to a stranger to the family of Kartic, and when the new Digwar was in his turn removed, a few months later, another person, Rajaram, who was a stranger to both the families, was appointed; it was then expressly stated as a point in his favour that he was not connected with Kartic. The view that the Digwar was liable to be removed for failure to discharge his duties satisfactorily and that on his removal the Executive Government was free to appoint a qualified stranger as successor, is borne out

by the documentary and oral evidence on the record.

The earliest document, namely, the report of Kanji Tahsildar, dated the 9th July 1799, though based on meagre materials, makes it reasonably clear, that the Digwars enjoyed the villages without payment of rent in lieu of their wages. Evidence of a more recent date is consistent with this position; for instance, the order on Adwaita and Gour mohan dated the 23rd May 1847 states explicitly that the Digwars held lands merely for remuneration for the labours of their services, and are consequently competent to create only such subordinate rights as do not continue beyond the period of their incumbency. The list of Ghatwals framed in 1849 makes it equally clear that the Digwars when they did not get their allowance in cash held the lands only in lieu of such allowance; and this was applicable to the Digwari now in suit. The same view is supported by subsequent reports and orders made on the occasion of dismissal of successive Digwars and the appointment of their successors, and this is confirmed by the statement of the plaintiff himself as to the nature of the tenure of the Digwari office made in an agreement between himself and his brother on the 1st April 1908. The position consequently is that the disputed lands appertain to the office of Digwar of Ghat Bharra, that the office itself is not hereditary as a matter of right, that the holder of the office is liable to be removed for failure to discharge his duties to the satisfaction of the Executive Government, that on the removal of a Digwar his successor acquires a valid title to the office only if appointed thereto by the Executive Government, and that although on two occasions strangers have been appointed to the office, during many generations the heir to the last holder has taken the office and the lands with the approval of the Executive Government. Tested in the light of these conclusions, what is the position of the plaintiff? He has not been appointed Digwar by the Executive Government, and he had not, consequently, a valid and enforcible title to that office at the time of the institution of the suit. He is plainly not entitled to a decree for possession of the lands annexed to that office, and the decree of the Subordinate Judge cannot, to this extent, be possibly confirmed. But it does not follow that the plaintiff is not entitled to any relief in the suit as framed, and here we must take into account the very special circumstances which have preceded its institution. The plaintiff, on the death of his father, was appointed Digwar by the Magistrate. But the order of the Magistrate was reversed on appeal by the Commissioner. The decision of the Commissioner was largely based on a misapplication of the judgment of this Court in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (1). That decision, it has not been seriously disputed before us by either party, has no possible application to this case. There the Court found that the particular tenure was not merely heritable but was also permanent, and that a tenure of this description could not be determined or resumed by the *zemindar* or the Government on the ground that the services were no longer necessary or had been dispensed with. It was further held that in the case of a tenure of this description where, during the life-time of the Ghatwal, his son, who was appointed his deputy, was dismissed, the dismissal of the son did not amount to a dismissal of the father, and that after the father's death, the son was entitled to succeed, although during his father's life time he had been dismissed while acting as a deputy of his father. It is obvious that these principles have no application to a case where, as here, the tenure is not heritable as of right and the lands are annexed to an office which also has not a hereditary character impressed upon it. The position then is that the Commissioner refused to approve the appointment of the plaintiff as Digwar, not because the Commissioner considered him unsuitable for the office, but because the Commissioner took an erroneous view of the relative rights of the plaintiff and his opponent, the determination of the Commissioner was in essence based upon an erroneous adjudication of a question of title. This explains why the Board of Revenue stated that the Board had no jurisdiction and why the Executive Government held that the remedy for any grievance which the plaintiff might have lay in the Civil Court. It need not be denied that, as was recognized in *Debee Narain Singh*

v. *Sree Kishen Sein* (12) and *Secretary of State* v. *Poran Singh* (13), the Civil Courts have no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But the position is obviously different where the Commissioner decides against a claimant, not in the exercise of his discretion, but upon an erroneous view of the relative title of his contestant: *Lall Dharee Roy* v. *Brojo Lall Singh* (14). I am of opinion, accordingly, that it is competent to this Court to grant to the plaintiff relief by way of a declaratory decree under section 42 of the Specific Relief Act, so that the plaintiff may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar of Ghat Bharra. A similar view has been taken in Bombay in connection with what are known as Vatans, and it has been ruled that if the plaintiff has the right and if the Court has jurisdiction to give him relief by declaring it, he is entitled to a decree; the Court is not concerned with the object or motive of the party who comes into Court in assertion of his alleged right and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue Authorities: *Ramchandra Dabholkar* v. *Anant Sat Shenvi* (15); *Govind Sitaram* v. *Bapuji Mahadeo* (16); *Khando Narain* v. *Apaji Sadashiv* (17); *Rahimkhan* v. *Dadamiya* (18); but the position is different when the declaration sought can be based only on the investigation of a question which is by Statute or otherwise expressly excluded from the cognizance of the Civil Court: *Khando Narayan* v. *Apaji Sadashiv* (19); *Chinto* v. *Lakshmibai* (20); *Balkrishna* v. *Balaji* (21); *Raoji* v. *Genu* (22); *Jiraji Sambaji Kambli* v. *Fakir Sabaji Kambli* (23). The view I take is supported by the decision of the Judicial Committee in *Salut Ali Khan* v. *Khajeh Abdool Gunney* (24), which recognised the principle that before the Court grants relief in a declaratory suit, the Court must see that the declaration of right may be the foundation of relief to be got somewhere. This conditon it appears to me is sufficiently answered in the present case. I arrive at this conclusion without hesitation or embarrassment in view of the letter of the Government of Bengal dated 29th March 1909.

The only other question for consideration is, whether a declaration should be granted in the suit as framed. Here, I think, the Court should be guided by well-settled principles now embodied in rule 7 of Order VII of the Code of 1908. The principle is best stated in the words of Lord Erskine in *Hiren* v. *Mill* (25). The rule is that if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert the specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief. This formulation of the rule, it may be parenthetically observed, is attributed *per incuriam*, to Lord Eldon, by Baron Parke, in *Cockerell* v. *Dickens* (3). In the application of this salutary rule, the test is whether the defendant will be taken by surprise [*Stevens* v. *Guppy* (26)]; and there can be no surprise if the deficient relief not specifically claimed, but supplied as the Courts think just, is consistent with the relief specifically claimed as well as with the case raised by the pleadings: *Cargill* v. *Bower* (27). This rule

(12) 1 W. R. 321.
(13) 5 C. 740.
(14) 10 W. R. 401.
(15) 8 B. 25.
(16) 18 B. 516.
(17) 11 Bom. L. R. 1342 *foot-note*.
(18) 4 Ind. Cas. 833; 11 Bom. L. R. 1339; 34 B. 101.
(19) 2 B. 370.
(20) 2 B. 375.
(21) 9 B. 25.
(22) 22 B. 344.
(23) 15 Ind. Cas. 840; 14 Bom. L. R. 395; 36 B. 420.
(24) 11 B. L. R. 203 (P. C.); 19 W. R. 171; I. A. Sup. Vol., 165.
(25) (1806) 13 Ves. 114 at p. 119; 33 E. R. 237; 9 R. R. 149.
(26) (1826) 3 Russell 171 at p. 185; 6 L. J. (N. S.) Ch. 164; 27 R. R. 59.
(27) (1878) 10 Ch. D. 502 at p. 508; 47 L. J. Ch. 649; 38 L. T. 779; 26 W. R. 716.

has been repeatedly recognised and approved by the Judicial Committee: *Cockerell* v. *Dickens* (3); *Durga Prosad Sureka* v. *Bhajan Lal* (4); *Gopi Narain Khanna* v. *Bansidhar* (5). The decision in *Walihan* v. *Jogeshwar Narayan* (2) is not really opposed to this view, and only illustrates the position that to entitle a plaintiff to judgment under the claim for general relief, different from that specifically claimed, the allegations relied upon must not only be such as to afford a ground for the relief claimed but they must have been introduced for the purpose of showing a right to relief and not for the mere purpose of corroborating the plaintiff's right to the specific relief claimed. In the case before us, the nature of the title under which the disputed property is held has been investigated after a protracted trial and there is no room for suggestion that the defendant will be taken by surprise if a declaratory decree is made in favour of the plaintiff. I hold accordingly that this is a case where a declaratory decree may properly be made, and I agree with the Chief Justice that this appeal should be allowed and the decree of the lower Court modified by the substitution of a declaration in the terms framed by him.

HOLMWOOD, J.—I have nothing to add to the judgments which have just been delivered and with which I agree.

*Appeal allowed.*

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PUNJAB CHIEF COURT.
**FULL BENCH.**
CIVIL REFERENCE No. 48 OF 1914.
January 4, 1916.

*Present*:—Mr. Justice Rattigan, Mr. Jastice Shadi Lal and Mr. Justice Leslie Jones.

FEROZ DIN AND OTHERS—PLAINTIFFS—PETITIONERS

*versus*

*Musammat* BASRI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Punjab Alienation of Land Act (XIII of 1900), s. 21 (a), object of—Declaratory decree, whether can be contrary to Act—Application by Deputy Commissioner—Procedure—Remand—Chief Court, power of.*

The intention of the Legislature in framing section 21 (*a*) of the Punjab Land Alienation Act was merely to enable the correction of decrees which on the face of the record infringe the provisions of the Act. [p. 447, col. 2.]

A decree, even though it be only declaratory, which has the effect of conferring a legal title where no such title would otherwise exist, may well be contrary to the provisions of the Act. [p. 447, col. 1.]

Where the evidence on the record is not sufficient for the disposal of an application made by a Deputy Commissioner under section 21 (*a*) of the Act, the Chief Court has power to order a remand for further inquiry. [p. 447, col. 2.]

Case referred by the Senior Subordinate Judge, Hoshiarpur, with his No. 787 of 30th November 1914.

Mr. *Broadway*, for the Petitioners.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

ORDER.—On the death of Ghulam Jilani Khan, a *Rajput* of Garhshankar in the Hoshiarpur District, his property was mutated by mutual agreement, half in the name of his widow, *Musammat* Basri, and half in the names of Feroz Din, Fazl Muhammad and Ata Muhammad, who claim to be the legitimate sons of the deceased by another lady named *Musammat* Begam, a *Natni* by caste, who is not a member of an agricultural tribe.

Objection was taken to the said mutation by certain reversioners of Ghulam Jilani Khan. They preferred an appeal to the Settlement Collector who, in a lengthy and elaborate order, held that it was not shown that Feroz Din, Fazl Muhammad and Ata Muhammad were the legitimate sons of Ghulam Jilani Khan, and, reversing the first order on that ground, directed that mutation should be made in the name of *Musammat* Basri alone.

Thereupon Feroz Din, Fazl Muhammad and Ata Muhammad instituted a suit against *Musammat* Basri in the Court of the District Judge of Hoshiarpur for a declaration that they are the sons and heirs of Ghulam Jilani Khan and entitled to hold half his estate. An application by the reversioners to be made parties to the suit was rejected and on confession of judgment by *Musammat* Basri, the plaintiffs obtained a decree. An application for the revision of that decree has now been filed by the Deputy Commissioner of Hoshiarpur under section 21 (*a*) (2) of the Alienation of Land Act, XIII

FEROZ DIN *v.* BASRI.

of 1900, as amended by Punjab Act I of 1907, on the ground that the decree of the District Judge is contrary to the provisions of that Act. The prayer is that the decree be altered so as to make it consistent with the Act, that is to say, "that the declaration be limited to granting the said three sons a half share in the said estate during the life-time of the said *Musammat* Basri," and as there is no evidence on the record that the decree-holders are illegitimate and, therefore, of the *Nat* tribe, this Court has been asked to order a remand for inquiry into the status of the decree-holders. Curiously enough the decree-holders have not been made respondents.

The case has been referred for the decision of a Full Bench on the ground that several important points of law are involved. One of them is the question whether a decree which is only a declaration of title can be held to be a decree contrary to any of the provisions of the Act; and, if that question is answered in the affirmative, a further question whether this Court must deal with the application upon the existing record or whether, if the evidence on the record is not sufficient for the disposal of the application, a remand for further inquiry should be ordered in such a case.

It appears to us that a decree, even though it be only declaratory, which has the effect of conferring a legal title where no such title would otherwise exist may very well be contrary to the provisions of the Act, and we can easily conceive of such a case; but it is at least open to question whether if the decree under consideration is contrary to the Act, the relief for which the Deputy Commissioner prays would be any more consistent with it. *Musammat* Basri is a young woman, and a decree enabling the plaintiffs to hold during her life-time might secure their possession for a great many years. It is to be remarked, moreover, that the existing decree would produce the same but no greater result. It is a decree *in personam* against *Musammat* Basri, and it will not enable the decree-holders to hold after her death if the reversioners choose to institute a suit and are able to obtain a finding favourable to themselves on the question of legitimacy.

We will, however, assume that it is still open to the Deputy Commissioner to ask for other and more appropriate relief and if the only objection to the application were the declaratory character of the decree, it is not one which would necessarily prevail.

We come now to the prayer for a remand for further inquiry. It appears to us that the intention of the Legislature in framing section 21 (*a*) was merely to enable the correction of decrees which on the face of the record infringe the provisions of the Act, *e.g.*, if a Court has granted a decree for the possession of land against a *Jat Sikh* to a person who is described in the plaint as a *Banya* of Lahore city.

It is, however, laid down in sub-section (5) of section 21 (*a*) that the provisions of the Civil Procedure Code as regards appeals shall apply, so far as may be, to the procedure of the Court in dealing with such applications, and that being so, this Court has undoubted power to order a remand where such an order is necessary.

Indeed there is certainly one class of cases in which the object of the Act might be completely frustrated unless power to order a remand is exercised. Suppose for instance, that *A* who is a money-lender and a member of a non-agricultural tribe comes into Court describing himself as a *Jat Sikh* and obtains a decree for possession of land against *B*, who is really a *Jat Sikh*, but having colluded with *A* does not expose *A*'s true character and confesses judgment.

In a case of that kind, however, the decree would have been obtained by the practice of fraud on the Court and where such fraud has been practised this Court would exercise its inherent power, even if sub-section (5) did not exist, to take any steps necessary to set aside a decree obtained by such means. If then a Deputy Commissioner were to ask for a further inquiry on an allegation of fraud, this Court would doubtless make the necessary order.

We do not propose to discuss the question whether it is possible that other combinations of facts may not arise which would justify an order of remand on some ground other than that of fraud on a Court, but we are satisfied that if there are such cases this is not one of them.

To return to the facts immediately before

us. The application of the Deputy Commissioner does not allege any fraud on the part of the decree-holders and it is clear from the very judgment of the District Judge (who was well aware of the order of the Settlement Collector as regards mutation) that no fraud was practised. The dispute between the decree holders and the reversioners as to the status of the former is one of a genuine character, and as there is no reason to suppose that the reversioners will drop the contention which they have so eagerly pressed, there is every likelihood that the question of the status of the decree holders will be fought out in a contested suit. If it is found that the decree-holders are legitimate, then there can have been no infringement of the Act, and if the contrary is found then the land will be taken by members of an agricultural tribe.

It is impossible to suppose that the Legislature ever intended that section 21 (*a*) (2) should be used for the purpose of asking this Court to adjudicate on a genuine dispute as to legitimacy, and we cannot but regard it as distinctly unfortunate that this case was ever taken up by authority. The objects of the Act are in no jeopardy and the interests involved are purely those of the reversioners, who probably think that the order of the Settlement Collector may be of more use to them in a proceeding of this kind than in a regular suit.

The application fails and is dismissed with costs.

*Application dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1399 OF 1914.

November 30, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RAMA AIYER *alias* RAMASAMI AIYER —PLAINTIFF—APPELLANT

*versus*

GOVINDA PILLAI (DIED) AND OTHERS— DEFENDANTS—RESPONDENTS.

*Abuse of process of Court—Interlocutory application in a suit, effect of—Suit for damages, maintainability of —Application for attachment before judgment, whether gives rise to damages.*

Abuse of the process of Court does not mean an improper procuring of the process of Court by the applying of the process of Court in an improper manner and for improper purposes. [p. 449, col. 2; p. 450, col. 1.]

Applications of interlocutory nature in a suit, however malicious, do not found an action for damages for abuse of process of Court. [p. 451, col. 1.]

In a suit the plaintiff applied for attachment before judgment of the defendant's goods and obtained an order though no attachment did in fact take place. The defendant brought a suit for damages:

*Held*, that the mere making of the application did not cause any damage and the suit did not lie. [p. 451, col. 2.]

*Nanjappa Chettiar* v. *Ganapathi Goundan*, 12 Ind. Cas. 507; (1911) 2 M. W. N. 414; 10 M. L. T. 365; 21 M. L. J. 1052; 35 M. 598; *Grainger* v. *Hill*, 4 Bing. (N. C.) 212; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769; *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674 at p. 687; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668; *Savez* v. *Roberts*, 1 Raym. 374; 91 E. R. 1147; *Johnson* v. *Emerson*, 6 Ex. Cas. 329; 40 L. J. Ex. 201; 25 L. T. 337; *Wiffen* v. *Bailey and Romford Urban District Council*, (1915) 1 K. B. 600; 84 L. J. K. B. 688; *Clis-old* v. *Cratchley*, (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409; *Mohini Mohan Misser* v. *Surendra Narain Singh*, 26 Ind. Cas. 296; 42 C. 550; 18 C. W. N. 1189; 21 C. L. J. 68, followed.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 893 of 1913, preferred against that of the District Munsif of Tiruvalur, in Original Suit No. 256 of 1912.

FACTS of the case appear from the judgment of Mr. Napier, J.

Mr. *T. V. Gopalaswamy Mudaliar*, for the Appellants.—It is only where an attachment has issued that there would be an injury and not where it has not.

[NAPIER, J.—In the case of an injunction it is the order itself that constitutes the process. Where the attachment is effected, the law makes it necessary that there should be a final remedy. Where attachment has not been effected, there is no injury. See *Nanjappa Chettiar* v. *Ganapathi Goundan* (1). In a suit instituted under this section, malice will have to be proved as a matter of fact, here there is an effective attachment.]

Mr. *T. V. Gopalaswami Mudaliar*.—The District Judge seems to think that where only the property is taken to Court, there is an effective attachment. The defendant says he did not say it was attached.

*Colvin* v. *Buckle* (2); *Quartz Hill Gold Mining Co.* v. *Eyre* (3).

(1) 12 Ind. Cas. 507; 35 M. 598; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. J. 1052.

(2) (1841) 8 M. & W. 680; 151 E. R. 1213; 11 L. J. Ex. 33; 58 R. R. 834.

(3) 11 Q. B. D. 674 at p. 687; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.

[SADASIVA AIYAR, J.—Legal damage has some special significance in English Law. Mere procuring an order of attachment implies legal damage.]

[NAPIER, J.—You must go to the earlier dicta of these two Judges in King's Bench case.]

Mr. *T. V. Gopalaswami Mudaliar.*—In *Nanjappa Chettiar* v. *Ganapathi Goundan* (1) Sundara Aiyar, J., says what it is meant by legal damage.

[NAPIER, J.—That is a case of trespass to goods.]

Mr. *T. V. Gopalaswami Mudaliar.*—*J.J. Doyle* v. *Dwarkanath Chatterjee* (4). In this case there is not only an attempt to attach but there is also trespass to goods. That they removed the goods, is found.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.—There is a difference between an action for malicious prosecution and interlocutory proceedings like these. Bigelow on Torts, page 185, proves out the distinction between the two. Under section 95, Civil Procedure Code, till there is any actual attachment no suit will lie.

[SADASIVA AIYAR, J.—Then there is the general section; for non-feasance, etc., an action will lie.]

In *Bishun Singh* v *A. W. N. Wyatt* (5) the decree was satisfied and without knowledge of it, an attachment issued.

In *Mohini Mohan Misser* v. *Surendra Narain Singh* (6), it was held that no suit will lie for a summary remedy for an injunction. Bigelow on Torts, page 185. In those kindred wrongs, it is the actual arrest or attachment that gives the right of suit.

[NAPIER, J.—The actual process has been misapplied. It is the perversion that gives rise to the suit ]

Mr. *G. S. Ramachandra Aiyar.*—In *Berry* v. *Adamson* (7) it was held that it was not actionable. In *Kissorimohun Roy* v. *Harsukh Das* (8), a distinction was drawn between an order of attachment made in England and in India.

[NAPIER, J.—In *Grainger* v. *Hill* (9) it is the act that gave rise to the action.]

Mr. *G. S. Ramachandra Aiyar.*—An arrest warrant was actually taken out. When the process is actually taken out, a suit for tort lies. In Pollock on Torts this very distinction is drawn. There are cases which are nearer a civil action. Those cases are cases of malicious prosecution. Where a petition is presented to wind-up a company, it gives rise to malicious prosecution. In this case, the proceedings are premature.

Mr. *T. V. Gopalaswami Mudaliar* in reply.—In *Bishan Singh* v. *A. W. N. Wyatt* (5) there are passages in my favour, so also on Bigelow on Torts.

JUDGMENT.

NAPIER, J.—This is an appeal from the judgment of the District Judge of Tanjore on appeal from the judgment of the District Munsif of Tiruvalur in a suit in which the plaintiff claimed damages from the defendant in respect of his action in applying for attachment before judgment and "coming to attach his moveables." The District Munsif gave judgment for the plaintiff, while the District Judge, holding that there was in fact no attachment, dismissed the suit on the ground that the taking out of notice gave no cause of action.

It has been argued before us that this view is incorrect and that, as the District Judge has found that there was no reasonable and proper cause for obtaining an order for attachment and that it was obtained maliciously, the plaintiff is entitled to recover damages in respect of that order. Great reliance has been placed on the decision of this Court in *Nanjappa Chettiar* v. *Ganapathi Goundan* (1). That was, however, a case where the attachment had been made and is of no assistance to us in this question. It was argued that the procuring of the order was an abuse of the process of Court and alternatively that, however it may be termed, a suit lies where the application is malicious and without reasonable or probable cause. The *first* point may be shortly disposed of. Abuse of the process of Court does not mean an improper procuring of the process of Court by the applying of the process

(4) 8 W. R. 89.

(5) 11 Ind. Cas. 729; 14 C. L. J. 515; 16 C. W. N. 540.

(6) 26 Ind. Cas. 296; 18 C. W. N. 1189; 21 C. L. J. 68; 42 C. 550.

(7) (1827) 6 B. & C. 528; 108 E. R. 546; 9 D. & R. 558; 2 Car. & P. 503; 5 L. J. (o. s.) K. B. 215.

(8) 17 C. 436 at p. 443; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472.

(9) 4 Bing. (N. C.) 212; 5 Scott, 561; 7 L. J. C. P. 85; 132 E. R. 769.

of Court in an improper manner and for improper purposes. The nature of this suit is clearly pointed out in *Grainger* v. *Hill* (9). There the defendants being desirous to possess themselves of a ship's register sued out a capias indorsed for bail in a certain sum and sent two Sheriff's officers with the writ to the plaintiff, who was lying ill in bed. The defendants accompanied the Sheriff's officers and told the plaintiff that they had not really come to take him but to get the ship's register; but that if he did not hand over the ship's register or find bail, they must take him. The plaintiff, being unable to procure bail and being much alarmed, gave up the register. The Court held that this was an abuse of the process of Court. Bosanquet, J., puts the matter thus: "This is not an action for a malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: the process was *enforced* for an ulterior purpose; to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of Court." And Tindal, C. J., says: "The complaint of the plaintiff is that the process of the law has been abused to effect an object not within the scope of the process."

The *other* point is much more difficult. But a careful examination of the judgment in *Quartz Hill Gold Mining Co.* v. *Eyre* (3) leads to the conclusion that the suit will not lie. The allegation is one of malicious civil prosecution and the circumstances under which such a suit will lie are exhaustively considered by the Court of Appeal in that case. The decision was that an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts to wind up a trading company even though no pecuniary loss or special damages be proved, for the presentation of the petition is from its very nature calculated to injure the credit of the company. Lord Justice Bowen in that case starts with this proposition that the bringing of an action, although falsely and maliciously and without reasonable or probable cause, will not support an action by the person so sued. The proposition, to my mind, dispcses of the case for reasons which will appear later. He adopts the doctrine of Holt, C. J., in *Savez* v. *Roberts* (10). There are three sorts of damages any one of which would be sufficient to support an action for malicious prosecution, damage to a man's fame, damage to a man's person and damage to a man's property, in that he is forced to expend his money in acquitting himself of the crime of which he is accused. The learned Lord Justice then goes on to point out that although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are certain legal proceedings which do necessarily and naturally involve damage and, therefore, do found an action, and he places under this head all ordinary indictments for ordinary offences. He then proceeds to consider what other proceedings necessarily involve damage and agrees with the decision in *Johnson* v. *Emerson* (11) that the false and malicious presentation without reasonable and probable cause of a bankruptcy petition against a trader gave rise to an action for malicious prosecution. He then proceeds to consider the question arising in the suit, whether a petition to wind up a Company maliciously and wrongfully brought does necessarily involve damage just as in the case of a bankruptcy petition, or does not, in which latter case, it would not justify an action for malicious prosecution. He then states that, as a petition to wind up a Company cannot be presented without being advertised in the newspapers, it necessarily follows that the petition must strike a blow at the credit of the Company and thereby necessarily involve damage and decides that the action will lie, for the reason that special damage is involved in the very institution of the proceedings. Brett, M. R., gave judgment to the same effect. This has invariably been followed and has lately been re-affirmed by the Court of Appeal. In *Wiffen* v. *Bailey and Romford Urban District Council* (12) Lord

(10) 1 Raym. 374; 91 E. R. 1147.

(11) 6 Ex. Cas. 329; 40 L. J. Ex. 201; 25 L. T. 337.

(12) (1915) 1 K. B. 600; 84 L. J. K. B. 688.

Justice Buckley says: "But, as was pointed out by Lord Justice Bowen in *Quartz Hill Gold Mining Co.* v. *Eyre* (3), it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings." And the Court held that a complaint under the Public Health Act requiring a house-holder to abate a nuisance by stripping the paper off the wall, etc., was not a proceeding necessarily and naturally involving damage, and, therefore, a suit for damages for malicious prosecution did not lie. Reliance is placed on the decision of the Court of Appeal in *Clissold* v. *Cratchley* (13). But there the Court based its judgment on the fact that the allegations supported an action for trespass in that the Sheriff's officer levied an execution on the plaintiff's goods at his farm. The case of *Quartz Hill Gold Mining Co.* v. *Eyre* (3) was never referred to and it is clear that no observation in this judgment could have been intended to throw doubt on the earlier decision. In this view of the law how will this action lie? The bringing of the original action thus gives no cause of action however malicious, *vide Mohini Mohan Misser* v. *Surendra Narain Singh* (6), where this doctrine is affirmed. An exception has been made to this broad rule in cases of bankruptcy petitions and winding-up petitions. But no case has been shown to us where the procuring of the process of Court in interlocutory proceedings has been held to found an action. And I am unable to see on what principle a man is more entitled to damages for the action of a plaintiff in a suit in applying for attachment before judgment, even though maliciously, than he is for the action of the plaintiff in bringing a suit maliciously and without reasonable and probable cause on false allegations of fact. If the original suit is protected it seems to me clear that proceedings in the suit must be protected unless they constitute abuse of the process of the Court. Further, even if there is a difference between the presenting of interlocutory applications and the bringing of a suit, I am unable to see how the making of an application necessarily and naturally involves damage. I cannot see how a man's credit naturally suffers more in the one case than in the other. The decisions as to bankruptcy and winding-up are special cases arising out of the publication of the petitions. There is no such publication in an application for attachment. I cannot but think that it would be most ill-advised to introduce the principle that applications of an interlocutory nature in a suit can found an action, however malicious. An application for discovery may result in far more damage, *i.e.*, *damnum* to a party to a suit, than the action itself, and for this reason, these applications are frequently taken to the Court of Appeal and have even resulted in settlement of the suit. But it has never been suggested that such an application, however malicious, would found an action. I would, therefore, dismiss this appeal with costs both on the ground that an interlocutory application in a suit does not of itself fonnd an action and also on the ground that damage does not necessarily and naturally flow from such an application. Appeal dismissed with costs.

SADASIVA AIYAR, J.—I agree.

*Appeal dismissed.*

(13) (1910) 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 54 S. J. 442; 26 T. L. R. 409.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 43 OF 1915.

September 16, 1915.

*Present*:—Mr. Stuart, A. J. C., and Mr. Mohammad Ali, A. J. C.

RAGHUBAR DAYAL—DECREE-HOLDER—APPELLANT

*versus*

THE BANK OF UPPER INDIA, LTD., LUCKNOW—JUDGMENT-DEBTOR—RESPONDENT.

*Companies Act (VII of 1913), s. 153—Creditors, meeting of, after Bank stopped payment—Agreement by majority of creditors to re-open and conduct Bank's business, effect of.*

At a meeting, held under the provisions of section 153 of Act VII of 1913, of the creditors of a Bank which had stopped payment, a majority in number, representing three-fourths in value of the

creditors present in person or by proxy, agreed to a scheme for its re-opening and the conduct of its business. The arrangement having been sanctioned by the High Court came into force accordingly. One of the creditors had, between the date when the creditors voted upon the proposal and the date when the High Court sanctioned the arrangement, obtained a decree in respect of his debt:

*Held*, that the agreement was binding on him and that such an agreement when sanctioned took effect from the date when it was arrived at, and not merely from the date of sanction. [p. 453, col. 2.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 3rd July 1915.

Mr. *Mumtaz Husain*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—Raghubar Dayal is a holder of certain money placed in fixed deposit in the Lucknow branch of the Bank of Upper India—a Company formed and registered under the Indian Companies Act having effect at the time of its formation. The Bank of Upper India suspended payment on the 8th October 1914, and on the 15th October 1914 a meeting of share-holders was held at Meerut—the head-quarters of the Company—which decided to apply to the Allahabad High Court for sanction to a scheme for continuing the business of the Bank. Raghubar Dayal was entitled in ordinary circumstances to withdraw his deposit in November 1914, but owing to the suspension of business by the Bank, he was unable to obtain payment of the sum standing at his credit. On the 15th December 1914 certain share-holders of the Bank propounded a formulated scheme for its re-opening and the conduct of its business. On the 17th December 1914, Raghubar Dayal gave notice in writing to the agent of the Lucknow branch to pay the amount due to him within twenty-four hours. The agent replied on the same day informing him of the existence of the proposed scheme. On the 19th December 1914, Raghubar Dayal filed a suit against the Bank in the Court of the Subordinate Judge of Mohanlalganj, Lucknow, for the recovery of the amount due to him with interest. On the 21st December 1914, an application was made to the Allahabad High Court for sanction to the proposed scheme. On the 23rd December 1914, Tudball, J, of the Allahabad High Court ordered a meeting to be held at Meerut under the provisions of section 153, Act VII of 1913, to consider and vote on the arrangement proposed. Raghubar Dayal as a holder of money in fixed deposit received notice of the holding of the meeting and was entitled to vote upon the proposal. The meeting was held on the 4th March 1915, and a majority in number representing three-fourths in value of the creditors or class of creditors concerned (of whom Raghubar Dayal was one) present in person or by proxy, agreed to the arrangement proposed. On the 19th April 1915, the Subordinate Judge of Mohanlalganj passed a decree in favour of Raghubar Dayal against the Bank of Upper India for Rs. 25,585-14-5 with interest and costs. On the 2nd June 1915, Tudball, J., sanctioned the arrangement accepted by the majority of creditors concerned, which came into force accordingly. At the end of the order he said, "it is also pointed out on behalf of the Bank that there are several suits by creditors pending in various Courts and that in some cases decrees have been obtained against the Bank and it is urged that this litigation should, if possible, be brought to a standstill. Under the scheme as sanctioned, the creditors in question who are fixed and floating depositors, will be bound by the scheme in view of the provisions of section 153 of the Indian Companies Act."

We understand Tudball, J., to mean by the words "creditors in question" creditors who had obtained decrees against the Bank.

He continued, "Fixed depositors can, in lieu of their debts, take either preference shares or debentures. Floating depositors are entitled to only 25 per cent. of their debt directly business is resumed and the balance will be available to them as laid down in the scheme. I do not think it is possible to pass any general order staying all proceedings in pending suits, but it is quite clear that such creditors as are now suing for their debts are bound by the scheme and can only claim satisfaction for what is due to them in the manner laid down in the scheme. Under the scheme it will not be possible for them to put their decrees

into execution and to recover their debts by sale of the Bank's assets. However, the matter is one which can be decided by each Court in which it arises as between the parties."

It is clearly the opinion of Tudball, J., that such a decree as that held by Raghbur Dayal cannot be executed against the Bank. The learned Subordinate Judge of Mohanlalganj, accepting the pronouncement as binding upon him, refused to execute the decree and the present appeal is against his refusal.

It is conceded by the respondent that the proncuncement of Tudball, J., is not binding upon this Court, but we see no reason to do otherwise than accept it as a correct statement of the law on the point. The appellant was a creditor within the terms of the arrangement when the arrangement was made. He is bound by the decision of the majority and is bound by the arrangement. It is true that the date on which the decree in his favour was passed fell between the 4th March 1915—the date when the creditors voted upon the proposal—and the 2nd June 1915—the date when Tudball, J., sanctioned the arrangement. But he does not, in our opinion, cease to be a creditor bound by the terms of the arrangement because he obtained a decree after it was made but before it was sanctioned. The words of the section having application are:—

"Where a compromise or arrangement is proposed between a Company and its creditors or any class of them..... the Court may, on the application in a summary way of the Company or of any creditor or member of the Compnay,.....order a meeting of the creditors or class of creditors... .....to be called, held and conducted in such manner as the Court directs.

"If a majority in number representing three-fourths in value of the creditors, or class of creditors.....present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors..."

The decree-holder was one of such class of creditors, and the agreement was thus binding on him, if sanctioned by the Court, and it became binding from the 4th March 1915. If it had been the intention of the Legislature that such an agreement should not be binding until the arrangement had been sanctioned by the Court, instead of the words "if sanctioned by the Court" the words "when it has been sanctioned by the Court" would ordinarily have been used. The agreement becomes binding from the date when it is arrived at, subject to subsequent sanction by the Court. If that sanction be refused, the agreement is without effect. But it is not the case that the agreement is to take effect from the date of sanction. It takes effect from the date when it is made. Such is our interpretation of the words of the section.

The learned Counsel for the appellant has, however, raised other points. He points out that the decretal amount consists of four items:

1. The amount due to the decree-holder on account of the sum deposited by him and the interest due up till the date fixed on which a notice of withdrawal was to be given according to the conditions under which the money was deposited.

2. Interest awarded by way of damages from that date till the date of institution of the suit.

3. Interest awarded by way of damages from the date of institution till the date of realization.

4. Costs.

He argues that, even if he be not allowed to execute his decree with respect to item No. 1, there is nothing in the terms of the agreement which prohibits his executing his decree with regard to the remaining three items. With regard to items Nos. 2 and 3 we are of opinion that as the scheme provides not only for the resumption of business on the 1st July 1915, but also for a settlement of accounts due for interest up to the 7th May 1915, the date when the decree-holder applied for execution of the decree, is governed by the arrangement which provides for the payment of interest to the 1st July 1915, and which also provides for the payment of interest after that date on the amount allotted in preference shares or debentures. We, therefore, decide against the appellant's

contention on the second and third points. With regard, however, to the claim for costs we consider that the appellant should succeed. He instituted his suit two days before the application to the Allahabad High Court was made, and we see no reason why he should be deprived of the right to execute his decree for costs as against the assets of the Bank.

We, therefore, modify the order of the lower Court by directing that the decree-holder be entitled to execute his decree for Rs. 1,046-13-5 as against the defendant. The claim was for execution of the decree to the extent of Rs. 28,283-11-3. We have only allowed execution to the extent of Rs. 1,046-13-5, that is to say a little more than 1/28th of the amount claimed. The parties will receive and pay costs in proportion to success and failure.

*Order modified.*

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 872 OF 1911.

January 3, 1916.

*Present*:—Mr. Justice Chevis and Mr. Justice LeRossignol.

INDAR NARAIN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

NANAK CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Debt—Immoral purposes—Consideration*—Onus—*Necessity—Books of account, how proved.*

If all necessary and legal debts of a person are defrayed from one known source, the presumption that all other loans were expended on immorality arises only when the debtor had no debts or business on which the loans *might* have been expended with propriety. [p. 456, col. 2.]

*Ram Nath* v. *Bulaqi Ram*, 17 Ind. Cas. 735; 50 P. R. 1913; 69 P. L. R. 1913; 15 P. W. R. 1913, referred to.

In a suit brought against the heirs of an original debtor for the recovery of moneys advanced on the security of mortgage-deeds, the onus lies on the plaintiff to establish that full consideration passed. [p. 457, col. 2.]

Where a person advances money to another on that other's assurance that the loans were required for business purposes, the person advancing the loan is not bound to see to the proper application of the money. [p. 458, col. 2.]

Where plaintiffs in a suit to recover moneys advanced on the security of mortgage-deeds attempted to prove consideration by reference to their books of account and on appeal the objection was taken that the books were not proved but it was established that the production of the books by the plaintiffs, the Trial Court had ordered a commissary to inspect and report on the books in the presence of parties and their Counsel which was done, and the defendants' Counsel after inspection furnished the commissary with a set of questions none of which suggested that the books were irregular or unreliable:

*Held*, that the books must be taken to have been adequately proved. [p. 457, col. 2.]

First appeal from the decree of the Additional District Judge at Delhi, dated the 19th April 1911, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., Mr. *Rup Narain* and Lala *Ram Kishore*, for the Appellants.

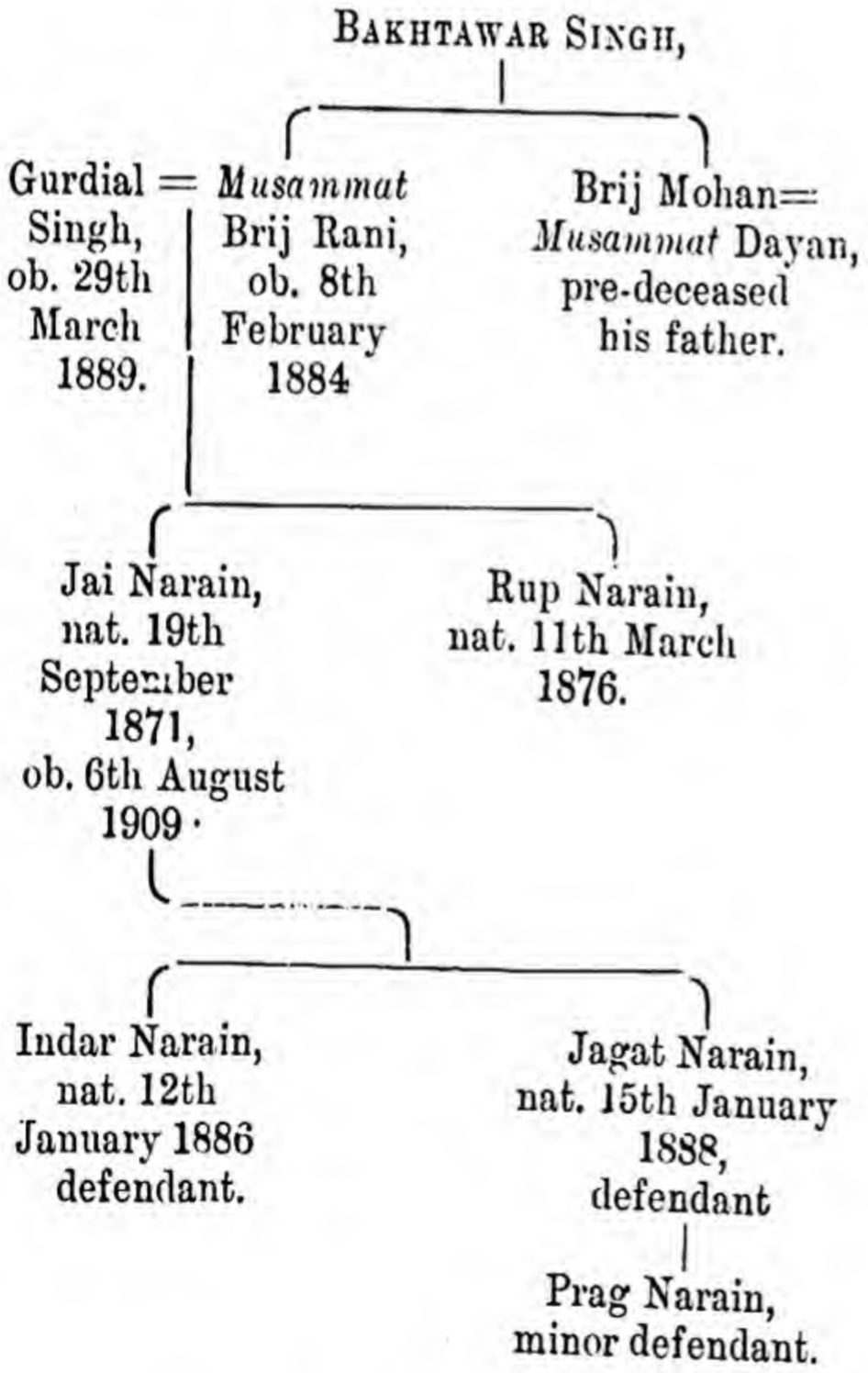
Mr. *Kirkpatrick*, Kanwar *Dalip Singh*, Mr. *Wazir Singh* and Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—This is a first appeal in a suit to recover Rs. 1,53,720 principal and interest secured on eight mortgage-deeds. The property on which the debt is secured is the same in each mortgage-deed. The mortgagor was Jai Narain who died at the age of thirty-eight in August 1909. The defendants Nos. 1 and 2 are his sons and defendant No. 3 is the son of defendant No. 1 and they are sued as surviving members of the joint Hindu family represented by Jai Narain. The pleas for the defendants are found at page 413 of the paper-book and they amount in brief to a denial that Jai Narain had power to mortgage the *katra* on which the loans obtained from the plaintiffs are secured and to an assertion that the late Jai Narain was a drunkard and addicted to debauchery into which he was led by Manak Chand, father of plaintiff No. 2, and that any consideration that may have been received by him was received for and spent on immoral objects. It was denied that full consideration had passed and in any case it was urged that the mortgages were not enforcible against the property, which by survivorship had become the sole property of the defendants.

The issues upon which the parties went to trial are printed at pages 417 and 418 of the paper-book and the findings on them of the lower Court in brief are that the

mortgages were executed and were for consideration; that the *katra*, the subject of the mortgage-deeds, was not purchased from the family funds but was the self-acquired property of Jai Narain; that Jai Narain led an irregular life but could not be called a debauchee inasmuch as he remained faithful to one woman; and that the loans for the recovery of which the plaintiffs now sue are not shown to have been taken for immoral purposes, but were taken for necessity. In accordance with its findings the lower Court decreed the plaintiffs' claim in full together with interest at 6 per cent. per annum up to the date of realization. From that decree this present appeal has been preferred to this Court.

The first point argued by Counsel was that the *katra* in dispute was not the self-acquired property of Jai Narain but was purchased by him on the security of and with the proceeds of the sales of other joint family property, and in this connection it will be well to set forth certain facts concerning Jai Narain and his family in the pedigree table which follows :




The *katra* in dispute is known as the *katra* Gurdial Singh and the first point for determination is whether it was ancestral property in the hands of Jai Narain.

It was purchased jointly by Jai Narain and Rup Narain for Rs. 69,000 in December 1898; they partitioned the *katra* later in 1905 and only Jai Narain's half is now in suit; they had partitioned their property received from Gurdial Singh and Bakhtawar Singh in April 1897.

It remains to be seen from what sources Jai Narain obtained his half share of the purchase-money.

He obtained Rs. 18,400 by the sale in August 1898 of certain shops in Lal Kua and the balance Rs. 18,000 was obtained on loan from the Alliance Bank of Simla.

The loan from the Alliance Bank was re-paid by Jai Narain by the sale of shops in Jauhari Bazar in 1900, out of the proceeds of which Rs. 10,500 were re-paid to the Bank, and the balance was re-paid out of the moneys received from plaintiff under the first mortgage-deed for Rs. 32,000, dated 17th February 1903.

Defendants contend that the Lal Kua and Jauhari Bazar properties were ancestral *qua* Jai Narain, that in any case the whole of the family property was mortgaged to the Alliance Bank in order to secure the loan wherewith a portion of the *katra* price was paid and that property acquired with the aid or on the security of ancestral property is itself ancestral property.

The plaintiffs-respondents do not deny this legal proposition, but urge that the money was advanced by the Alliance Bank as a mere loan, that there was no mortgage, further that the Lal Kua and Jauhari Bazar properties were the self-acquired or separate property of Jai Narain.

The Lal Kua property was purchased in 1878 by Jai Narain described as the adopted son of *Musammat* Bibi Dayan, widow of Brij Mohan (see pedigree table), and the vendor received the money from Gurdial Singh described as the general agent of the aforesaid *Musammat* Dayan. The ostensible vendee was at the time seven years old and whilst the plaintiffs contend that the property was a gift to him from his reputed adoptive mother, defendants assert that the funds were Gurdial Singh's and that the transaction was *benami*.

The Jauhari Bazar property was purchased in 1881 also in the name of Jai Narain when he was barely 10 years of age.

Gurdial Singh, the father of Jai Narain, was a petty official with a small salary but, suggest the defendants, with a considerable though unavowable income, and for prudential reasons he purchased the Lal Kua and Jauhari Bazar properties in his minor son's name.

In the absence of any proof that *Musammat* Dayan, the reputed but not the real adoptive mother of Jai Narain, had means to purchase this Lal Kua property—for her father in-law left her only an annual allowance of about Rs. 250 we think that the Lal Kua and Jauhari Bazar properties were purchased *benami* with Gurdial Singh's funds.

As to the mortgage on the whole family property, we hold that it was effected; Rup Narain deposes to it (page 446, line 42); it is referred to in the sale-deed of the Jauhari Bazar property and we feel perfectly sure that a Bank like the Alliance Bank of Simla would not have loaned such a large sum as Rs. 36,000 to Jai Narain and Rup Narain without collateral security.

On these grounds we hold that the half *katra* in dispute was ancestral property in the hands of Jai Narain in which the defendants, his descendants, took a share by the mere fact of their birth.

That Jai Narain led an immoral and extravagant existence we see no reason to doubt. It is proved not only by the evidence of the defendants but even by some of the plaintiffs' testimony. We are not concerned with the point whether by remaining faithful to one mistress he avoids the category of a debauchee; all that we have to determine is whether he was addicted to the expenditure of money in immoral courses and this question we answer in the affirmative: in fact it is admitted by the plaintiffs.

From this point forward, however, the parties join issue, the plaintiffs contending that the defendants must show that each particular debt and apparently each item of each debt was specifically spent on an immoral object, whilst the defendants rely upon the rule laid down in *Ram Nath* v. *Bulaqi Ram* (1), and claim that if they can show that all necessary and legal debts of Jai Narain were defrayed from another source, they are entitled to the benefit of a presumption that all other loans were expended on immorality.

The rule enunciated in *Ram Nath* v. *Bulaqi Ram* (1) is based on common sense and we see no reason why it should not be acted upon, but its application will, of course, be restricted to the cases to which it can be exactly fitted.

In the arguments before us the rule appears to have been misunderstood to mean that the inference of immorality could be drawn in cases in which *as a fact* all proper debts had been defrayed from other moneys than those in respect of which the suit is brought, whereas a careful consideration of the decision shows that the inference is to be drawn only when the debtor had no debts or business on which the loans *might* have been expended with propriety. The general rule no doubt is that some clear connection between the debt and the immorality must be established, but it does not follow that every debt of an immoral individual is an immoral debt. We hold it proved, and it is even admitted that plaintiffs were aware of the connection of Jai Narain with *Musammat* Chananni, a luxurious prostitute, that he spent money on her and drank more whisky than was good for him, that plaintiffs made no exact inquiry as to the need for the loans and were content with the debtor's assurance that they were required for business and litigation, and it remains to be seen whether their lack of caution deprives them of their right to recover their moneys from the mortgaged *katra*.

It is in evidence that Jai Narain's unavoidable living expenses were about Rs. 350 per mensem and that his income was about double that sum before the purchase of the *katra*.

That evidence we see no reason to reject, but the statements require some modifications. Jai Narain and Rup Narain separated in 1897, and immediately plunged into litigation; their suit against *Musammat*

(1) 17 Ind. Cas 735; 50 P. R. 1913; 69 P. L. R. 1913; 15 P. W. R. 1913.

Sarsuti became a *causes celebres* and went to the Privy Council.

Admittedly the brothers had heavy expenses, but defendants claim to have proved that those expenses were paid with moneys other than plaintiffs'.

When the brothers separated in 1897, they had apparently no debts although Jai Narain appears to have met Chananni and kept her since 1895 or 1896. In August 1898 he made a gift of these shops to *Musammat* Chananni whose salary is said to have been Rs. 300 per mensem *plus* considerable allowances for clothes, servants, etc. When he died in 1909 all his property had been either sold or mortgaged, but the property which came to him at partition was valued at Rs. 17,500 only. That property, however, did not include the Lal Kua and Jauhari Bazar properties. In addition to the debt claimed by plaintiff Jai Narain is said by Rup Narain (page 456) to have left other debts aggregating over Rs. 70,000.

The District Judge finds it impossible to differentiate between these debts, to decide which were properly and which improperly incurred and to establish a definite and certain connection between plaintiffs' debts and Jai Narain's immoralities and we feel bound on a consideration of the arguments and the evidence to reach a similar conclusion.

The dispute now is narrowed down to the question of consideration, which the plaintiffs attempt to prove by reference to their books of which they keep a full set.

The first contention on this point raised by the defendants-appellants is that the books are not proved. This is a pettifogging objection heard too often in this Court; the facts are that plaintiffs produced their books before the lower Court, but as the transactions to be investigated were very numerous and complicated and extended over many years, the lower Court passed an order that a commissary should inspect and report on the books in the presence of parties and their Counsel. This was done and defendants' Counsel after inspection furnished the commissary with a set of questions, which that gentleman answered by reference to the books.

Those questions dealt with details of the transactions between the parties, but not one suggested that the books were irregular or unreliable. It is quite clear that defendants accepted the books as correct records of what had taken place and we hold that they were adequately proved.

On the question of consideration, we have heard very long arguments and have been led through a maze of accounts. Although the mortgages are registered documents, it must be remembered that the defendants are not the original debtors but are setting up their title as against that of the original debtor, consequently on plaintiffs lies the onus of establishing that consideration passed. The first mortgage is dated 17th February 1903 and is for Rs. 32,000; of this Rs. 28,000 are admitted whilst the remaining Rs. 4,000 are proved by detailed entries in the plaintiffs' cash book.

We hold that full consideration passed, that Jai Narain was indebted to the Alliance Bank and other persons in heavy sums, and was also suffering serious losses in business. It is noteworthy that Rup Narain, his brother against whose character there is no suggestion of any kind, was also heavily indebted at the time, that he too had dealings with the plaintiffs, that he too executed a mortgage to plaintiffs for Rs. 28,000 on the same date and that he attested as a witness all the mortgages in suit except two which were executed during his absence from Delhi.

This last circumstance does not bind the defendants, but it is not without significance, for Rup Narain is the real defendant in this case, acting on behalf of his minor nephews.

It is quite possible, even probable, that some portion of this loan was spent on *Musammat* Chananni and on drink, but it is quite impossible for us to say what portion that was, while so far as plaintiffs knew, the whole may have been required to liquidate legitimate debts. The whole of this mortgage must stand.

The second mortgage for Rs. 11,000 is dated 3rd August 1904. It refers to pending litigation. Of this Rs. 8,000 was for the payment of *hundis* previously cashed by the debtor. Those cash payments have been traced by us in the plaintiffs' cash

book (pages 255-259 of paper-book); the balance paid in cash and by deduction of interest on the previous mortgage is attested also by the cash book entries and by the certificate of the Sub-Registrar. Though we have found that the Sub-Registrar's certificate in most of these mortgages differs in details from the cash book entries, we do not doubt that both tally in reality. Consideration for this mortgage is proved.

The third mortgage, dated 2nd May 1905, is for Rs. 21,000 of which Rs. 10,200 were due on *hundis*. The cash payment of the amounts due on the *hundis* have been proved from the plaintiffs' cash book (pages 270-272 of paper-book).

The cheques handed over to Jai Narain were cheques drawn by Rup Narain in favour of plaintiffs and as Rup Narain attested the deed and did not prove by positive evidence that he had never issued such cheques, we see no reason for disbelieving plaintiffs' books. The details of cash and currency notes are discrepant, but on page 282 the numbers of the notes are given and we hold that consideration passed in full.

The fourth mortgage dated 16th September 1905 is for Rs. 18,000 made up as follows :—

| | Rs. |
|---|---|
| 6 *Hundis* paid off ... | 13,500 |
| Cash before Registrar ... | 4,500 |

Counsel for plaintiffs admits that he cannot point to any entries in his clients' accounts which show cash payments against the *hundis* cited in the mortgage-deed. He suggests that the dates given in the deed are incorrect: the case, however, is of such a type that we must insist on reasonable proof of consideration for each *hundi* and that proof is here lacking, for plaintiffs do not produce even the cancelled *hundis*.

The fifth mortgage, dated 6th March 1906, is for Rs. 25,000. Rupees 5,000 were on account of *hundis* on plaintiffs' cash payments shown on page 277 although the dates do not tally. The receipts for Rs. 4,500 are entered on page 278, the *hundis* on third persons on page 48 and one *ruqqa* for Rs. 2,500 is accounted for at the bottom of page 278, but the *ruqqa* for Rs. 1,100 cannot be traced.

The sixth mortgage, dated 22nd October 1906, is for Rs. 9,500.

*Hundis* for Rs. 6,000 are shown on page 279. The receipt for Rs. 1,300 is accounted for on page 280.

The cash paid before the Registrar is shown as item 31 on page 283.

The cash items in the seventh and eighth mortgages also are established; the other items of importance are for interest due on the earlier mortgages. These seventh and eighth mortgages are dated respectively 9th September 1907 and 1st June 1909.

On the question of necessity we have been addressed at very great length by both Counsel; the line taken by appellants was an attempt to show that the costs of litigation and business losses had been defrayed from other sources than plaintiffs' loans.

Even had appellant been wholly successful in his attempt, that would not justify a finding in his favour for if the debts existed, the plaintiffs were not bound to see to the application of the money.

The plaintiffs' books show that their claim is made up of the following items :—

| Rs. | |
|---|---|
| 1,21,436 | Cash actually advanced. |
| 7,027 | Discount. |
| 32,666 | Interest on *hundis* after due date and on mortgages. |
| 481 | Rent. |
| Total 1,61,660 | less Rs. 17,600 re-paid. |

Balance in suit Rs. 1,44,060, *plus* interest.

As noted above the cash payments have been traced with the exception of Rs. 14,600.

Out of the first loan Rs. 28,000 appear to have been deposited in the Delhi and London Bank, some Rs. 13,000 were paid off to the Alliance Bank on account of their mortgage and large sums were paid to Counsel and others for litigation in the Chief Court. With respect to the other mortgages, the District Judge has shown that substantial sums were paid out of the consideration into the Delhi Bank and that large cheques on that Bank were issued by Jai Narain to pay Counsel and also to liquidate the losses on his unfortunate venture into business.

It must be remembered that from 1897 until almost the date of his death Jai

Narain was involved in very expensive litigation. *Musammat* Sarsuti's case dragged on from 1897 to 1909. The Probate of Izzat Narain's Will was in dispute from November 1900 to December 1901.

Another suit against Izzat Narain's son, Ram Kishen, lasted from April 1901 to June 1901.

The businsss was one in piecegoods and iron and resulted in dismal failure. What the precise figure of the losses was, is not established but it was something considerable. Mr. Roberts (page 457) states that he closed some of the accounts and Jai Narain paid the losses, but he did not see any accounts, and did not wind up the whole business, and over Rs. 7,000 are said to be still due.

The business was carried on an extensive scale, but no books are said to have been kept. This we find hard to believe, more especially as Ram Kanwar refers to a big book kept by Jai Narain which has not been produced. It is quite impossible for us to say what the business losses were.

Jagat Narain's wedding is said to have been one of the causes of Jai Narain's indebtedness. Defendants point out that the wedding took place before the date of the first mortgage, but this is no conclusive argument, for at the date of the first mortgage Jai Narain was already deeply involved.

Our conclusion is that Jai Narain led an irregular life and spent extravagantly on wine and woman; on the other hand he expended large sums in litigation, and encountered heavy losses in business; his debts immoral and moral are inextricably entangled and it is impossible for us to determine how much was moral and how much immoral.

Though the plaintifis were undoubtedly aware of Jai Narain's weaknesses, there is no sound basis for holding that they could distinguish between his proper and his improper necessities and we reject the suggestion that Manak Chand encouraged Jai Narain in vice.

In conclusion we find that plaintiffs have proved consideration for all the mortgages except Rs. 14,600; that sum they have failed to prove either by reason of mismanagement or because they are not prepared to show the exact cash payments that took place.

We accept the appeal and modify the lower Court's decree by reducing the decretal sum by Rs. 14,600 *plus* interest and compound interest as follows; on Rs. 13,500 from 16th September 1905 to date of suit with quarterly rests at 10 annas per cent. per mensem, on Rs. 1,100 from 6th March 1906 to date of suit with quarterly rests at the same rate.

The sum now decreed shall carry interest from date of this decree to date of realization at the rate of 6 per cent. per annum and the plaintiffs shall also have costs in proportion.

*Appeal accepted; Decree modified.*

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MADRAS HIGH COURT.

APPEALS NOS. 103 AND 131 OF 1914.

November 4, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

IN A. NO. 103 OF 1914

PARU AMMA AND OTHERS—DEFENDANTS NOS. 19 TO 23—APPELLANTS

*versus*

ITTICHERI AMMA AND OTHERS—PLAINTIFFS NOS. 1 TO 10 AND DEFENDANTS NOS. 1TO 18, RESPONDENTS.

IN A. NO. 131 OF 1914

NARAYANA MENON—DEFENDANT NO. 1—APPELLANT

*versus*

ITTICHERI AMMA AND OTHERS—PLAINTIFFS NOS. 1 TO 10 AND DEFENDANTS NOS. 2 TO 11 AND 13 TO 23—RESPONDENTS.

*Marumakkattayam Law—Will conferring express powers of alienation—Presumption*—Tavazhi—*Manager in possession as* kanomdar *owning equity of redemption —Discharge—Burden of proof.*

A testator in Malabar giving property to his wife and children who are governed by the Marumakkattayam Law is presumed to give it to them as a *tavazhi* to be held with the incidents of *tarwad* property, and not to the donees individually as tenants-in-common. But this presumption is based on the principle of construing the terms of a Will in the light of surrounding circumstances and must not be used for the purpose of controlling and modifying the express words of a Will. [p. 461, col. 2; 462, col. 1.]

PARU AMMA *v.* ITTICHERI AMMA.

Where, therefore, a testator governed by the Marumakkattayam Law devised to his son properties which he had obtained] exclusively for himself from his *tarwad* and gave the son absolute rights of alienation :

*Held*, that on a true construction of the Will the son took an absolute estate and the mere fact of his being the manager of the *tavazhi* did not raise a presumption that the gift was for the benefit of the *tavazhi*. [p. 462, col. 1.]

*Kunhacha Umma* v. *Kutti Mammi Hajee*, 16 M. 201; 2 M. L. J. 226; *Chakkara Kannan* v. *Varayalankandi Kunhi Pokker*, 30 Ind. Cas. 755; 18 M. L. T. 255; 29 M. L. J. 481 (F. B.); (1915) M. W. N. 740; *Naku Amma* v. *Raghavan Menon*, 18 Ind. Cas. 1; 38 M. 79; *Kalliani Amma* v. *Govinda Menon*, 12 Ind. Cas. 492; 10 M. L. T. 399; 22 M. L. J. 23; (1911) 2 M. W. N. 487; 35 M. 649; *Kozhi Thomma* v. *Narayanan Krishnan*, 22 Travancore Law Report 239; *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, 6 M. I. A. 526; 4 W. R. 114; 19 E. R. 198; 1 Ind Jur. (N. S.) 37; 1 Boulr Rep. 228; 1 Suth. P. C J. 29; 1 Sar. P. C. J. 583; *Mahomed Shumsool Hoda* v. *Shewukram*, 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; *Narasamma Hegadthi* v. *Billa Kesu Pujari*, 31 Ind. Cas. 543; 25 M. L. J. 637, distinguished.

Where the manager of a family is in possession as *kanomdar* and is himself the owner of the equity of redemption, and where he pleads that he has discharged his liability to the family by payment to two of its members, there is a heavy burden on him to prove satisfactorily that he did, as a matter of fact, make the payment. [p. 463, col. 1.]

As manager he is bound to deal with the money for the benefit of the family and to account for the application of the money. [p. 464, col. 1 ]

Appeals against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Original Suit No. 47 of 1912.

IN APPEAL No. 103 OF 1914

Messrs. *C. V. Anantha Krishna Aiyar* and *P. S. Narayanaswamy Aiyar*, for the Appellants.

IN APPEAL No. 131 OF 1914

Mr. *C. Madhavan Nair*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *N. R. Krishna Aiyar*, for the Respondents in both.

JUDGMENT.

COUTTS-TROTTER, J.—I have had the advantage of perusing the judgment which my brother is about to deliver, and as I entirely agree with it, no useful purpose would be served by my going over the same ground twice. I have considered very carefully the Full Bench decisions in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) and *Chakkara Kannan* v. *Varayalankandi Kunhi Pokker* (2) and I have come to the conclusion that the principles of construction they lay down do not compel me to treat Exhibit IV as being other than what it purports to be on the face of it, a devise of an absolute estate to the 1st defendant. Its language is to me quite inconsistent with its being intended as a *putravakasam* gift. The argument that the donee's position as manager of a *tavazhi* raises a presumption that the intention was to benefit the *tavazhi*, loses all its force from the fact that it is not contended that the gift was to the whole *tavazhi* of which he was the manager, but only to the sub-*tavazhi* constituted by the present appellants.

The other issues in the case raise questions of fact only and as we are concurring in the findings of the learned Subordinate Judge, I do not think it necessary to add anything to my brother's observations. The decree will be amended as set out in his judgment; and each party will bear their own costs throughout. The memorandum of objections is dismissed.

SRINIVASA AIYANGAR, J.—These are appeals against a decree of the Subordinate Judge of Palghat by which he declared that the 1st defendant was not the absolute owner of the suit properties, that the discharge of the *kanom* on them pleaded by him was not true or valid and that the sale by the 1st defendant in favour of the 19th defendant was not binding on the plaintiffs; he also gave the necessary consequential reliefs. Plaintiffs and defendants Nos. 1 to 6 and 8 to 12 are some of them the children others the grandchildren of the 7th defendant and they constitute a sub-*tavazhi*. Defendants Nos. 13, 14 and 16 to 18 are some of them the children and others the grandchildren of the 15th defendant, the elder sister of the 7th defendant. Plaintiffs and defendants Nos. 1 to 18 constitute a *tavazhi* or a branch which, along with two other branches, forms a main *tarwad*. The suit properties originally belonged to the *tarwad* of one Panamballi Achan, the husband of the 7th defendant and the father of the 1st plaintiff and defendants Nos. 2 to 6; he granted a *kanom* on the suit properties for a sum of Rs. 3,000 on the 12th June 1887 to the *tavazhi*, Exhibit Ia; the *kanom*-deed was, however, executed in the names of the first, second, third, fourth, fifth and the

(1) 16 M. 201; 2 M. L. J. 226.

(2) 30 Ind. Cas. 755; 29 M. L. J. 481; (1915) M. W. N. 740; 18 M. L. T. 255 (F. B.).

thirteenth defendants (the then existing male members of the *tavazhi*), who were all minors, and the 7th and 15th defendants. By that deed Panamballi Achan acknowledged receipt of Rs. 2,40) from the *tavazhi* and reserved a sum of Rs. 600 to be paid to one Krishnan Pattar, the previous mortgagee. The 1st defendant, who is the eldest male member of the family, attained majority in 1889 and from that time was in possession and management of the suit properties as *karnavan* or manager of the *tavazhi*. There was some question raised as to whether the 7th and 15th defendants were not the actual managers of the *tavazhi*, though the 1st defendant, the senior male, was the *de jure* manager. But the Exhibits B and C series conclusively show that the 1st defendant as the manager was in possession and management of the only immoveable property which the *tavazhi* possessed, namely, the *kanom* right in the suit properties under Exhibit *Ia*. It appears that in execution of a decree against the *taruad* of Panamballi Achan, some of the properties belonging to that *tarwad* were brought to sale and purchased in the year 1893 by the 1st defendant. We have held in Appeal No. 132 of 1914 heard along with these appeals that the purchase was made with funds supplied by Panamballi Achan himself and that it enured for the benefit of the sub-*tavazhi* constituted by the wife and children of Panamballi Achan and not solely to the 1st defendant personally.

There were some disputes in the family of Panamballi Achan, in consequence of which a suit was instituted against him which was finally compromised on the 19th March 1901 by which Panamballi Achan obtained the suit properties and some others as absolute owner, Exhibit 14. In paragraph 6 of that document, it is stated that Panamballi Achan shall have full rights of alienation in respect of the properties obtained by him and also that the remaining members of his family shall have no right whatsoever in them. The result of the transaction was the said Achan ceased to be the *karnavan* of his *tarwad*. It would appear that he was maintained by the 1st defendant during the time of the suit and before he obtained the above properties. On the 24th October 1901, the Achan executed a Will, Exhibit IV, by which he devised the bulk of the properties including the suit properties in favour of the 1st defendant, his eldest son. The *first* question for determination in this appeal is, whether the devise was to the 1st defendant personally or to him as the manager or representative of his sub-*tavazhi*. The Subordinate Judge has held that the devise was to the sub-*tavazhi*, but I am unable to agree with him.

The material portions of the Will are these:—"The properties described in the schedule are comprised in the properties which I obtained exclusively for myself from my *tarwad* with *absolute rights* of *alienation*. All the said properties shall on my death be taken possession of and enjoyed with *absolute rights of alienation* by Narayanan, son of myself, and Kaveri Amma; no other person shall have any right whatsoever to raise any objection or dispute regarding the said property adversely to the said Narayanan and the said Narayanan shall well and duly perform all my funeral ceremonies."

It was, no doubt, held in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) which after being questioned has been confirmed in the recent Full Bench decision of this Court in *Chakkara Kannan* v. *Kunhi Pokker* (2), that a testator in Malabar giving property to his wife and children who are governed by the Marumakkattayam Law is persumed to give it to them as a *tavazhi* to be held with the incidents of *tarwad* property, and not to the donees individually as tenants-in-common. Such gifts are known as *putravakasam* gifts. The learned Pleader for the appellant contended that that presumption was applicable only to cases where the gift or devise was to all the then existing members of the *tavazhi*. The authority of the cases in this Court reported as *Naku Amma* v. *Raghavan Menon* (3) and *Kalliani Amma* v. *Govinda Menon* (4) is against this contention and in a case reported as *Kozhi Thomma* v. *Narayanan Krishnan* (5) cited by the

(3) 18 Ind. Cas. 1; 38 M. 79.
(4) 12 Ind. Cas. 492; 35 M. 649; 10 M. L. T. 399; 22 M. L. J. 23; (1911) 2 M. W. N. 487.
(5) 22 Travancore Law Report 239.

learned Pleader for the respondent it was held that a devise to the senior male member of a *tavazhi*, that is to the natural representative of the family, was to be presumed to be a *putravakasam* gift to the *tavazhi*, and not merely to the donee individually. But this presumption which, as I understand it, is based on the principle of construing the terms of a Will in the light of the surrounding circumstances, must not be used for the purpose of controlling and modifying the express words of a Will, but can only be used for the purpose of construing it. Though the fact of the 1st defendant being the manager of the *tavazhi* may lead to a presumption that the gift was intended for the benefit of the *tavazhi* of which he was the manager, it is impossible in this case to presume that the gift was in favour of the *tavazhi* constituted by the plaintiffs and defendants Nos. 1 to 18 of which the 1st defendant was the manager; for Panamballi Achan could have had no wish to benefit the children of his wife's sister. In fact, the contention of plaintiffs is that the gift was only to the sub-*tavazhi* and not to the whole *tavazhi*. Further, absolute powers of alienation are expressly given to the first defendant and unless it was intended to give the property to him personally it would be impossible for him to exercise that power. Mr. Ramachandra Aiyar, the learned Pleader for the respondents, contended that the powers of alienation expressly given merely indicate the nature or the quantum of the interest conferred on the family, the absolute interest in the property; and the 1st defendant as manager of the family would have power to alienate the family properties for the benefit of the family. But the very limited power of alienation which the 1st defendant as manager of the sub-*tavazhi* would have is not the power which is conferred on him by the Will. The decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* (1) which is followed in the recent Full Bench case is itself based on the decisions of the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (6) and *Mahomed Shumsool Hooda* v. *Shewukram* (7), the latter of which is a case of a devise to a Hindu wife by her father-in-law, the Privy Council expressing its opinion that a gift *simpliciter* to a woman may be presumed to confer only a widow's estate as being more in accordance with the presumed wishes of the testator. Even in that case, the widow may have a limited power of alienation in the corpus of the property devised. But if an absolute power of alienation is conferred by the Will nobody has ever contended, even in the case of a devise by a Hindu husband to his wife, that the devisee did not take an absolute interest in the property but only took a widow's estate. The other terms of the Will set out above also show that the intention of the testator was to devise the property solely to the first defendant as his individual property and that the gift was not a *putravakasam* gift. That the testator was quite familiar with the distinction between a gift to an individual and to a *tavazhi* represented by that individual is also clear from Exhibit XVII, paragraph 7, a transaction brought about by the Achan himself. I, therefore, hold that the 1st defendant became the owner of the equity of redemption in the suit properties under the terms of Exhibit 4. I do not think it necessary to consider the various cases cited by the Pleaders on both sides, as they do not lay down any principle of law or rule of construction and they are of no use on the construction of the terms of this particular Will. I may, however, note that the same learned Judge came to different conclusions on the construction of two Wills couched in practically the same language [Vide *Kalliani Amma* v. *Govinda Menon* (4)and *Narasamma Hegadthi* v. *Billa Kesu Pujari* (8).]

The *next* question which arises for decision is, whether the 1st defendant has discharged the *kanom* of 1887. His case is that he paid Rs. 1,500 to each of the 7th and 15th defendants, as each of the sub-branches were entitled to a half of the *kanom* amount and he relies on Exhibit I, the deed of surrender executed by the person in whose favour the original *kanom* deed was executed. His story is, no doubt, supported by the 7th

(6) 6 M. I. A. 526; 19 E. R. 198; 4 W. R. 114; 1 Ind. Jur. (N. S.) 37; 1 Boulr. Rep. 228; 1 Suth. P. C. J. 291; 1 Sar. P. C. J. 583.

(7) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226.

(8) 31 Ind. Cas. 543; 25 M. L. J. 637.

defendant who says that she received Rs. 1,500 from her son, the 1st defendant, but I agree with the Subordinate Judge that the story of payment is not true. The 1st defendant who as the *karnaran* or manager of the family was in possession of the suit properties as *kanomdar*, was himself the owner of the equity of redemption and when he pleads that he has discharged his liability to the family by payment to two of its members there is a heavy burden on him to prove satisfactorily that he did, as a matter of fact, make the payment. He says that he paid Krishnam Pattar from his own earnings the sum of Rs. 600 to be paid under Exhibit II*a*. That is how he accounted for his possession and management of the suit properties when he tried to make out that the 7th and 15th defendants were in *de facto* management of the properties of the *tavazhi*. I have no doubt that this story was invented by the 1st defendant for the purpose of showing that, at the time of the Will, Exhibit 4, he was not the actual representative of the family and also for the purpose of pleading that the alleged payment by him of the *kanom* amount to the 7th and 15th defendants was a good discharge in law of his liability. This, of course, is not true. If, however, his story, namely, that he paid Rs. 600 out of his own earnings to redeem the previous mortgagee be true, the *kanom* amount due to the family would be only Rs. 2,400 and not Rs. 3,000, and he would not have paid Rs. 1,500 each to the 7th and 15th defendants. His evidence suggests that he paid Rs. 1,500 to his mother at home and Rs. 1,500 at the Registrar's Office to the 15th defendant. The endorsement of the Registrar contradicts this story and shows that a sum of Rs. 1,500 was tendered for payment to the 7th and 15th defendants. It is further difficult to understand why he did not pay the whole sum before the Registrar. It is impossible again to understand why he split the sum into Rs. 1,500 each, though as admitted by the 7th defendant, there was no division between her branch and that of the 15th defendant. He is unable to account for his possession of Rs. 1,500, the sum alleged to have been paid to his mother and his story that he borrowed from the 19th defendant Rs. 1,500 (to make up the Rs. 3,000), is not supported by any reliable evidence. The Subordinate Judge has disbelieved that story and I agree with him. The 15th defendant has not gone to the box to depose to her having received the sum of Rs. 1,500 while the 7th defendant has not chosen to say as to what she did with the Rs. 1,500, which she is alleged to have received. Mr. Ramachandra Aiyar suggested that this *kanom* of Rs. 3,000 though said to belong to the *tavazhi* of the plaintiffs and defendants Nos. 1 to 18 was really a gift made by the Achan to his wife and children under the guise of a loan similar to gifts having been made by the 15th defendant's husband to her and her children. It appears from the evidence of P. W. No. 3 that the only properties which the *tavazhi* possessed was this *kanom* of Rs. 3,000 and two other sums of Rs. 1,200 and Rs. 1,000 due by the Manayil people and Ayyatturai Pattar, the *sambandakkar* of the 15th defendant. He also made the following statement which is significant: "I cannot boldly say that the rent of the *kanom* of Panamballi people was not enjoyed by the 7th defendant and the income of the other two by the 15th defendants." This statement was made in the cross-examination of the witness by the 1st defendant and one cannot help thinking that the suggestion of Mr. Ramachandra Aiyar is probably right, though it is not possible to act on it as if it was a fact proved by evidence in the case. But it is impossible to avoid the suspicion that the 1st defendant made no payment whatsoever either to the 7th or the 15th defendant of the *kanom* amount of Rs. 3,000, but that he has induced his mother (who and her children alone were interested in this amount) to admit a discharge, while the 15th defendant and her children were not in fact affected by this pretended payment. This makes it unnecessary to discuss the further question, namely, whether the 1st defendant could in law relieve himself of his liability by payment to the 7th and 15th defendants as alleged by him. The only person who ordinarily could give a discharge was the *de jure* manager of the family, who in the case happened to be the 1st defendant himself. He could have discharged himself of his liability by investing the money in some security on behalf of the family or by payment to all the members of the family. He is, I think, not entitled to pay to two of the members of the

family, constituting them managers for the mere purpose of receiving the money and giving him a discharge. At any rate he being the person who as manager was entitled, in fact was bound, to deal with the money for the benefit of the family, he is, I think, bound to account for the application of the money. It is, however, unnecessary to express a final opinion on this point. But it is to be observed that the receipt of this Rs. 3,000 is acknowledged by all the persons in whose name the original *kanom* stood and if I had arrived at the conclusion that the 1st defendant had really and *bona fide* made the payment, I would have held that that was a valid discharge of his liability as that would be a payment to the persons who represented the family in the particular transaction.

The only *remaining* question is as to the right of the 19th to 23rd defendants, who claim to have purchased the suit properties from the 1st defendant under Exhibit 28, dated the 17th February 1911. Their case is that they purchased the suit properties for a sum of Rs. 6,500 from the 1st defendant free from all claims of the *tavazhi* as *kanomdars* under Exhibit I*a*; inasmuch as the 1st defendant was the owner of the equity of redemption under Exhibit 4 and as they *bona fide* paid full value believing the representations made that the *kanom* in favour of the family had been discharged, they were entitled to hold the properties against the plaintiffs. As regards their title to the equity of redemption, as I have found that the 1st defendant was absolute owner, they are entitled to it whether they paid consideration for it or not, that being a matter in which the plaintiffs have no concern. As regards their right to hold the property free of the claim of the *tavazhi*, I hold they have not proved that they had no notice of the subsisting claim of the family. I have disbelieved the story of the loan of Rs. 1,500 by the 19th defendant to the 1st defendant which is said to have formed part of the price. If the 19th defendant did not give the loan of Rs. 1,500, she or her agent must have been a party to this pretended discharge and could not possibly have believed that the right of the family came to an end. It is unnecessary to discuss the question whether the balance of the price of Rs. 5,000 was paid to the 1st defendant or not.

I, therefore, hold that defendants Nos. 19 to 23 are bound to surrender the suit properties to 1st defendant on behalf of the *tavazhi* of the plaintiffs and defendants Nos. 1 to 18 as mortgagees entitled to hold possession till redeemed. Mr. Anantha-krishna Iyer, on behalf of the defendants Nos. 19 to 23, offered to pay the mortgage-money if we came to the conclusion that the mortgage was still subsisting under the circumstances and to avoid multiplicity of suits. I think our order should be that defendants Nos. 19 to 23 should deposit the sum of Rs. 3,000 and the value of the improvements, if any, to which *kanomdars* may be entitled, within a time to be fixed after the ascertainment of the amount due to the *kanomdars*, the money so paid to be invested in immoveable property by the 1st defendant under the directions of the Court for the benefit of the *tavazhi*; in which case the plaintiffs' suit will be dismissed.

If the defendants Nos. 19 to 23 do not pay the amount ascertained to be due within the time fixed, the *tavazhi* of the plaintiffs and defendants Nos. 1 to 18 as mortgagees may recover possession of the suit properties from the defendants Nos. 19 to 23.

Under the circumstances each party must bear their costs in this and in the lower Court. The case will go back to the Court of the Subordinate Judge at Palghat to ascertain the amount of improvements, if any, and pass a final decree fixing the time of payment. Parties will be at liberty to adduce fresh evidence as to the improvements if any.

The memorandum of objections is dismissed.

*Appeal partly allowed;*
*Decree modified.*

MOHAMMAD HADI v. MOHAMMAD TAKI.

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 120 OF 1913.

September 16, 1915.

*Present*—Mr. Stuart, A. J. C., and Mr. Mohammad Ali, A. J. C.

*Saiyed* MOHAMMAD HADI—PLAINTIFF—APPELLANT

*versus*

*Saiyed* MOHAMMAD TAKI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Award—Award not filed in Court, effect of—Deed of conveyance not executed to give effect to terms of award, effect of—Title of persons under such award, if can be impugned.*

The title of persons entitled to a property under an award of arbitrators cannot be impugned because the award has not been filed in Court or because no deed of conveyance has been executed to give effect to its terms. [p. 467, col. 2.]

Appeal against the decree of the District Judge, Rae Bareli, dated the 20th January 1913, reversing that of the Subordinate Judge, Rae Bareli, dated the 23rd November, 1912.

Mr. *Zahur Ahmad*, for the Appellant.

Messrs. *M. Wasim* and *Ali Mohammad*, for Respondent No. 1.

JUDGMENT.

This appeal has been referred for decision to a Bench. The facts are as follows:—

Half of a certain grove is in the cultivatory possession of one Husain Abbas. Saiyed Mohammad Hadi, claiming that this share was his own by a right of purchase, sued to dispossess Husain Abbas and Mohib Haidar who (he asserted) were trespassers in possession of this half share. Husain Abbas defended the suit, and set up that the half share in question belonged to Saiyed Mohammad Taki, brother of Saiyed Mohammad Hadi, and that he was a tenant of the half share on behalf of Saiyed Mohammad Taki. Saiyed Mohammad Taki was made a party to the suit. He supported the assertions of Husain Abbas and stated that the half share in the grove in question had been the property of Saiyed Mohammad Mohsin Husain, father of Mohammad Hadi and himself, that it with other property was partitioned between the brother and himself, and that this particular moiety fell to him.

The suit which was instituted in the Court of the Subordinate Judge of Rae Bareli was decreed by him. On appeal the District Judge of Rae Bareli reversed the decision and dismissed the suit. He found that the plaintiff had not been in possession within limitation, that the moiety share in the grove was originally joint property, that it had been the subject of a partition, and that it had fallen to the share of Mohammad Taki who was in rightful possession of it. This second appeal is preferred.

The first point taken is that the suit was not barred by limitation, as the plaintiff-appellant was in possession within twelve years of the date of the suit.

The Counsel for the contesting respondent agrees that the suit is not barred by limitation. We are of the same opinion. Three points remain for decision:—

1. Was the moiety of the grove in question joint property?

2. Was title to it legally transferred to Mohammad Taki by the award?

3. Did the parties agree to abandon the award, and did Mohammad Taki thus give up all title to the moiety of the grove in question?

On the *first* point the Subordinate Judge found that this moiety was purchased after the death of Mohammad Mohsin Husain by Mohammad Hadi alone. The District Judge arrived at no finding upon the point. There is no necessity to remit the case for decision by the learned District Judge upon this point, as we have ample materials on the record on which to decide it. The moiety share in the grove was certainly acquired in the name of Mohammad Hadi after the death of his father. But from a reference to arbitration (Exhibit K3) it appears that in 1895 certain property was divided among the sons of Saiyed Mohsin Husain as joint property. They agreed to divide such property by mutual consent. In this reference it is stated that the property to be divided is described in the list of joint property prepared on 27th March 1891. This list contains a statement that the half share of the grove in question is joint property. It was specially excepted from partition in the reference of 1895. There is a finding of fact that

Mohammad Hadi signed Exhibit K3. There was a subsequent agreement to make a partition of the property excepted in 1895. That agreement is dated the 2nd May 1906 (Exhibit A2). An award was made accordingly (Exhibit A3) on 4th June 1906. Thus the moiety of the grove in question fell within the terms of the reference, and under the award it was given to Mohammad Taki. The learned Counsel for the appellant has objected that Exhibit K3 is inadmissible in evidence for want of registration. We decide against him upon this point. We find that Exhibit K3 is not inadmissible in evidence for want of registration, that it is admissible and that it is proved. Upon the above evidence our finding is that, although the moiety of the grove in question was purchased in the name of Mohammad Hadi, it is clearly proved to have been accepted as the joint property of his brothers and himself. We further find that it fell to the share of Mohammad Taki in 1906.

We now come to the *second* point, which is the point on which the reference was made. The point taken by the appellant is that, inasmuch as the award in question was not filed in Court and no deed of conveyance was made transferring title in the moiety of the grove to Mohammad Taki, title did not pass under the award to Mohammad Taki, and thus he was not in a position to introduce Husain Abbas as a tenant of the moiety of the grove. It is to be observed that this is not a suit brought by Mohammad Taki to obtain possession of the moiety of the grove. The person in physical possession is Husain Abbas. He claims title from Mohammad Taki. The suit is one to dispossess Mohammad Taki and Husain Abbas.

The first decision quoted to us, as to the effect of an award that has not been filed in Court, is in the case of *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (1). This decision has, however, only an indirect bearing on the subject.

We next come to a decision of their Lordships of the Privy Council in *Rani Bhagoti* v. *Rani Chandan* (2). In that case an award was made by arbitrators, by which certain property was allotted to Rani Bhagoti. That award was not filed in Court and no conveyance was executed to give effect to its terms. Rani Chandan claimed that property. Their Lordships decided in 1885 that the award was a good award, and that Rani Chandan having been a party to the proceedings could not claim property which had been transferred under its terms to Rani Bhagoti.

In 1891 their Lordships of the Privy Council decided in the case of *Muhammad Newaz Khan* v. *Alam Khan* (3) that in a case, where there had been a reference to arbitration and an award by which certain landed property had been made over to Alam Khan, a suit by other parties to the arbitration proceedings for the recovery of a portion of that property from Alam Khan could not lie, and that the award must have effect. In that case Alam Khan applied to have the award filed pursuant to the provisions of section 525 of Act XIV of 1882, and the Civil Courts had refused permission to file the award. Their Lordships held that the fact that such an application had been made and refused did not affect the question. They stated at page 418: "Though the application under section 525 was refused, that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award is not valid, because the party in whose favour it was had never applied to have it filed in Court. Can then the refusal to file, or of an application made to do so, have the effect that the award can never be relied upon in any suit relating to the subject-matter dealt with by it?" Their Lordships answered that question in the negative.

In 1896 their Lordships of the Privy Council decided in *Bhaiya Ardawan Singh* v. *Udey Pratab Singh* (4) that an award of the British Indian Association of Oudh, which did not come within the provisions of section 33, Act I of 1869, as it was filed in Court more than six months after the passing of the Oudh Estates Act, which

(1) 13 B. L. R. 312; 1 I. A. 157.
(2) 11 C. 386; 12 I. A. 67; 4 Sar. P. C. J. 624; 9 Ind. Jur. 320.
(3) 18 C. 414; 18 I. A. 73; 70 P. R. 1891.
(4) 23 C. 838; 23 I. A. 64.

was not filed in Court and which was not embodied in a deed of conveyance, nevertheless operated to secure the title of the person to whom it transferred certain property as against the other party to the arbitration proceedings.

These are all the decisions of their Lordships of the Privy Council upon the point. The principle laid down in the above decisions to the effect that the title of a person holding possession of property under an award, which has not been filed in Court and the terms of which have not been embodied in a deed of conveyance, is secure, has been followed in *Krishna Panda* v. *Balaram Panda* (5); *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharjee*(6); *Laldas Jibhai* v. *Bai Lala* (7) and *Bhaurao Jivaji Tivle* v. *Radhabai Laxaman Jivaji* (8). The principle has been carried even further in other cases.

In 1900 it was decided in *Sornavalli Ammal* v. *Muthayya Sastrigal* (9) that persons entitled to immoveable property, under an award which had not been filed in Court and the terms of which had not been embodied in a deed of conveyance, had a right to recover possession of the property from another party to the arbitration proceedings upon the basis of the award alone, and the same principle was followed in *Sheo Narain* v. *Beni Madho* (10) in 1901, and in *Bhajahari Saha Banikya* v. *Behary Lal Basak* (11) in 1906.

In *Thakur Sheo Narain Singh* v. *Thakur Bishunath Singh* (12), Wells, A. J. C., decided that the fact that an award was not filed in Court afforded no reason for holding that it was invalid, and that a party claiming under such an award to enforce its terms (no deed of conveyance having been executed to give effect to them) was entitled to obtain possession of property awarded to him against another party to the arbitration proceedings.

(5) 19 M. 290.
(6) 2 Ind. Cas. 414; 37 C. 63; 10 C. L. J. 41; 14 C. W. N. 75.
(7) 1 Ind. Cas. 105; 11 Bom. L. R. 20; 5 M. L. T. 226.
(8) 2 Ind. Cas. 431; 11 Bom. L. R. 406; 33 B. 401.
(9) 23 M. 593; 10 M. L. J. 208.
(10) 23 A. 285; A. W. N. (1901) 83.
(11) 33 C. 881; 4 C. L. J. 162.
(12) 7 O. C. 369.

The learned Counsel for the appellant quotes against the authority of these decisions some remarks made by Lindsay, J. C., in *Dilipat Singh* v. *Kashi Nath* (13). They are as follows: —

"But until an award, whether oral or written, has been made a rule of Court so as to give it the force of a Civil Court decree it cannot, in my opinion, operate to transfer property. The law is thus laid down in a recent work on the Law of Arbitration in India by D. C. Banerji at page 448: 'In suits for recovery of property, if an award is made by which a certain property is adjudged to be made over to a party and such award is made a rule of Court, the effect will be to convey the property in the same way as an ordinary decree of Court for possession of property conveys it and it will be carried out by execution; but when the award and the decree only decide the question of title, the property cannot pass without conveyance.'"

We do not understand the learned Judicial Commissioner to state anything which conflicts with the authorities quoted by us. The facts of the case which he decided were not facts upon which these authorities have bearing. It is perfectly clear that as Mohammad Taki obtained title to the moiety of this grove under the terms of the award, his title cannot be impugned because the award was not filed in Court, or because no deed of conveyance had been executed to give effect to its terms. We, therefore, decide the second point against the appellant.

With regard to the *third* point we find that when Mohammad Taki applied for mutation of names with respect to the moiety of the grove before the Tahsildar, his brother Mohammad Hadi, appellant, raised objections to the validity of the award. The Tahsildar endeavoured to get the parties to come to some agreement, and Mohammad Taki is recorded as having stated that he would accept any arrangement that the third brother Mohammad Naki might choose to make. Mohammad Naki then made a division which was apparently accepted by the appellant. Mohammad Taki said he would not accept the arrangement made by Mohammad Naki The Tahsildar then refused to grant mutation

(13) 24 Ind. Cas. 542; 17 O. C. 108 at p. 114.

of names in favour of Mohammad Taki. The Tahsildar as a Revenue Official had no authority to refer the dispute to arbitration. It was his duty in those proceedings simply to record the name of the person in possession of the moiety of the grove. The entry in the Revenue register of landed proprietors is not a judicial process and there were no judicial proceedings before the Tahsildar. Thus the Tahsildar had no authority to refer the point to arbitration. The proceedings were most informal and the statement of the appellant cannot be considered to constitute withdrawal from the award. Thus the subsequent decision of Mohammad Naki can have no effect to vitiate the previous award. In no circumstances could the appellant claim the whole moiety under the decision of Mohammad Naki, for that decision awarded him only one-sixth.

In *Krishna Panda* v. *Balaram Panda* (5), a decision to which reference has already been made, it was decided that in order that the parties should be remitted to their previous rights, it was not enough that the award was not enforced or even that both parties objected to it. There must be positive evidence that both parties agreed that the former state of things should be restored. In another decision which has already been quoted, *Laldas Jibhai* v. *Bai Lala* (7), the above decision was followed and approved. But apart from that there is nothing in the proceedings before the Tahsildar that could amount to a revocation or abandonment of the original award.

This appeal, therefore, fails upon every point and is dismissed accordingly. The appellant will pay his own costs and those of the contesting respondent.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1914.

August 19, 1915.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

UPENDRA NATH BOSE—DEFENDANT—APPELLANT

*versus*

BINDESHRI PROSAD—PLAINTIFF—RESPONDENT.

*Appeal—Letters Patent, cl. 15 "Judgment", meaning of—Concurrent findings of fact, effect of Hindu Law—Alienation—Limited owner—Widow—Family settlement, validity of—Consent of expectant reversioners, effect of—Mere attestation of deed, effect of—Compromise—Deed, construction of—Decree, admissibility of.*

The word "judgment" is used in clause 15 of the Letters Patent in the sense of "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement. [p. 474, col. 1; p. 478, col. 2.]

An appeal under clause 15 of the Letters Patent must be deemed to have been preferred against a decree, and all the points necessary to be investigated for the determination of the correctness of that decree are open for consideration, although the Court as a Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of two Courts. [p. 474, col. 1; p. 478, col. 2.]

Where a deed by a limited owner with qualified powers of alienation is called in question, the test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. The doctrine of legal necessity is but a particular phase of the law. [p. 476, col. 1; p. 481, col. 1.]

The sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it lawful and valid. [p. 476, col. 2; p. 481, col. 2.]

A mere attestation of a deed does not necessarily import consent to an alienation effected thereby, nor even a knowledge of the contents thereof. [p. 476, col. 2; p. 484, col. 1.]

The validity of a family settlement is not affected by the circumstance that the grantor of a lease of some of the family property was a limited owner in possession with qualified powers of alienation. [p. 477, col. 1; p. 483, col. 1.]

Per *Mookerjee, J.*—A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore, or resile from. [p. 482, col. 1.]

Deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. [p. 482, col. 1.]

A compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such a case, the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim. [p. 482, col. 2.]

UPENDRA NATH BOSE *v.* INDESHRI PROSAD.

Per *Jenkins, C. J.*—A decree dismissing a suit based on a compromise filed on the petitions of both the parties is admissible in evidence without registration. [p. 475, col. 2.]

Letters Patent Appeal against the decree of Mr. Justice Mullick, dated the 20th August 1914, arising on a difference of opinion between Stephen and Mullick, JJ., in Appeal from Original Decree No. 477 of 1910, against that of the Subordinate Judge, 2nd Court, Gaya, dated the 20th June 1910.

JUDGMENT.

STEPHEN, J.—The plaintiff in this case, who is the same as the plaintiff in the suit under appeal in R. A. No. 372, sues to have a *mokurari* lease, granted by *Musammat* Lochan Koer on the 29th August 1893 of an eight-annas share in Mouzas Partappore, Chergerwa, Ralshi and Gajhanda, declared not to be binding on him, and also for possession and mesne profits. The suit has been decreed in the lower Court with mesne profits. The following facts are admitted. The plaintiff is the son of Lochan Koer, the wife of Deo Nath, the daughter of Jaikaran, the son of Mahadeo. The defendants are the assignees of Uma Shankar, the son of Gouri Baijnath, the son of Dayanath, the son of Mahadeo. As stated in Appeal No. 372 of 1910, Lochan died on the 5th May 1906, her predecessors having died before her, and Gouri Baijnath died in 1883 in similar circumstances.

On the 15th May 1893, Uma Shankar sued Lochan for the possession of certain property, the suit being No. 62 of 1893. On the 20th August, Lochan executed the *mokurari* in suit in order to settle Uma Shankar's claim, the plaintiff being an attesting witness to the document, and on the 13th November in the same year the suit was accordingly dismissed. On the 6th August 1894, Uma again sued Lochan with whom he joined the plaintiff in a suit numbered 193 of 1894. This suit was dismissed on a compromise on the 18th February 1895 on petitions by Uma Shankar, Lochan and the plaintiff.

The two main questions to be decided are whether the *mokurari* is binding as an alienation or otherwise on the plaintiff; and whether the plaintiff can be allowed to deny its binding force as far as he is concerned. To decide the *first* point we must first consider the contents of the *mokurari patta*, and the circumstances under which it was made: and the latter is more conveniently considered first. In 1893 Lochan seems to have considered herself to be entitled to the enjoyment of a Hindu widow's estate in Jaikaran's property, and to have been in possession of it since Jasoda's death in 1873. Her possession was fortified by a succession certificate granted in 1874, which all the parties concerned seem to have regarded to some extent as a document of title. But it must be observed that both Gouri Baijnath and his son Uma Shankar had opposed the grant of that certificate to her, as the former had opposed a similar grant to Jasoda. Uma Shankar brought his suit No. 62 of 1893 on the 11th May joining two other defendants, strangers to Lochan. The cause of action was that he and his father were members of a Mitakshara family, and that the latter, for the purpose of supplying the requisites of a life of debauchery, alienated some of the family property which came into the hands of the defendants, who received it by a series of transfers that did not in fact affect his interest. The suit was valued at Rs. 400. It was not suggested that there was any connection between the property in suit and the estate of Jaikaran. The *patta* of the 28th August was admittedly given with the object of getting rid of this suit, though possibly with other objects as well. It commences by reciting that Deonath Rai and Jaikaran were separate in mess and business; it then describes Lochan's succession to Jaikaran's property, and her wish to help Uma Shankar. It specifically states that in the suit he has no point in his favour and has no interest in the estate of Jaikaran; and then there follows a grant of a *mokurari* with a nominal payment of Re. 1 reserved to the grantor. A question has been raised as to whether in terms the *patta* affects to transfer more than Lochan's limited interest. I hold that it does, as the *mokurari* is twice described as perpetual and descendible to children, generation after generation, and purports to bind her heirs, by which the heirs of Jaikaran may reasonably be supposed to be indicated. The *patta* is signed by Lochan, and her signature is attested by the plaintiff.

The materials on which we can form any opinion as to whether or not this document was executed for necessity are very scanty. The value of the property affected is assessed in this suit at Rs. 40,000; otherwise we seem to have no evidence on the subject. Uma Shankar's cause of action would, as the Judge says, have been very difficult to prove but Uma Shankar valued his claim at only Rs. 400, which goes to show that the execution of the deed could have been avoided. The *kabuliat* corresponding to the *patta* attributes the making of the grant to natural love and affection more explicitly than does the *patta*. My chief ground, however, for disbelieving in the necessity of this grant is to be found in Uma Shankar's subsequent conduct. He had admitted in the *kabuliat* that he had no right in respect of Jaikaran's estate and had undertaken to bring no more unfounded suits, and had accepted a *patta* with corresponding statements. Yet in August 1894 we find him bringing his suit No. 193 of 1894 against Lochan and the plaintiff, founded on the assertion that Jaikaran held his property jointly with Gouri Baijnath, his father, and claiming property held by Lochan by reason of a breach of a previous settlement made on that basis. In the next February this suit was dismissed on the terms that the defendants should pay their own costs, the plaintiff making a complete acknowledgment that his suit was groundless and hopeless and admitting that the two branches of the family were separate. The obvious bad faith of this second suit makes it impossible to suppose that the first suit was brought in good faith. Lochan may have found it convenient to give the *mokurari* to quiet a false claim, but I know of no reason for saying that it was legally necessary that she should, and there is every reason for saying it was not.

I hold, therefore, that the *patta* in suit was not executed for necessity.

I also hold that it was not validated by the attestation of the plaintiff. In the *first* place, attestation is not necessarily the same as consent. In the *second*, the bad faith of Uma Shankar goes some way to rebut the presumption of the consent of a reversioner, and when that reversioner is a very young man and the attestation is the only indication of consent, it may be held to be rebutted. I have doubts as to whether the plaintiff was an adult at the time of this deed. The facts as relating to his minority set out in Appeal No. 372 do not indicate majority here even to the extent they did there; on the other hand it is for the plaintiff to prove infancy, and it is perhaps the safest course to follow the lower Court in holding that he has not done so. In view of the other holdings, however, this is immaterial.

I must next consider the question whether the plaintiff can be allowed to deny the binding force of his mother's alienation, assuming that he was of age on the 10th February 1895, the date of his petition in Uma Shankar's second suit. On that day his mother confirmed the *patta* of the 20th August 1893, in a petition which is part of the same transaction as that in which the plaintiff's petition is made. In that petition the plaintiff recites his mother's grant and "declares that he neither has nor shall ever have either directly or indirectly any claim and dispute with the plaintiff (*i. e.*, Uma Shankar); the plaintiff and his heirs shall all along continue in possession and enjoyment of the *mokurari* properties". It is argued on behalf of the defendant that this is a covenant to maintain the validity of his mother's grant, and it may be observed that it refers to a grant made to Uma Shankar and his heirs "all along." I cannot see how this argument is to be resisted. The petition was made by a person *sui juris*, there is no suggestion of any fraud, concealment or undue influence. The plaintiff was, we may suppose, ignorant of business, and did not understand what he was doing. But he had plenty of legal advisers, he was acting with his parents, and it is impossible to say that he acted without consideration. It follows that the plaintiff has bound himself not to do what he is doing in bringing this suit and that consequently he cannot be allowed to succeed. This is so independently of any question of what is usually known as estoppel: and the case is merely that the plaintiff is doing something which he has bound himself not to do, and which consequently he cannot be allowed to do.

This practically decides the appeal in favour of the appellants-defendants. But one more point raised on behalf of the plaintiff must be noticed. This is that as the decree in No. 193-194 is not registered

under the Indian Registration Act of 1877, the alienation by Lochan is not proved. This, however, overlooks the real nature of the defendants' case as I conceive it, which rests on Lochan's grant of 1893 which was registered: the existence of that grant has been recognised by the decision in both suits: but the alienation exists independently of the decrees. I do not, therefore, think it necessary that we should consider the numerous authorities as to the necessity for registering judgments, to which we have been referred. It may perhaps be said that the plaintiff's personal covenant is embodied in the decree, and is at least expressed nowhere else. But then a covenant to recognise as valid in whole an alienation which is valid in part, does not seem to fall under the provisions of section 17 of the Act.

In the view I take of the case, it is unnecessary that I should consider the points that have been raised as to limitation, and the question whether the existence of a family settlement makes any difference to what would otherwise be an alienation.

I consider, therefore, that the appeal should be allowed. My learned brother, however, is of the contrary opinion. The decree of the lower Court is, therefore, confirmed and the appeal is dismissed with costs.

MULLICK, J.—I regret that I cannot agree with the decision of my learned brother. As he has so fully dealt with the facts of the case it will not be necessary for me to re-state them and I accept his findings of fact. The evidence in the present case as to age does not materially differ from that in the other two cases and for the reasons given by him I agree with my learned brother that the plaintiff was *sui juris* on the 20th of August 1893.

If then the plaintiff was of age on that date, the next question that arises is, what was the effect of his attestation of the *mokurari patta* executed by his mother Lochan Koer. Attestation is some evidence of consent but having regard to the circumstances and the relations existing between the plaintiff and his parents, I agree with my learned brother that it is not sufficient evidence either to prove legal necessity or that that the transaction was a fair one. Any presumption that arises from such attestation has been sufficiently rebutted. The learned Subordinate Judge has shown that Uma Shankar's suit No. 62 of 1893, the withdrawal of which was the chief consideration of the *mokurari patta* was not a *bona fide* suit; that Uma Shankar knew that he had no case; and that there was neither legal necessity nor good consideration. I agree with these findings. I further agree with him that the suit was barred by limitation. It is, in my opinion, established that Jasoda Koer was in possession of Jaikaran's estate from 1865, the year of Jaikaran's death, to the 26th December 1873, the date of her own death, and that Lochan Koer succeeded her and remained in uninterrupted possession till the date of the suit of 1893. Now Uma Shankar's father Gouri Baijnath died in 1885 and if limitation began to run against Gouri Baijnath, Uma Shankar's minority at the time of Jasoda's death would be no answer. But Uma Shankar attempts to overcome this difficulty by saying that Gouri Baijnath was in possession from the 26th to the 27th December 1873, on which day he executed a deed of release in Uma Shankar's favour, that he Uma Shankar, remained in possession till sometime in 1874, when while still a minor he was dispossessed by Lochan Koer, and that he is therefore entitled to the benefit of the period of his minority. But there is no satisfactory evidence whatsoever to support the story of Gouri Baijnath's possession for a period of 24 hours and the suit of 1893 was clearly barred. In these circumstances I agree with the learned Subordinate Judge that the *mokurari patta* of August 1893 was a wholly inoperative document and that it is no bar to the plaintiff's suit.

The next question is what is the effect of the compromise petition filed by the plaintiff in Uma Shankar's suit No. 193 of 1894 on the 10th February 1895. In my opinion it is not a covenant which binds the plaintiff. The plaintiff, though he had attained majority, was a reversioner effecting a release of his chance of succession, and such a transaction was wholly void. Nor does the principle of equitable assignments apply. In the case of *Sumsuddin Goolam Husain* v. *Abdul Husain Kalimuddin* (1) the learned Judges refused to apply this principle in

(1) 31 B. 165; 8 Bom. L. R. 781.

circumstances very similar to those now before us and they seem further to have held that apart from the release the reversioner was not bound by her covenant. In this connection it is to be observed that there is a material difference between the petition of compromise in this case which is a release and the *ekrarnamas* in Appeals Nos. 372 and 448 which are mere covenants and which we have held to be binding upon the plaintiff. A further objection to the release is that it was wholly without consideration. An examination of the merits of suit No. 193 of 1894 makes this quite clear. That suit was lodged by Uma Shankar for the following reliefs:

1. To obtain a declaration of his half-anna share in the estate of Jaikaran, on the ground that his grandfather Deonath was joint in food and property with Jaikaran and that although Gouri Baijnath, his father, had alienated his share of that property, Uma Shankar's half share had not been affected.

2. For possession of certain properties enumerated in schedule B of the plaint in that suit, which are wholly unconnected with the villages covered by the *mokurari patta* now under consideration.

Now the Subordinate Judge has found on Uma Shankar's own admission and upon other satisfactory evidence that Deonath and Jaikaran were separate in food and property and that Uma Shankar's claim was an unscrupulous attempt to blackmail Lochan Koer. It is established beyond doubt that Uma Shankar knew that he had not got a *bona fide* claim and that this fact was also known to the plaintiff and his mother. If that was the case, then it is impossible to hold that the purchase of peace was a good consideration for the covenant. For the same reason any argument based upon a compromise by way of family arrangement must necessarily fail.

If again it is urged that the consideration for the compromise was love and affection on the part of the plaintiff towards Uma Shankar, then the reply is, *firstly*, that a document executed for such consideration must be registered, and as the compromise was not registered it cannot be admitted in evidence and, *secondly*, that upon the facts it is manifest that love and affection were out of the question and the withdrawal of a dishonest suit was the only consideration for the transaction.

If then the compromise is neither binding upon nor evidence against the plaintiff, the next question that arises is as to the effect of the decree made upon that compromise on the 18th February 1895. It has been urged that the decree operates as *res judicata*. The reply to this is that the property now in suit was not the subject-matter of suit No. 193 and that, therefore, the decree cannot operate as *res judicata* in respect of that property. Moreover, the plaintiff had then no interest in the property which was the subject-matter of that suit and any decree passed in it could not bind his chance of reversion.

It is next urged that apart from *res judicata* the decree is evidence of a covenant which binds the plaintiff. In order to deal with the objection it is necessary to examine the decree. The decree sets out in full the petitions of Uma Shankar, Lochan Koer, and Bindeshri Prosad and then runs as follows: "This case coming on for final disposal on the 18th February 1895, before Mr. H. Holmwood, District Judge of Gaya, in the presence of Anup Narain, Pleader for plaintiff, and Babu Upendra Chandra Mittra, Pleader for defendant No. 1, and Moulvi Varasat Hosain, Pleader for defendant No. 2, it is ordered and decreed that this suit be dismissed without costs in the terms of the compromise petition." In my opinion the decree is inadmissible for want of registration, so far as it affects the property which was not the subject-matter of the suit in which it was made. There has been some difference of opinion upon the question of law involved, but I think the ruling of this Court in *Gurdeo Singh* v. *Chandrika Singh* (2) is binding upon us. But even if it be held that the compromise petition is embodied in the decree, which from the form of the decree and the reliefs granted

(2) 1 Ind. Cas. 913; 5 C. L. J. 611; 36 C. 193.

by it does not appear to be the case, and that it is, therefore, admissible in evidence without registration, still it must operate either as a release or an agreement. If the former, it is void as a transfer of a chance of succession and if the latter, it is void for want of consideration.

There is next the question of limitation. Can the plaintiff succeed till he sets aside the compromise decree, and as he has not done so within three years of the decree, is his suit barred? The reply to this is that it is not necessary for the plaintiff to set aside the compromise. In the *first* place, the decree was one of dismissal and made no order for relief against him. In the *second* place, the property now in suit was not covered by the decree and in the *third* place, the decree was not registered. The plaintiff is suing as a reversioner and Article 141, Schedule I of the Limitation Act, governs his case. Under that Article his suit is fully within time. Finally there remains the ground of estoppel. Upon the facts it is not clear how any case of estoppel can arise. Uma Shankar was fully aware that there was no legal necessity either for the execution of the *mokurari patta* of 1893 or of the compromise petition of 1895. By his own unqualified admission he was not acting honestly and in good faith. In these circumstances he cannot take advantage of the provisions of section 115 of the Evidence Act. The result is that disagreeing with my learned brother I would dismiss the appeal with costs.

Sir *Rash Behary Ghose* and Babu *Baranashibashi Mookerjee*, for the Appellant.

Dr. *Sarat Chunder Bysack* and Babu *Chandrasekhar Prosad Singh*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—Jaikaran Lal, a Hindu governed by the Mitakshara School of Law, died in 1865, leaving him surviving his widow *Musammat* Jasoda Koer and his daughter *Musammat* Lochan Koer. *Musammat* Lochan Koer was married to Deonath Sahai, and the plaintiff Bindeshri Prosad is the sole surviving male issue of the marriage.

Bindeshri instituted this suit on the 14th April 1909 against Upendra Nath Bose and others and he seeks a declaration that he is the sole reversionary heir of Jaikaran Lal and on the death of his grandmother *Musammat* Jasoda Koer and *Musammat* Lochan Koer he became entitled to the present possession of the entire estate left by his maternal grandfather. He seeks the further declaration that the *mokurari* lease granted by *Musammat* Lochan Koer to Uma Shankar Prosad under *patta* and *kabuliat* dated the 20th August 1893, in respect of 8-annas share in Mauzas Pertappore, Chergerwa, Rokshi and Gajhanda appertaining to Mahal Kother, Touzi No. 3142, District Gaya, is not binding on the inheritance of the plaintiff and is null and void and inoperative as against him. Finally he prays for possession and mesne profits.

The suit No. 100 of 1909 was heard by the second Subordinate Judge of Gaya together with suits of a similar nature and the procedure adopted by the learned Judge has occasioned a certain amount of confusion as to the evidence. But happily we have been freed from this by the mode in which the appeal has been presented by the learned Vakils who have conducted the case before us, for they have limited themselves in their respective arguments to the materials to be found in the paper-books of this appeal, so I need make no further reference to this aspect of the case. The Subordinate Judge decided in the plaintiff's favour.

Upendra Nath Bose preferred an appeal to the High Court and this was heard by Stephen and Mullick, JJ. They differed in opinion and so the appeal of the Subordinate Judge was confirmed. From this judgment of confirmation this present appeal to the High Court under clause 15 of the Letters Patent has been preferred. It was contended at the outset for the respondent that though the learned Judges, Stephen and Mullick, JJ., differed in opinion as to the disposal of the case, there were isolated points in the case on which they were agreed. As to these it was argued there was no appeal. But this rests on a misconception of the scope of clause 15 of the Letters Patent. The appeal sanctioned is not from any point, but from the judgment

and the meaning of the word "judgment" lends no support to the respondent's contention. The Letters Patent were framed in England and from the scheme and the language of the Letters Patent, as also from the Secretary of State's accompanying despatch, it is apparent that the word is used in the sense of "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement. What was said in *Nundeeput Mahta* v. *Urquhart* (3) lends support to the respondent's contention, but I cannot find that it has ever been followed and Sir Richards Couch's view in *Maharanee Heeranath Kooer* v. *Baboo Burm Narain Singh* (4) is hardly in accord with it. In my opinion we must be guided by the words of clause 15 and they do not support the respondent's contention. At the same time, I think that we ought to have regard to the rule, which their Lordships of the Privy Council ordinarily observe, of declining to interfere with concurrent findings of fact by two Courts.

I will now proceed to deal with the appeal on the merits. The *patta* and *kabuliat* of the 20th August 1893 which the plaintiff impugns have a history which has to be understood before the true relations of the parties can be understood and it goes back to the death of Jaikaran Lal in 1865. I have said he left a widow and daughter, he also was survived by a nephew, Gouri Baijnath, his deceased brother's son.

The position of the family will be apparent from the following tabular statement:—

MAHADEV DUTT

| | |
|---|---|
| Dyanat Ray. | 1st wife *Musammat* Toro—Jikaran Lal, |
| Gouri Baijnath Persad. | 2nd wife *Musammat* Jasoda Koer, |
| Uma Shankar Persad. | Deonath Sahai—*Musammat* Lochan Koer |
| | Bindeshri, plaintiff. |

After Jaikaran Lal's death two applications were made for a certificate under Act XXVII of 1860 to collect debts due to his estate.

One was preferred by *Musammat* Jasoda Koer, who claimed to be his heiress on the ground that he was separate in estate. The other was preferred by Gouri Baijnath on the allegation that he and his uncle were joint. In the Court of 1st instance Gouri Baijnath succeeded. On appeal this order was reversed and the certificate was granted to the widow, *Musammat* Jasoda Koer. The judgment of the High Court, which was pronounced on the 4th August 1866, is reported as *Musammat Josoda Koonwur* v. *Gourie Byjonath Sohae Singh* (5). This was not conclusive of the rights of the parties and so on the 10th of September 1866 Gouri commenced a suit against the widow to establish his right as the surviving member of a joint family.

A review too, was sought of the High Court's decision. An amicable settlement, however, was proposed which, after securing considerable benefits to *Musammat* Jasoda during her life, provided that properties representing one-third of the entire immoveable property claimed by *Musammat* Jasoda and her daughter should [illegible] the daughter to be taken possession of by her after the death of *Musammat* Jasoda, the encumbrances created in the life-time of Jaikaran Lal being paid off by Gouri Baijnath, that after the death of *Musammat* Jasoda Gouri Baijnath should be entitled to take possession of all the immoveable properties except those given to Lcchan and that all pending cases were to be withdrawn. *Musammat* Lochan Koer was added as a party to the suit, petitions of compromise were filed, and the suit was decided in accordance with this family arrangement. On the 26th December 1873 *Musammat* Jasoda Koer died. According to the allegations made in the plaint in suit No. 193 of 1894 Gouri Baijnath took possession of the properties except those which were to go to *Musammat* Lochan and on the 27th December 1873 he made a gift of them to his son Uma Shankar, the plaintiff in suit No. 193 of 1894. Again on *Musammat* Jasoda's death there was a contest as to the grant of a succession certificate. The decision was in

(3) 13 W. R. 209.
(4) 17 W. R. 316 at p. 335.
(5) 6 W. R. 139.

*Musammat* Lochan's favour and this was upheld by the High Court on the 15th May 1874.

Gouri Baijnath died on the 9th of August 1883.

In 1893 suit No. 62 of 1893 was instituted by Uma Shankar against *Musammat* Lochan for a certain family tenement and it was his case that he was ready to institute another suit for the establishment of his title to, and recovery of, possession of the properties claimed by *Musammat* Lochan as the estate of Jaikaran Lal. But there was a compromise on the 2nd August 1893 between Uma Shankar on the one side and *Musammat* Lochan Koer and Bindeshri, the present plaintiff, on the other. The terms were that suit No. 62 of 1893 was to be withdrawn and the contemplated suit abandoned, and that *Musammat* Lochan Koer should grant Uma Shankar a permanent *mokurari* of 8 annas of *Mauza* Pertappore and other properties specified on a rental of Re. 1 over and above the Government Revenue and Road and Public Works Cess. There were other terms which need not now be specified. On the 20th August 1893 the *mokurari patta* was executed by *Musammat* Lochan Koer and attested by Bindeshri. Uma Shankar, however, on the allegation that the compromise had not been carried out commenced suit No. 193 of 1894 against *Musammat* Lochan Koer and Bindeshri Prosad for the recovery of the properties claimed by *Musammat* Lochan Koer as the estate of Jaikaran Lal. The claim was resisted and Bindeshri in his written statement, paragraph 41, contended that the plaintiff had no right to bring the suit contrary to the compromise in the *mokurari patta* and *kabuliat* in respect of 8 annas of *Mauza* Pertappore, that the said compromise could not be set aside by the Court and that whatever rights the plaintiff Uma Shankar had under two earlier instruments became extinct and extinguished by virtue of the compromise.

This suit was compromised on the 18th February 1895. Evidently *Musammat* Lochan was determined that this compromise must finally end this family litigation and so a petition was presented by Uma Shankar in which he admitted all the infirmities of his claim and stated that he had proposed and the defendants had accepted as a compromise that the *mokurari*, dated 20th August 1893, of 8 annas of *Mauza* Pertappore, etc., should stand good. He accordingly prayed for the dismissal of the suit on those terms. Petitions were also presented by *Musammat* Lochan Koer and Bindeshri. In conformity with these petitions the suit was dismissed in the terms of the compromise on the 10th February 1895. There is, in my opinion, no foundation for the contention that this decree is inadmissible for want of registration. The compromise does not purport to convey release or otherwise deal with immoveable property.

On May 5th, 1906, *Musammat* Lochan Koer died. On the 14th May 1909 the present suit was instituted against several defendants of whom Upendra Nath Bose alone has contested the plaintiff's claim before us. He is a purchaser of the property.

The following issues were framed by the Trial Judge:

1. Is the *mokurari* lease, dated 20th August 1893, executed by Lochan in favour of Uma Shankar binding upon the plaintiff? Was it executed for any legal necessity?

2. Is the plaintiff estopped from claiming *sir* possession of the properties in suit?

3. Was the plaintiff minor at the time the *mokurari* lease was executed and the petition of compromise, dated the 10th February, filed in suit No. 193 of 1894 in the Court of the District Judge, Gaya?

4. To what amount of mesne profits, if any, is the plaintiff entitled?

5. Are the auction sale, dated 21st November 1901, at which the defendants Nos. 1 and 2 purchased the property in suit and the *dar-mokurari* lease, dated 2nd December 1908, granted by defendants Nos. 1 and 2 to defendants Nos. 3 and 4, binding on the plaintiff?

6. Is the suit barred by limitation?

On the question of minority, the Subordinate Judge and both the Judges of the Division Bench are against the plaintiff and I think this concurrent finding of fact should not be disturbed. I will, therefore, deal with the case on the

footing that the plaintiff was a major at the two dates indicated.

The position then, is this that the *mokurari* lease was executed by *Musammat* Lochan and attested by Bindeshri who was then a major, while Deonath Sahai, presumably Bindeshri's father, also had a hand in the affair for it was at his request that one of the witnesses attested *Musammat* Lochan's execution of the document. I agree with the Judges of the Division Bench that the *mokurari* lease on its true construction purports to be perpetual and descendible. Why then should it not be binding on Bindeshri? The form of the issues suggests that this must be answered by reference to the doctrine of legal necessity, and this idea is prominent in the judgments both of the Subordinate Judge and of the Judges of the Division Bench. But in the circumstances of this case, this is not the test to be applied. *Musammat* Lochan, it is true, had only a daughter's interest, and so her power of disposition was limited by the law regulating such dispositions. The doctrine of legal necessity would appear to be but a particular phase of that law, and the more universal test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. There is, I think, sanction for this view to be found in the leading case of *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (6), where it was said of a Hindu widow that "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." Similar citations might be multiplied, but it will suffice to quote the words of Lord Moulton, who in delivering the opinion of the Privy Council said, "it has always been a feature of Hindu Law as administered by this Board to attach great weight to the sanction by expectant reversioners of an alienation as affording evidence that the alienation was under circumstances which rendered it lawful and valid:" *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (7). If Bindeshri consented, we have the consent of an expectant reversioner who has actually succeeded to the property on the determination of the particular interest.

There is, therefore, every reason for applying this test of the propriety of the transaction. But then the question is, Did Bindeshri consent? He certainly attested the *mokurari* of the 20th August 1893, but this would not conclusively establish his consent, for it can be shown that his signature was there for some other purpose than that of giving consent. Bindeshri has given evidence in the case. In examination-in-chief the case he made was minority and that has not been believed. His cross-examination does not throw any further light on the point. The Subordinate Judge held that the attestation did not prove consent to alienation. Mullick, J., was of opinion that any presumption of consent that might arise from the attestation had been rebutted. He does not, however, explain how it was rebutted, unless he means to rely on the view he expresses that the suit No. 68 of 1893 was not a *bona fide* suit.

Stephen, J., also held that attestation did not validate the transaction because it was not necessarily the same as consent and the presumption of consent was rebutted by Uma Shankar's bad faith. But the attestation does not stand alone. It is followed, first, by Bindeshri's resistance to Uma Shankar's claim in suit No. 193 of 1894 on the grounds set forth in paragraph 41 of

(6) 8 M. I. A. 529 at p. 551; 2 W. R. 61 (P. C.); 1 Suth. P. C. J. 476; 1 Sar. P. C. J. 820; 19 E. R. 631.

(7) 23 Ind. Cas. 162; 41 C. 793 at p. 805; 18 C. W. N. 673; 12 A. L. J. 711; 19 C. L. J. 620; 16 Bom. L. R. 425; 16 M. L. T. 68; 27 M. L. J. 123; 1 L. W. 533 (1914) M. W. N. 430 (P. C.).

Bindeshri's written statement, in which he insists on the compromise referred to in the *mokurari patta* and *kabuliat* as an answer to the claim and avers that Uma Shankar's rights became extinct and extinguished by virtue of that compromise. Nor do matters rest there, for Bindeshri is party not only to the suit No. 193 of 1894 but also to the compromise in that suit which affirmed the *mokurari patta*. All this should, in my opinion, be accepted as establishing that the lease was legitimate, and certainly one that it would be wrong to declare invalid at the instance of the present petitioners. For even if there be a doubt as to the fact or efficacy of the consent as evidenced by the attestation, there can be no question as to the subsequent consent, and "*Omnis ratihabitio retro-trahitur et mandato priori æquiparatur*" [*Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (8).] Much has been said about the lack of good faith in the earlier suits, but I am not sure that I fully understand what was meant. It surely can hardly be said that the suit of the 10th of September 1866 was brought in bad faith merely because in the certificate proceedings Gouri Baijnath had failed, and especially when it is borne in mind that the Court of first instance was in Gouri's favour and that the High Court decision was in some measure based on admissions made only for the purpose of those proceedings. The compromise of that gave a fresh starting point. It may or may not have been open to successful attack, but having regard to the circumstances it was one to which the principle enunciated in *Khunni Lal* v. *Gobind Krishna Narain* (9) (to cite one case out of many) was applicable, and I fail to see how it can give rise to any inference that the suit was not brought in good faith. Moreover, there is always a danger of referring a knowledge of principles now known to a time anterior to their establishment, and though *Appovier* v. *Rama Subba Aiyan* (10) has made obvious to us that there can be a partition of interest without a division by metes and bounds, this had not been conclusively determined on the 11th of September 1866. So it is quite possible that when the suit of 1866 was commenced, the petitioner may have thought not only that the facts but also the law was on his side inasmuch as there had been at that time no division by metes and bounds. Is there then any reason for thinking that there was a lack of good faith in Uma Shankar's suit No. 62 of 1893 and his expressed determination to sue for recovery of properties claimed by *Musammat* Lochan Koer as the estate of Jaikaran Lal? In approaching this question it must be borne in mind that Uma Shankar could rest his claim on the compromise which terminated the litigation of 1866, and that was a compromise in support of which, as I have already said, it was possible to invoke the principle applied in *Khunni Lal* v. *Gobind Krishna Narain* (9).

It is true that the *mokurari* of the 28th of August 1893, in which suit No. 62 of 1893 terminated, contains expressions depreciatory of Uma Shankar's claim, but they must not be taken too seriously. This form of exaggeration is not an unfamiliar conveyancing device in the *mofussil*: it takes the place of a release and is balanced by the benefit secured. It is the price of the benefit. And what is true of the contents of this *mokurari patta* is as true of the still more depreciatory confessions which preface or accompany the compromise in the suit No. 193 of 1894. It is as much a part of the *mofussil* conveyancer's art as the beaver hat or pipe of wine was of the special pleader in times gone by, and perhaps hardly deserves to be taken more seriously as a statement of actual fact. It is intended to furnish a useful controversial weapon of defence for the future rather than to be a correct description of any one's mind apart from the transaction in which it is found.

I, therefore, hold on a consideration of all the circumstances that Bindeshri is not entitled to impugn the *mokurari patta* and that it is binding on him. It follows that in my opinion the appeal should be allowed and the suit dismissed with costs throughout.

MOOKERJEE, J.—This is an appeal by the second defendant, in a suit commenced by the

(8) 30 A 1; 17 M. L. J. 605; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 766; 35 I. A. 1 (P. C.); 3 M. L. T. 1; 5 A. L. J. 1.

(9) 10 Ind. Cas. 477; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 33 A. 356.

(10) 11 M. I. A. 75; 8 W. R. 1 (P. C.); 1 Suth. P. C. J. 657; 2 Sar. P. C. J. 218; 20 E. R. 30.

plaintiff-respondent for recovery of possession of land, on declaration that an alienation by way of permanent lease, made by his mother on the 20th August 1893, is not binding upon the estate in his hands as the representative of his maternal grandfather. The suit was decreed by the Trial Court. Upon appeal to this Court, Stephen, J., was of opinion that the decree of the Subordinate Judge should be reversed and the suit dismissed. Mullick, J., was of opinion, on the other hand, that the decree of the primary Court be affirmed. Consequently, that decree was confirmed under sub-section 2 of section 98 of the Civil Procedure Code, 1908. The second defendant who has thus been defeated in both the Courts below has preferred this appeal under clause 15 of the Letters Patent.

A preliminary point has been raised as to the scope of the question open for examination in the present appeal. The respondent has argued, on the strength of a dictum of Norman, C. J., in *Nundeeput Mahta* v. *Urquhart* (3), that under clause 15 of the Letters Patent, an appeal lies only in respect of that part of the judgment upon which the two Judges differ and that where both the Judges composing the Division Bench agree in their finding on a certain point, the Court of Appeal has no power to question that finding. Norman, C. J., attributes this view to Peacock, C. J., and refers to the decision in *Hazara Begum* v. *Khaja Hossein Ali* (11). The judgment of Peacock, C. J., however, does not lend any support to the conclusion of Norman, C. J.; Peacock C. J., merely ruled that where the contention before a Division Bench has reference to a single point only, whereon the Judges differ, it is not open to the parties in an appeal under clause 15 of the Letters Patent to raise before the Appellate Court other points not raised before the Division Bench. We have, on the other hand, the opinion of Couch, C. J., clearly indicated in *Maharanee Heeranath Koer* v. *Burm Narain Singh* (4), that the point on which the Judges of the Division Bench have agreed is open for consideration in the appeal under the Letters Patent, though it was added that "on a question of fact we think we ought to be guided by the rule of the Privy Council where there have been the decisions of two Courts to the same effect." Indeed, it is reasonably clear from the terms of clause 15 of the Letters Patent, that the appeal is allowed, not against what is called judgment under the Code of Civil Procedure, but against what corresponds to a decree or an order. That clause allows an appeal from the judgment not being a sentence or order passed or made in any criminal trial. The term "judgment" here means not the statement given by the Judge of the grounds of his decree or order, but the sentence of the law pronounced by the Court upon the matter contained in the record (Co. Litt. 39*a*, 168*a*; 3 Blackstone's Commentaries, 395). A judgment, then, is the decision or sentence of the law given by a Court of Justice as the result of proceedings instituted therein for the redress of an injury or, as has been quaintly expressed, judgment is the determination and result of law. This is clear from paragraph 23 of the Despatch from Sir Charles Wood which accompanied the first Letters Patent. The appeal must, consequently, be deemed to have been preferred against the decree and all the points necessary to be investigated for the determination of the question of the correctness of that decree are open for consideration, although the Court as a Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of the trial Judge and of the two Judges of the Division Bench.

The following genealogical table will serve to elucidate the relative situation of the parties in the different stages of this protracted controversy between them.

MAHADEO.

| Jaikaran. | Dayanath, |
|---|---|
| Died 15th Dec. 1865, Widow Jasoda Koer Died 26th Dec. 1873, | |
| Lochan Koer Died 5th May 1906, Married Deonath Sahay Died 2nd May 1906, | Gouri Baijnath Died 9th Aug. 1883, |
| Bindeshri Prosad, Plaintiff | Uma Shankar Born 8th Aug. 1870. Assignor of Defendant. |

The property now in dispute admittedly belonged to Jaikaran; on his death, it passed to his widow Jasoda Koer, and, on the death of the latter, it devolved on

(11) 12 W. R. 498.

Lochan Koer. On the 20th August 1893, Lochan Koer granted a permanent lease of the property to Uma Shankar. The deed was witnessed by her son Bindeshri Prosad and also by a Pleader, Babu Suryya Kumar, who attested at the request of her husband Babu Deonath Sahai. Lochan Koer died on the 5th May 1906, and on the 14th May 1909 Bindeshri Prosad instituted the present suit for recovery of possession of the villages upon declaration that the lease was not binding upon the estate of his maternal grandfather, which, upon the death of his mother, had devolved upon him as reversionary heir. The second defendant, who had purchased the lease-hold interest in execution of a mortgage decree against Uma Shankar, resisted the claim on the ground that the lease was for a lawful purpose, that its propriety was unquestionable though made by a Hindu female heir with a qualified power of alienation, and that it was operative against the inheritance in the hands of the reversionary heir. For the determination of the question thus raised, the circumstances antecedent to the grant of the lease must be carefully scrutinised, and for this purpose, the narrative of events requires to be carried back to the point of time when Jaikaran died on the 15th December 1865.

Immediately on the death of Jaikaran, disputes broke out in the family, as to whether Jaikaran had died joint with or separate from Deonath. Jasoda Koer, the widow of the deceased, and Gouri Baijnath, his nephew, applied on the 8th and 9th January 1866, respectively, for a certificate under Act XXVII of 1860 for the collection of debts due to the deceased. On the 7th April 1866, the District Judge of Gaya dismissed the application of the widow and granted a certificate to the nephew, who also obtained an order for possession in his favour under Act XIX of 1841. The widow appealed to this Court, and on the 4th August 1866 obtained a reversal of the order of the District Judge adverse to her. The elaborate judgment of this Court pronounced on that occasion [*Musammat Josoda Koonwur* v. *Gourie Byjonath Sokae Singh* (5)] affords convincing proof that there was a substantial matter in controversy between the parties. This need not cause any surprise, if we remember that what constitutes partition of joint properties held by an undivided Mitakshara family was at that time a matter of doubt and uncertainty, which was settled by the now classical judgment of Lord Westbury in *Apporier* v. *Rama Subba Aiyan* (10) pronounced on the 17th November 1866, and, by still later decisions of the Judicial Committee in *Rajah Suraneni Vankata Gopala Narasimha Row Bahadoor* v. *Rajah Suraneni Lakshma Venkama Row* (12); *Doorga Pershad* v. *Kundun Koowar* (13); *Ram Pershad Singh* v. *Lakhpati* (14); *Balkishen Das* v. *Ram Narain Sahu* (15) and *Parbati* v. *Naunihal Singh* (16). The nephew thus defeated could hardly be expected to remain satisfied with the result of the preliminary skirmish, and, as might have been anticipated, instituted a regular suit against Jasoda Koer for recovery of possession of the estate of Jaikaran on the 10th September 1866 on the allegation of title by survivorship. What might thus have proved a protracted litigation, ruinous to the family, was brought to a speedy termination by the intervention of friends, relatives and legal advisers of the parties. Terms of settlement were arranged, and in order that they might be operative after the death of Jasoda Koer, Lochan Koer was added as a party defendant to the suit, and it was indeed her father-in-law RaghubarDayal who took a prominent part in the settlement of the dispute. It is not necessary for our present purpose to set out in detail the terms of the settlement or to examine how far they were reasonable. Their general effect was that Jasoda Koer would get possession of all the moveable and immoveable properties, while Gouri Baijnath was to receive an annuity of Rs. 4,000 a year. Immoveable properties which yielded a net profit of Rs. 10,000 a year and represented one-third of the estate, were to vest absolutely in Lochan Koer, free of encumbrances, but subject to the life-interest of Jasoda Koer; the remainder of the estate would devolve upon Gouri Baijnath upon the death of Jasoda Koer. On the 11th Decem-

(12) 13 M. I. A. 113; 3 B. L. R. 41 12 W. R. 40 (P. C.); 2 Suth. P. C. J. 265; 2 Sar. P. C. J. 496; 20 E. R. 494.

(13) 1 I. A. 55; 13 B. L. R. 235; 21 W. R. 214.

(14) 30 I. A. 1; 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103 (P. C.).

(15) 30 I. A. 139; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461 (P. C.).

(16) 3 Ind. Cas. 195; 36 I. A. 71; 31 A. 412; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 983; 10 C. L. J. 121 (P. C.); 11 Bom. L. R. 878; 19 M. L. J. 517.

ber 1866, mutual deeds were executed with a view to give effect to this family arrangement, and petitions of compromise were presented to the Court; a decree by consent of parties was ultimately made on the 25th March 1867. There are indications on the record that the terms of this compromise were carried out by both the parties at least for some years. But on the death of Jasoda Koer on the 26th December 1873, disputes broke out again between the two branches of the family, and on the 5th January 1874 Lochan Koer applied for a certificate under Act XXVII of 1860 for the collection of debts of the estate of her father. The application was opposed by Gouri Baijnath, but was granted on the 12th February 1874 by the District Judge, and his order was confirmed on appeal to this Court on the 15th May 1874; *Gouree Byjnath* v. *Lochan Koer* (17). The result was that Lochan Koer retained possession of the estate of her father contrary to the terms of the family settlement of 1867. Gouri Baijnath, who is said by his son to have thereafter led a life of depravity and extravagance, died on the 9th August 1883, leaving as his sole heir an infant son, Uma Shankar, at that time a boy of thirteen years. In 1893 Uma Shankar, after attainment of his majority, instituted a suit against Lochan Koer for recovery of a house which had been sold in execution of a decree against his father and had been purchased by her in the name of one Mir Enayet Hossain. Uma Shankar also threatened at the same time to institute another suit against Lochan Koer for recovery of the estate of Jaikaran on the basis of the family settlement of 1867. Proposals for compromise were set on foot; and it was during the pendency of the suit for recovery of the house that Lochan Koer, on the 20th August 1893, granted to Uma Shankar the perpetual lease now in controversy, and the lease and its counterpart state explicitly that as a consideration for the grant of the lease, the lessee undertook to withdraw the suit already instituted and to refrain from the institution of groundless suits. On the 13th November 1893, Uma Shankar withdrew from the suit for recovery of the house, which was accordingly dismissed. The compromise, however, was of very brief duration, for on the 6th August 1894 Uma Shankar instituted a suit against Lochan Koer and her son Bindeshri Prosad for recovery of possession of the estate of Jaikaran. Lochan Koer and Bindeshri Prosad filed separate written statements on the 9th and 10th September 1894 in which they repudiated the settlement of 1867, and relied on the perpetual lease as a complete extinction of the prior rights of Uma Shankar. This suit also was amicably settled, and on the 18th February 1895, it was dismissed in the terms of the petition of compromise filed by Uma Shankar, Lochan Koer and Bindeshri Prosad. Uma Shankar relinquished all his claims to the estate of Jaikaran, and Bindeshri declared that he neither had nor would ever put forth, directly or indirectly, any claim to the properties included in the perpetual lease granted by his mother to Uma Shankar. This assurance proved as illusory as similar promises by other members of the family on previous occasions. Lochan Koer died on the 5th May 1906, and Bindeshari Prosad on the 14th May 1909 instituted the present suit for declaration that the perpetual lease was not operative after the death of his mother and did not bind the estate of his maternal grandfather which had devolved upon him as reversionary heir. From the facts narrated, it would appear at first sight that no claim could be more hopeless than an endeavour by a person to challenge a deed, created in settlement of a family dispute, attested by the claimant at the time of execution and solemnly affirmed by him subsequently in a Court of Justice. The Trial Court, however, held that the plaintiff was entitled to succeed, as the deed, executed as it was by a Hindu daughter in possession of the estate of her father, could be supported only on proof of legal necessity. That decree has been affirmed by this Court. The Judges of the Division Bench were agreed that there was no legal necessity for the lease, but they differed upon the question, whether the act of the plaintiff in the suit of 1894 disentitled him to all relief. Upon the best con-

(17) 22 W. R 102

sideration, I have been able to give to the case, I have been driven to the conclusion that the course this litigation has taken has resulted in a failure of justice and that the relative rights of the parties have not been examined from the true standpoint.

The test in cases of this description, where a deed by a limited owner with qualified powers of alienation is called in question, is whether the purpose for which the alienation was made was proper or legitimate. This is clear from the judgment of Turner, L. J., in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*(6): "it is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alien the property, *except for special purposes*. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. *To support an alienation for the last she must show necessity*. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so, if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given, *the purpose for which the alienation is made must be proper.*" Whether the particular purpose is proper or not must depend on the circumstances of the case; but it is plain that necessity is only one of the tests of propriety. This is clear from the observation of Sir James Colvile in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (18) that the concurrence of the members of the family suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law, of Lord Davey in *Sham Sundar Lal* v. *Achhan Kunwar* (19) that the concurrence of the kindred raises a presumption that the transaction was a fair one or one justified by Hindu Law, and of Lord Moulton in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerjee* (7) that the sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it *lawful and valid*. The same result would be attained, if the expression "legal necessity" had not had impressed upon it a narrow sense and had not become generally associated with cases where there is actual pressure on the estate or danger thereto to be averted. Tested in the light of the broad principle that the validity of the transaction impeached depends upon the answer to the question, whether it was proper, fair and justified by Hindu Law, what is the position of the parties here? The lease was granted in settlement of a long-standing feud which had harassed the members of the family for more than one generation and seemed at the time ready to be revived on every possible occasion. It is unquestionable that the litigations of 1866 and 1867 had their origin in substantial disputes between the two branches of the family and it is equally undeniable that the settlement of 1867 was perfectly *bona fide*. In 1873, on the death of Jasoda Koer, the dispute was revived, and the former settlement, which had been accepted by Lochan Koer, was repudiated by her. Her cousin, Gouri Baijnath, had consequently, *prima facie*, a good ground of complaint against her, and it is not a matter for surprise that his son Uma Shankar should, in 1893, have endeavoured to assert his rights under the settlement of 1867. Can it then be reasonably maintained that a perpetual lease, granted to secure a compromise of such a dispute, lacks that element of fairness and propriety, which is essential for its justification as an operative act by a limited owner under the Hindu Law? A desperate attempt has been made by the plaintiff to establish that no substantial dispute existed between the two branches of the family at any stage, that the claim of Gouri Baijnath and his son was wholly unfounded and that there was no real controversy either in 1867 or in 1893 which stood in need of settlement for the benefit and protection of the estate of Jai-

(18) 13 M. I. A. 209; 12 W. R. 47 (P. C.); 3 B. L. R. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529.

(19) 25 I. A. 183; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

karan. In support of this view, reference has been made to recitals by Uma Shankar, that he had no shadow of a claim to the estate of Jaikaran. No real weight, in my opinion, should be attached to statements of this description. We may usefully call to mind the familiar words of Knight Bruce, L. J., in *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (20), that the deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. To the same effect is the observation of Lord Macnaghten in *Achal Ram* v. *Kazim Husain Khan* (21), where the draftsman had introduced in the recitals an obviously untrue statement, probably under the notion that it might impart some additional solemnity to the instrument. These exhibitions of the art of the conveyancer, whether mediæval or modern, cannot be permitted to mislead the Court. If Lochan Koer and her advisers had taken seriously the allegation that Uma Shankar had not the vestige of a claim to the estate of her father, it is inconceivable that she should have parted with a valuable property in his favour. We know, from the antecedent history of the family, that there had been serious disputes between the parties and whatever recitals might have been inserted in the deeds, whatever price Uma Shankar might have paid in the way of untrue conciliatory admissions, with a view to secure the compromise, the fact is incontrovertible that there was a substantial dispute between the parties which was settled by the grant of the lease. A settlement of a disputed or doubtful claim, effected in this manner, is clearly a valid and binding arrangement which the parties thereto are not permitted to deny, ignore or resile from, on principles explained by the Judicial Committee in a long series of cases: *Rajunder Narain Rae* v. *Bijai Govind Singh* (22); *Maharajah Hetnarain Singh* v. *Baboo Modnarain Singh* (23); *Sri Gajapathi Radhika Patta Maha Devi Garu* v. *Sri Gajapathi Nilamani Patta Maha Devi Garu* (24); *Mantappa Nadgowda* v. *Baswuntrao Nadgowda* (25); *Greender Chunder Ghose* v. *Troyluckho Nath Ghose* (26); *Muhammad Imam Ali Khan* v. *Husain Khan* (27). As Lord Kingsdown said in *Trigge* v. *Lavallee* (28), a compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases, the consideration which each party receives is the settlement of the dispute; the real consideration is, not the sacrifice of a right, but the abandonment of a claim. To the same effect is the statement of Turner, L. J., in *Lucy's case* (29), that it is sufficient if the parties *bona fide* consider that there is a question to be decided between them, for otherwise no compromise will be good if it ultimately turned out that there was no doubt upon the point which was made the subject of compromise: *Callisher* v. *Bischoffsheim* (30) approved in *Miles* v. *Newzealand Alford Estate Co.* (31); *Helan Dasi* v. *Durga Das Mundal* (32); *Birbhadra Rath* v. *Kalapataru Panda* (33) and *Satya Kumar Banerji* v. *Satya Kirpal Banerji* (34). It may further be pointed out, as explained in *Williams* v. *Williams* (35), that a family arrangement may be upheld, although there are no rights actually in dispute at the time of making it, and the Courts would not be disposed to scan with much nicety the quantum of consideration; this principle is appli-

(20) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(21) 32 I. A. 113; 27 A. 271; 9 C. W. N. 477; 15 M. L. J. 197 (P. C.); 8 O. C. 155.

(22) 2 M. I. A. 181 at p. 249; 1 Moo. P. C. 117; 1 Sar. P. C. J. 175; 12 E. R. 757; 18 E. R. 269.

(23) 7 M. I. A. 311; 3 W. R. 51 (P. C.); 1 Suth. P. C. J. 355; 1 Sar. P. C. J. 678; 19 E. R. 326.

(24) 13 M. I. A. 497 at p. 512; 6 B. L. R. 202; 14 W. R. 33 (P. C.); 2 Suth. P. C. J. 365; 2 Sar. P. C. J. 601; 20 E. R. 637.

(25) 14 M. I. A. 24 at p. 36; 15 W. R. 33 (P. C.); 2 Suth. P. C. J. 407; 2 Sar. P. C. J. 648; 20 E. R. 695.

(26) 21 I. A. 35; 20 C. 373.

(27) 25 I. A. 161; 26 C. 81; 2 C. W. N. 737.

(28) (1862) 15 Moo. P. C. 270 at p. 292; 1 N. R. 454; 9 Jur. (N. S.) 261; 8 L. T. 154; 11 W. R. 404; 137 R. R. 61.

(29) (1853) 4 De G. M. & G. 356; 22 L. J. Ch. 732; 17 Jur. 1143; 43 E. R. 545; 102 R. R. 163.

(30) (1870) 5 Q. B. 449; 39 L. J. Q. B. 181; 18 W. R. 1127.

(31) (1886) 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 669.

(32) 4 C. L. J. 323.

(33) 1 C. L. J. 388 at p. 405.

(34) 3 Ind. Cas. 247; 10 C. L. J. 503.

(35) (1867) 2 Ch App. 294; 36 L. J. Ch 419; 16 L. T. 42; 15 W. R. 657.

cable not merely to cases where arrangements are made between the members of a family for the preservation of its peace, but also to cases where arrangements are made between them for the preservation of its property: *Persse* v. *Persse* (36). We are not now concerned with the question, when and how a family arrangement may be set aside on the ground of mistake, inequality of position, undue influence, coercion, fraud or other similar ground, for no such vitiating factor is alleged or proved in this case. Consequentiy, the decision in *Gordon* v. *Gordon* (37) and other cases of the same class [*Lawton* v. *Campion* (38); *Bentley* v. *Mackay* (39); *Moxon* v. *Payne* (40); *Fane* v. *Fane* (41)], on which much stress was laid by the respondents, have no application. There is no room for doubt that, to use the language of Lord Westbury in *Dixon* v. *Evans* (42), there was here an honest settlement of an existing dispute, which, if not manifestly *ultra vires* of the parties, is one that a Court of Justice ought to respect and ought not to permit to be questioned. The question thus arises, whether the validity of the family settlement is affected by the circumstance that the grantor of the lease was a limited owner in possession with qualified powers of alienation. The answer must be in the negative in view of the decision of the Judicial Committee in *Khunni Lal* v. *Gobind Krishna Narain* (9). There, a Hindu became a convert to Islam. His son, who was a Hindu, predeceased him. On his death, there was litigation as to the succession between his son's daughters and his daughter's son. The parties compromised the dispute and took the estate in certain shares. The daughter's son then attacked the compromise in a suit; it was ruled that the compromise was in the nature of a family settlement and was operative. As Lord Moulton said in *Hiran Bibi* v. *Sohan Bibi* (3) a compromise of this character is, in no sense of the word, an alienation by a limited owner of the family property, but is a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent and by way of compromise, admitted by the other parties. [*Tarinee Churn Gangooly* v. *Watson & Co.* (44); *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (45); *Gur Nanak Prashad* v. *Jai Narain Lal* (46); *Bihari Lal* v. *Daud Husain* (47); *Subbammal* v. *Arudaiyammal* (48); *Bhogaraju Venkatarama Jagiraju* v. *Adapalli Seshayya* (49).] The view cannot be defended on principle that a qualified owner, like a Hindu widow, daughter or mother, is bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal, and that she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interests of the estate. There is thus no room for reasonable doubt that the permanent lease granted by Lochan Koer was binding upon the inheritance.

We are fortified in this view by the significant circumstance that it met with the approval of the then next reversioner, who was no other than the present plaintiff. Reference may in this connection be made to the observations of Turner, L. J., in *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (6), of Sir James Colvile in *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (18) and of Lord Davey in *Sham Sundar Lal* v. *Achhan Kunwar* (19), which will all be found quoted in the judgment of the Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (50), to show that the concurrence of the reversioner raises a

(36) (1840) 7 Cl. & Fin. 279; 4 Jur. 358; West. 110; 7 E. R. 1073; 51 R. R. 22.
(37) (1821) 3 Swans. 470; 19 R. R. 230; 36 E. R. 910.
(38) (1854) 18 Beav. 87; 23 L. J. Ch. 505; 18 Jur. 88; 2 W. R. 209; 52 E. R. 35; 23 L. T. (o. s.) 201; 104 R. R. 378.
(39) (1862) 31 Beav. 142; 54 E. R. 1092; 135 R. R. 135, affirmed on app. 4 De G. F. & J. 279; 10 W. R. 873; 45 E. R. 1194.
(40) (1873) 8 Ch. App. 881; 43 L. J. Ch. 240.
(41) (1875) 20 Eq. 698.
(42) (1872) 5 H. L. 606 at p. 618; 20 L. J. Ch. 139
(43) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.).
(44) 12 W. R. 413; 3 B. L. R. A. C. 437.
(45) 27 Ind. Cas. 954; 21 C. L. J. 157; 19 C. W. N. 1280.
(46) 14 Ind. Cas. 814; 34 A. 385; 9 A. L. J. 375.
(47) 18 Ind. Cas. 721; 35 A. 240; 11 A. L. J. 352.
(48) 30 M. 3.
(49) 12 Ind. Cas. 123; 10 M. L. T. 179; 35 M. 560.
(50) 19 Ind. Cas. 273; 17 C. W. N. 701; 40 C. 721; 17 C. L. J. 499.

presumption that the alienation is made for a proper purpose. [See also the observation of Lord Moulton in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerjee* (7) and of Sir Andrew Scoble in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (8).] Reliance need not be placed on the circumstance that the plaintiff attested the document, for as pointed out by the Judicial Committee in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (18) and *Hari Kishen Bhagat* v. *Kashi Parshad Singh*(51) mere attestation of a deed does not necessarily import consent to an alienation effected thereby, nor even a knowledge of the contents thereof. But, in the present case, we have something more substantial and less equivocal embodied in the petition of the plaintiff, dated the 10th February 1895, which was incorporated in the decree of the 18th February 1895; we have also his deliberate assertion in his written statement in that suit. The maxim here applies that a subsequent ratification has a retrospective effect and is equivalent to a prior command; *omnis ratihabitio retro trahitur et mandato priori æquiparatur* [Co. Litt. 207-a; *Fleckner* v. *The Bank of the United States* (52)]. A futile effort has been made to escape from this position by the argument that the plaintiff was at the time an infant, that his petition was in essence a transfer of a *spes successiones* by a reversioner and consequently inoperative in law [*Sham Sundar Lal* v. *Achhan Kunwar* (19); *Brindaban Chunder Shaha* v. *Sureshwar Shaha Pramanik* (53); *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (54)] and that in any event, the petition was inadmissible because it was not registered. [*Pranal Anni* v. *Lakshmi Anni* (55); *Bindesari Naik* v. *Ganga Saran Sahu* (56); *Abdul Saheb Gandigiwad* v. *Mallikarjunappa Shivamurteya* (57).] This contention is entirely baseless; the plea of minority has been rejected as untrue by all the Judges; and the petition does not, either in form or in substance, effect a transfer of an interest in immoveable property, vested or contingent, present or future; but it does record the approval of the transaction by the reversionary heir and thus affords cogent evidence of its propriety. From every possible point of view, consequently, the lease proves unassailable.

The result is that in concurrence with the Chief Justice I hold that this appeal must be allowed and the suit dismissed with costs in all the Courts.

HOLMWOOD, J.—It is unnecessary for me to add anything to the judgments just delivered with which I am in full agreement.

*Appeal allowed; Suit dismissed.*

(51) 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 C. 876; 42 I. A. 64; 21 C. L. J. 225.

(52) 8 Wheaton 363338; 5 Law. Ed. 631.

(53) 3 Ind. Cas. 178; 10 C. L. J. 263 at p. 267.

(54) 3 Ind. Cas. 476; 5 M. L. T. 122; 19 M. L. J. 88; 32 M. 206.

(55) 26 I. A. 101; 22 M. 508; 3 C. W. N. 485; 9 M. L. J. 147.

(56) 25 I. A. 9; 20 A. 171; 2 C. W. N. 129; 7 Sar. P. C. J. 273.

(57) 22 Ind. Cas. 292; 15 Bom. L. R. 1142 38 B. 224.

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MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 165 OF 1913.

December 2, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ALAGAMUTHU PILLAI—DECREE-HOLDER—APPELLANT

*versus*

DEVASAGAYA FERNANDEZ—DEFENDANT—RESPONDENT.

*Provincial Small Cause Courts Act* (IX *of* 1887), *ss.* 25, 27—*Order in execution passed by Small Cause Court, whether appealable—Revision*—Batta *memorandum, whether a step-in-aid of execution.*

An appeal against an order in execution passed by a Small Cause Court is barred by section 27 of the Provincial Small Cause Courts Act but under section 25 of the Act a revision petition lies to a High Court against such an order. [p. 485, col. 2.]

*Veeramathari* v. *Subramaniar Iyer*, 12 Ind. Cas. 959; (1911) 2 M. W. N. 585, distinguished.

*Lakshminarasimhacharyulu* v. *Lakshmamma*, 12 Ind. Cas. 169; 11 M. L. T. 380, referred to.

A *batta* memorandum which mentions that it is paid for notice to issue to the judgment-debtor under section 248 of the old Civil Procedure Code, is an application to take a step-in-aid of execution and saves limitation. [p. 485, col. 2.]

GOKAL CHAND *v.* NIADAR MAL.

*Vijiaraghavulu Naidu* v. *Srinivasulu Naidu*, 28 M 399; *Vala Subramania Pillai* v. *Sankara Subbu Naidu*, 7 Ind. Cas. 859; 8 M. L. T. 235; (1910) M. W. N. 713, followed.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Spencer, in Civil Revision Petition No. 710 of 1911, preferred to the High Court against the order of the Court of the Subordinate Judge of Tuticorin, in Execution Petition No. 459 of 1911 (in Small Cause Suit No. 710 of 1904).

FACTS.—The plaintiff, one Alagamuthu Pillai, obtained against the defendant a decree for Rs. 250 in the Small Cause side of the Subordinate Court, Tinnevelly. He applied for execution of that decree. A notice was ordered to issue to the judgment-debtor under section 248 of the Code of Civil Procedure, 1882; *batta* was paid but no notice was actually served upon the judgment-debtor and the application was consigned to the record. Upon a second application for execution being made, the Court dismissed it as being more than three years from the date of the decree. A petition for revision of the order was rejected by the High Court, upon which this Letters Patent Appeal was filed.

Mr. *P. R. Narayanaswami Aiyar*, for the Appellant.—Orders in execution made in Small Cause Suits are not appealable and only a revision petition to the High Court lies under section 25 of Act IX of 1887.

The *batta* memorandum for the notice under section 248 of the Code of Civil Procedure is an application to take a step-in-aid of execution.

JUDGMENT.—The learned Judge has relied on the decision found in the unauthorised report in *Veeramathari* v. *Subramania Iyer* (1) in support of his view that an appeal lay to the District Court against the order of the Small Cause Court in execution and that hence no revision petition lay to this Court. That case is reported as a decision given in Appeal against Order No. 5 of 1911, but that reference is a clear mistake for Civil Miscellaneous Second Appeal No. 5 of 1911. That decision follows an earlier decision in *Lakshminarasimhacharyulu* v. *Lakshmamma* (2). This earlier case decided that an appeal lies against an order passed on an application under section 310A of the Civil Procedure Code to set aside an auction sale of immoveable property in execution. The case inaccurately reported as *Veeramathari* v. *Subramania Iyer* (1) was a case where in execution of a Small Cause decree (transferred to the original side for execution), immoveable property was sold and an application was made under section 310A of the Civil Procedure Code to set it aside. The learned Judges held that an appeal lay against an order passed on such an application but that a second appeal did not lie. That case has, therefore, no application. In the present case the order in execution was passed by the Small Cause Court on its Small Cause side and section 27 of the Provincial Small Cause Courts Act clearly barred an appeal against such an order and hence a revision petition lay under section 25 to this Court.

On the merits we shall follow *Vijiaraghavalu Naidu* v. *Srinivasalu Naidu* (3) and *Vala Subramania Pillai* v. *Sankara Subbu Naidu* (4). Holding, therefore, that the *batta* memorandum, which mentions that it is paid for notice to issue to the judgment-debtor under section 248 of the Civil Procedure Code, is an application to take a step-in-aid of execution, we decide that the execution application is not barred by limitation and we grant the prayer of the execution application, reversing the order of the Subordinate Judge with costs payable by the respondent to petitioner throughout.

*Petition allowed; Application granted.*

(1) 12 Ind. Cas. 959; (1911) 2 M. W. N. 585.
(2) 12 Ind. Cas 169; 11 M. L. T. 380.
(3) 28 M. 399.
(4) 7 Ind. Cas. 859; (1910) M. W. N. 713; 8 M. L. T. 235.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 689 OF 1912.

April 12, 1915.

*Present*:—Mr. Justice Shah Din and Mr. Justice Chevis.

GOKAL CHAND - DEFENDANT—APPELLANT

*versus*

NIADAR MAL—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 28, Sch. I, scope*

POTHI NAICKEN *v.* NAGAMA NAICKER.

*of—Sale, cancellation of—Previous suit by defendant dismissed as time-barred—Subsequent suit, whether barred by* res judicata.

The first Schedule to the Limitation Act only provides periods of limitation within which suits must be brought. It does not provide any period for defences.

The plaintiff bought a house sold by a Receiver in order to clear off certain debts and got possession of it with the exception of 2 *kothris*. The defendant sued for the cancellation of the sale but the suit was dismissed as time-barred. The plaintiff, then, sued to get possession of the *kothris*:

*Held*, (1) that the decision in the previous suit could not be regarded as *res judicata* and the defendant was not precluded from impeaching the sale;

(2) that the defence was not time-barred under Schedule I to the Limitation Act, nor under section 28, as the defendant had been in possession of the subject-matter of the suit.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 6th February 1912.

Mr. *Sundar Das*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—The late Dhani Ram had three sons, Bindraban, Munshi Ram and Gokal Chand, of whom the last named is the present appellant. In 1908 Ghamandi Lal, etc., got a decree against Bindraban, Munshi Ram and their sons for Rs. 2,727. Soon after the decree Udho Ram, who had been appointed a Receiver and had been authorised to sell certain property in order to clear off debts, sold a house belonging to the brothers to Niadar Mal and with the sale money paid off the decree holders. Niadar Mal got possession of the house with the exception of two *kothris* which were locked up, and for these two *kothris* Niadar Mal has now sued. Gokal Chand in 1911 sued the Secretary of State, Niadar Mal and others for cancellation of the sale effected by Udho Ram, but this suit was dismissed as time-barred. In the present suit brought by Niadar Mal for possession of the *kothris* Gokal Chand again resists the claim on the ground that the sale is not binding on him. The lower Courts have decided the case against him. So Gokal Chand appeals to this Court.

The learned Divisional Judge holds that Gokal Chand, having failed to get the sale set aside within the period allowed by law, cannot impeach it now,

We are of opinion that this decision is incorrect. The matter in dispute certainly cannot be regarded as *res judicata*, for nothing was decided in the former case which was dismissed simply on the score of limitation. And as to the defence in the present case being time-barred, we note that Gokal Chand is not the plaintiff in this case and the 1st Schedule to the Limitation Act only provides periods of limitation within which suits must be brought. It does not provide periods of limitation for defences. Section 28 of the Limitation Act is also no bar, as that section merely provides that at the determination of the period allowed by law to any person for instituting a suit *for possession* of any property his right to such property shall be extinguished. This, however, is not a case in which Gokal Chand has been out of possession for a period exceeding that which the law would allow him for bringing a suit to recover possession. On the contrary, it appears that Gokal Chand has all along held possession, or at least part possession, of the two *kothris* which are the subject-matter of this suit. Plaintiffs are now seeking to dispossess him and they must prove their right to do so.

We accept the appeal and remand the case to the District Judge under Order XLI, rule 23, for decision on the merits. Stamp on appeal to this Court will be refunded. Other costs of this appeal will be costs in the cause.

*Appeal accepted; Case remanded.*

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MADRAS HIGH COURT.

**FULL BENCH.**

LETTERS PATENT APPEAL No. 61 OF 1915.

November 10, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice,
Mr. Justice Sadasiva Aiyar and
Mr. Justice Seshagiri Aiyar.

POTHI NAICKEN, MINOR, BY HIS NEXT FRIEND K. N. P. N. NARAYANASWAMI NAICKER—PLAINTIFF—APPELLANT

*versus*

K. NAGAMA NAICKER AND OTHERS—DEFENDANTS—RESPONDENTS.

*Partition—Deed of partition turning joint tenants into*

POTHI NAICKEN *v.* NAGAMA NAICKER.

*tenants-in-common, whether compulsorily registrable—Deed dealing with moveables and immoveables, admissibility of, to prove partition of moveables—Intention of parties—Contract, part of, unenforceable—Contract, validity of.*

A deed of partition between two members of a joint Hindu family, which has the effect of causing the immoveable properties held by the co-parceners as joint tenants thenceforward to be held by them as tenants-in common, cannot affect such immoveable properties or be received as evidence of any transaction affecting it unless it is registered. [p. 487, col. 2.]

In order to make a deed of partition which deals also with moveables admissible to prove a partition of the moveables only, it should clearly appear that it was the intention of the parties to partition the moveables apart from the immoveables. [p. 488, col. 1.]

When there is an entire contract and part of it cannot be enforced, the whole goes, though it is otherwise when an instrument contains two or more distinct contracts which are severable. [p. 487, col. 2.]

*Johnson* v. *Johnson*, 3 Bos. & P. 162; 6 R. R. 736; 127 E. R. 89; *Mayfield* v. *Wadsley*, (1824) 3 B. & C. 357; 5 D. & R. 224; 3 L. J. (o. s.) K. B. 3; 107 E. R. 766; *Green* v. *Saddington*, (1857) 7 El. & Bl. 503; 3 Jur. (N. S.) 717; 5 W. R 593; 119 E. R. 1333; 110 R. R 698, referred to.

*Thandavan* v. *Valliamma*, 15 M. 336; 2 M. L. J. 130, distinguished.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Sankaran Nair and the Hon'ble Mr. Justice Oldfield, in Appeal Suit No. 119 of 1912, reported as 28 Ind. Cas. 625, preferred against the decree of the District Court of Madura, in Original Suit No. 12 of 1910.

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Messrs. *S. Srinivasa Aiyangar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This suit was brought by the minor plaintiff to question an alleged partition under Exhibit III between himself and his paternal uncle Subba Naick in the year 1907. The District Judge dismissed the suit and on appeal his decree was affirmed under section 98 (2) of the Code of Civil Procedure in accordance with the judgment of Sankaran Nair, J., Oldfield, J., differing and being of opinion that at any rate as regards immoveable property, Exhibit III was inadmissible in evidence for want of registration under section 49 of the Indian Registration Act. The plaintiff appealed under the Letters Patent and after carefully considering the case we agree with Oldfield, J., that Exhibit III in the language of section 17 (1) of the Act operates to create a right, title, or interest, of the value of one hundred rupees or upwards to or in immoveable property. The material portion of the document is as follows: "As we have, in the presence of the undermentioned *panchayatdars*, divided, into equal moieties, the cash, moveables and immoveables, Court decrees, etc., of which we are now possessed valued at Rs. 80,000, our connection shall hereafter be only by relationship, but we shall have no monetary connection in respect of these properties:" We think this has the effect of causing the immoveable properties theretofore held by the co-parceners as joint tenants thenceforward to be held by them as tenants-in-common, under section 49, therefore, Exhibit III cannot affect such immoveable property or be received as evidence of any transaction affecting it.

The further question then arises whether Exhibit III is admissible to prove a partition of moveables only It has been held as regards the Statute of Frauds that the Statute operates to prevent an action on a contract though part of the contract may not be within it. Leake on Contract (3rd Edition), 252, and Parsons (9th Edition), Volume II, page 674, citing *Johnson* v. *Johnson* (1) and *Mayfield* v. *Wadsley* (2). See also *Green* v. *Saddington* (3). The principle laid down in these cases would appear to be that when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts in which case they are severable. In *Thandavan* v. *Valliamma* (4), it was held in a case somewhat similar that the contract as regards the partition of immoveables might be severed from that as regards moveables, but in that case the contract contained separate provisions as to each. In the present case on the whole, I have come to the conclusion that there is not sufficient justification for treating Exhibit III as consisting of two or more separate

(1) 3 Bos. & P. 162; 6 R. R. 736; 127 E. R. 19.

(2) (1824) 3 B. & C. 357; 5 D. & R. 224; 3 L. J. (o. s.) K. B. 3; 107 E. R. 766.

(3) (1857) 7 El. & Bl 503; 3 Jur. (N. S.) 717; 5 W. R. 593; 119 E. R. 1333; 110 R. R. 698.

(4) 15 M. 336; 2 M. L. J. 130.

contracts. As pointed out by Parsons, Volume II, page 673, the question ultimately turns on the intention of the parties, and I am not satisfied that there was any intention that the moveables should be partitioned apart from the immoveables. For these reasons I would allow the appeal and give judgment for the plaintiff with costs throughout, set aside the decree of the District Judge and remand the case for disposal as regards prayers (*d*) and (*e*) of the plaint.

SADASIVA AIYAR, J.—I agree. Mr. S. Srinivasa Aiyangar, for the respondents, further contended that the unequivocal declaration by Subba Naicken in the unregistered deed Exhibit III effected a division of status between him and the minor plaintiff. But after a consideration of all the circumstances of this case I think that the right view to take is that the deceased Subba Naick did not intend such a division in status to take place without the deed itself simultaneously taking effect as a valid division deed, in other words, he never contemplated a division of status unless and until the deed itself is legally capable of effecting such a division. I, therefore, am unable to uphold that contention of the respondents' learned Vakil.

SESHAGIRI AIYAR, J.—I agree and have nothing to add.

*Appeal allowed.*

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## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 160 OF 1915.

July 16, 1915.

*Present*:—Mr. Justice Parlett.

MI AMINA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KARAM ALI—DEFENDANT—RESPONDENT.

*Pre-emption right, exercise of—Muhammadan Law—Clog on transfer—Introduction in Burma—Equity and justice—Burma Laws Act (XIII of 1898), s. 13.*

The exercise of the right of pre-emption in conformity with the Muhammadan Law is generally adverse to public interest and the administration of justice and equity does not require its introduction in Burma. [p. 488, col. 2.]

The right of pre-emption under the Muhammadan Law must be exercised with the utmost promptitude. [p. 489, col. 2.]

Appeal against the judgment and decree of the District Judge of Arakan, dated the 16th July 1915, in Civil Appeal No. 3 of 1915, reversing those of the Sub-Divisional Court of Kyauktan in a suit for exercise of a right of pre-emption of an adjoining land.

Mr. *S. M. Bose*, for the Appellants.

JUDGMENT.—The appellants are the heirs and legal representatives of Kurban Ali, who sued to enforce a right of pre-emption over a house and site sold by Abdul Aziz to Karam Ali, he being the owner of adjoining property. The Sub-Divisional Court granted a decree against which Karam Ali appealed, one of his grounds being that the claim for pre-emption of an adjoining land is not governed by section 13 of the Burma Laws Act. The Divisional Court held that as no question of succession, inheritance, marriage or caste, or any religious usage or institution arises, Muhammadan Law was not applicable under that section. The correctness of the view that section 13 (1) is inapplicable, is not contested in this appeal, but it is contended that under clause (3) the claim to pre-emption should in this case be dealt with in conformity with Muhammadan Law as such a decision would be according to justice, equity and good conscience. Two cases are cited both from Allahabad and neither of very recent date. [*Musammat Chundo* v. *Hakeem Alim-ood-deen* (1) and *Gobind Dayal* v. *Inayatulah* (2).] The latter of these by no means impresses me with the view that to introduce into this country the clog upon transfer involved in the Muhammadan Law of pre-emption would be to further the ends of justice and equity. On the contrary, I feel strongly, as was said in *Nusrut Reza* v. *Umbul Khyr Bibee* (3), that the result of the exercise of this right is generally adverse to public interest. The fact that I am unable to find a single reported case where the right has been recognized by the Courts of Burma confirms me in my view that the administration of justice and equity does not demand its introduction. I, therefore, dismiss the appeal. I may add, however, that had my decision as to the Law applicable been different, the suit would still have failed on another ground.

(1) 6 N. W. P. H. C. R. 23.
(2) 7 A. 775; A. W. N. (1885) 228.
(3) 8 W. R. 369.

The right of pre emption under Mahammadan Law must be exercised with the utmost promptitude [*Baijnath Ram Goenka* v. *Ramdhari Chowdhry and Deo Nandan Per had* v. *Ramdhari Chowdhry* (4)] and it is quite impossible to hold that that condition was fulfilled in this case. The respondent had admittedly been in possession of part at least of the property for more than a year before the suit was filed, and though the suit was held not barred by limitation as it was brought within a year from the registration of the deed of sale sought to be impeached, yet it was not brought till nine months after the registration, a delay which especially in view of plaintiffs' knowledge as a neighbour of respondent's prior possession is fatal to his claim.

*Appeal dismissed.*

(4) 35 C. 402; 35 I. A. 60; 10 C. W. N. 419; 7 C. L. J. 318; 10 Bom. L. R. 253; 18 M. L. J. 116; 3 M. L. T. 349.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1699 AND 1700 OF 1914.

November 26, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Abdur Rahim.

DEVARAJA AIYANGAR—DEFENDANT—APPELLANT IN BOTH

*versus*

IN S. A. No. 1699 OF 1914

TIRUMALASAMI NAIDU—PLAINTIFF—RESPONDENT.

IN S. A. No. 1700 OF 1914

BODI CHETTIAR—PLAINTIFF—RESPONDENT.

*Execution—Assignment of mortgage decree fraudulently, effect of—Sale in execution—Assignee, whether obtains good title—Insolvency of judgment-debtor—Official Assignee, if necessary party.*

Where, in a suit to recover certain property on the strength of the plaintiff having purchased it from the Official Assignee in execution of a money-decree against the insolvent, it appeared that the defendant purported to have purchased the same property sometime before in execution of a mortgage-decree which had been fraudulently and collusively assigned to him without consideration:

*Held*, (1) that the purchase of the defendant was not a *bona fide* one and gave him no title to the property; [p. 489, col. 2.]

(2) that the judgment-debtor having been adjudicated an insolvent and all his property having vested in the Official Assignee before the sale to the defendant, the Official Assignee was a necessary party to all proceedings affecting that property, and a sale held without his being brought on the record was not binding and did not convey any title. [p. 490, col. 1.]

*Raghunath Das* v. *Sundar Das*, 24 Ind. Cas. 304; 27 M. L. J. 150; 18 C. W. N. 1058; 1 L. W. 56; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.), followed.

Second appeals, respectively, against the decrees of the District Court of Chingleput, in Appeal Suits Nos. 36 and 37 of 1913, preferred, respectively, against the decrees of the Court of the District Munsif of Tiruvalur, n Original Suits Nos. 34 and 35 of 1912.

Messrs. *T. Rangachariar* and *C. Narasimha Chariar*, for the Appellant.

Messrs. *L. A. Govindaraghava Aiyar* and *K. N. Kumaraswami Aiyar*, for the Respondents.

### JUDGMENT.

IN SECOND APPEAL NO. 1699 OF 1914.

The plaintiff has instituted this suit to recover certain property from the defendant, on the strength of his purchase from the Official Assignee of Madras, who was in possession of the properties of the judgment-debtor. The purchase was in execution of a money-decree and was made in 1907. The defendant purports to be another purchaser of the same property and his purchase was sometime in 1904. He purchased in execution of a mortgage-decree. The date of the decree is 12th August 1898. The owner of the property Anandalwar was adjudicated an insolvent on his own application on the 6th January 1902. The sale, therefore, under which the defendant purchased was brought about after Anandalwar had become an insolvent and his property had vested in the Official Assignee. But the Official Assignee was not made a party to the proceedings in execution. Both the lower Courts have found upon the evidence that the purchase of the defendant was not a *bona fide* one, that the mortgage-decree at the time he obtained the assignment of it had been satisfied and that the assignment was for no consideration and collusive and that, therefore, the purchase gave no title to the defendant. It is perfectly clear upon the evidence that Anandalwar, the insolvent, had entered into several fraudulent

transactions in order to defraud his creditors and it is also well established that the defendant was a friend of his, and assisted him in many of these fraudulent transactions. There is the important fact that both in the original schedule and in the amended schedule, the insolvent did not mention that there was anything due under the mortgage-decree. It is true that an application was subsequently filed by the original decree-holder, in which he claimed that there was a balance of Rs. 370 and odd still due. But if as a matter of fact the decree was unsatisfied at the date of the alleged assignment to the defendant, nothing was easier for the defendant than to have gone into the witness-box, and deposed to the fact that there was a balance due and that he actually paid that amount to the decree-holder. He has not chosen to go into the witness-box and he was the best person to prove that as a matter of fact he paid the consideration for the assignment or that the decree was unsatisfied on the date of the assignment. Under the circumstances, it is not possible for us to say in second appeal that there was no evidence to show that the transaction which resulted in this purchase of the defendant was a fraudulent and collusive one and that the decree was, as a matter of fact, satisfied before the assignment. If then the defendant knew of it and took the assignment without paying any consideration with full knowledge that the decree had been paid off, it could not be contended that the purchase conveyed any title. That is sufficient to dispose of the second appeal. But there is also another objection to the validity of the defendant's purchase. And it is his failure to bring on record the Official Assignee in the execution proceedings. When Anandalwar was adjudicated an insolvent, all his rights in the properties became vested in the Official Assignee and it was certainly the duty of a decree-holdor, whether of a money-decree or a mortgage-decree, proceeding in execution against any property which belonged to the insolvent, to bring on record the Official Assignee who was the person in whom all the rights of the properties had become vested. The result of his failure to bring on record the Official Assignee must be taken to be that the sale in execution cannot bind him. This is clearly deducible from what is laid down by their Lordships of the Privy Council in the case reported as *Ragunath Das* v. *Sundar Das* (1). At page 155 their Lordships say dealing with the case of a money-decree-holder: "Their Lordships are of opinion that this sale was altogether irregular and inoperative. In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents". This, of course, does not apply to the present case. But then they proceed to say: 'In the second place, no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place, the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property." The last two propositions certainly bear on the present case and show that the defendant's purchase could not bind the Official Assignee, who was not brought on record in the execution proceedings. The second appeal will be dismissed with costs.

IN SECOND APPEAL NO. 1700 OF 1914.

Second Appeal No. 1700 of 1914 follows our decision in the above Second Appeal No. 1699 of 1914 and for the like reasons as are recorded in the judgment therein this second appeal will be dismissed with costs.

*Appeals dismissed.*

(1) 24 Ind. Cas. 304; 27 M. L. J. 150; 18 C. W. N. 1058; 1 L. W. 567; 16 M. L. T. 353; (1914) M. W. N. 147; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.).

ANANGA MOHUN *v.* BEJOY CHANDRA.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 596 OF 1912.

April 23, 1915.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Mullick.

ANANGA MOHUN CHAKRAVERTY AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

BEJOY CHANDRA DUTTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court, power of—Suit against two defendants—Decree prayed for against both or either of them—Decree against one—Appeal—No appeal by plaintiff—Appellate Court, power of to decree against other defendant.*

In a suit against two defendants for contribution for arrears of rent realized from the plaintiff, the plaintiff prayed that a decree may be passed against both the defendants or against either of them who may be found to be the true owner. The first Court passed the decree against one defendant, who filed an appeal. The lower Appellate Court found that it was the other defendant against whom the decree ought to have been passed and as the plaintiff had not appealed, dismissed the suit:

*Held*, that under the circumstances the lower Appellate Court should have passed a decree against the other defendant and not dismissed the suit entirely. [p. 491, col 2.]

Appeal against the decree of the Subordinate Judge of Pabna, dated the 5th December 1911, reversing that of the Munsif, 1st Court at Pabna, dated the 19th May 1911.

Babus *Mohini Mohan Chakravarti* and *Atul Chandra Gupta*, for the Appellants.

Babu *Jotindra Nath Lahiri*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for contribution. The plaintiffs and some of the defendants were co-sharers in a *jote* the rent of which was in arrears. Some of the co-sharer landlords obtained a decree for arrears of rent and attached the properties of the plaintiffs alone, whereupon the plaintiffs deposited the decretal amount in order to save their properties. They now sued the defendants for the proportionate share payable by them.

The Court of first instance held that the defendant No. 1 was the real owner of a certain share in the *jote* and that his wife, the defendant No. 2, was merely a *benamidar* for her husband and accordingly gave a decree against the defendant No. 1 alone. The defendant No. 1 appealed to the lower Appellate Court, urging that it was not he but his wife, the defendant No. 2, who was the real owner of the share and that he, therefore, was not liable for any share of the rent. The learned Subordinate Judge has found that the defendant No. 2 was the real owner and he has reversed the decree of the Court of first instance and dismissed the suit of the plaintiffs entirely. The plaintiffs have appealed to this Court.

We are of opinion that the lower Appellate Court is wrong in dismissing the suit entirely. The plaintiffs prayed that a decree might be passed against both the defendants Nos. 1 and 2 or against either of them who might be found to be the true owner; and when the Subordinate Judge found that it was not the defendant No. 1 but the defendant No. 2 who was the true owner, he ought to have passed a decree against the latter although there was no appeal preferred by the plaintiffs who were the respondents before him. That the Court had the power to pass a decree against the defendant No. 2 would appear from the provisions of Order XLI, rule 33, Code of Civil Procedure, which runs as follows:—"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. Illustration.—*A* claims a sum of money as due to him from *X* or *Y*, and in a suit against both obtains a decree against *X*. *X* appeals and *A* and *Y* are respondents. The Appellate Court decides in favour of *X*. It has power to pass a decree against *Y*." Here both the defendants Nos. 1 and 2 were parties to the appeal and under the circumstances we think the lower Appellate Court ought to have passed a decree against the defendant No. 2.

It is pointed out, however, on behalf of the respondents that the defendant No. 2 set up certain payments alleged to have been made by her to some of the other

co-sharer landlords, namely, Umamoyee and Kanak Sundari, and that there was an arrangement under which the rent payable by the defendant No. 2 for her share of the *jote* was to be paid to these two ladies alone. Both the Courts below have disbelieved the story of this arrangement; and the question whether the defendant No. 2 did pay any portion of the rent payable for the *jote* to those two ladies for their share of the rent was considered by the Court of first instance and was found against the defendant, that Court having disbelieved the *dakhilas* produced by her in support of the said payments. On appeal, the lower Appellate Court has not come to any definite finding as to whether there was really any payment by the defendant No. 2 to these two ladies If there was really any payment to them on account of the rent payable for the *jote*, then the defendant No. 2 would be entitled to get a proportionate reduction.

Under the circumstances, we think that the decree of the lower Appellate Court should be set aside and the case sent back to that Court in order that it may determine upon the evidence on the record whether any payment was made by the defendant No. 2 to the two ladies in respect of the rent payable for the entire *jote*, whether the plaintiffs were liable for the share of the rent, if any, paid by the defendant No. 2 to those two ladies and obtained the benefit of such payment; and, if it finds these questions in favour of the defendant No. 2, then it will allow her a deduction to the extent of the plaintiffs' share from the amount to which the plaintiffs were found entitled under the decree of the Court of first instance. With the exception of the points stated above, no other question will be gone into by the lower Appellate Court. Costs will abide the result according to the success of each party.

*Appeal allowed; Case remanded.*

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 5 OF 1915.

August 9, 1915.

*Present*:—Mr. Justice Ormond and Mr. Justice Twomey.

*In re Hajee* MAHOMED HADY—PETITIONER

*versus*

M. JOAKIM AND ANOTHER—RESPONDENTS.

*Execution of decree—Application for substitution of name—Decree, validity of, if can be impeached.*

Where an application was made for the substitution of the petitioner's name in place of the decree-holder with a view to the execution of the decree:

*Held*, that the question of the validity of the decree did not arise in such a proceeding. [p. 493, col. 1.]

Reference made by the Judge, Small Causes Court, Rangoon, under section 113 of the Civil Procedure Code and Order XLVI, rule 1, for orders on the question.

FACTS of the case appear from the following referring order of the Judge of Small Causes Court, dated 15th July 1915:—

"Application is made by the petitioner for the substitution of his name on the record in place of the decree-holders with a view to execution of the decree in this suit.

The decree is for rent due and for compensation for use and occupation, and stands exactly on the same footing as the decree passed in Civil Regular No. 5631 of 1914 of this Court.

The decree, so far as it related to compensation for use and occupation, was set aside by the Chief Court in Civil Revision No. 153 of 1914 upon the legal ground that the Receivers, who were the plaintiffs in that suit and are the decree-holders in this, had no powers under their order of appointment except to receive. The order of appointment is the same, and if this legal objection is good in that suit, it must equally hold good in this, and the decree in this suit must for the same reason and to the same extent be legally bad. In these circumstances, and if there is to be uniformity of decisions, it appears to me it would be wrong for this Court to execute such a decree or even to sanction a step-in-aid of execution of it without first referring the matter to the

Chief Court for such orders as may be considered desirable.

There are other suits I believe which stand on exactly the same footing; but I have not the references before me.

I accordingly refer this application to the Chief Court under section 113 of the Civil Procedure Code and Order XLVI, rule 1, for orders as to whether it should be proceeded with and whether execution of the decree in its present form should thereafter issue, if and when applied for."

JUDGMENT.- Hajee Mohamed Hady applied to be substituted for the Receiver who had obtained a decree. There seems to be no question that if the decree was good, the petitioner would be entitled to be substituted as decree-holder. The learned Judge of the Small Causes Court is apparently of opinion that the decree is bad and should not, therefore, be transferred. The application was one in execution and the question of validity of the decree does not arise. The answer to the reference is in the affirmative.

*Reference answered in the affirmative.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 722 OF 1914.

November 30, 1915.

*Present*:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

RT. SIVAJI RAJAH SAIB AND ANOTHER—PLAINTIFF'S LEGAL REPRESENTATIVES—APPELLANTS

*versus*

THE RECEIVER APPOINTED BY THE COURT OF THE SUBORDINATE JUDGE OF TANJORE—DEFENDANT—RESPONDENT.

*Madras Estates Land Act (I of 1908), s. 4, cl. (3)—Commutation of rent—Rate, determination of.*

In determining the rate of commutation of rent a Court is not justified in accepting the list of prices prepared by the Collector without further proof that these were prices actually prevailing in that locality during the year in question. [p. 493, col. 2.]

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 27 of 1912, preferred against the decree of the Court of the Revenue Divisional Officer of Kumbakonam, in Summary Suit No. 112 of 1911.

Mr. *R. N. Aingar* and Messrs. *Grant* and *Greatorex*, for the Appellants.

Mr. *L. A. Govindaraghava Aiyar*, for the Respondent.

This second appeal coming on for hearing on the 10th March 1915, the Court (Spencer and Coutts-Trotter, JJ.) delivered the following

JUDGMENT.—In the written statement the defendant stated that Rs. 1-6-0 was a fair price per *kalam* of paddy. The Collector found that Rs. 1-6-0 was a fair rate. The defendant at the trial in that Court did not claim more. The District Judge has not given reasons for admitting additional evidence at the hearing of the appeal, and he was not justified in accepting the list of prices prepared in the Collector's office without further proof that these were prices actually prevailing in that locality during the years in question. The Court of first instance had evidence before it from which it might have decided what was the actual average outturn in grain on the suit lands in Aduthorai, during the preceding ten years, excluding famine years, as prescribed by section 40, clause (3) (*a*), of the Madras Estates Land Act, and thus had no need to base its finding on the outturn of grain in the adjoining village of Vichitrarajapuram, although under clause (3) (*b*) the Court might have taken into consideration money-rents paid on lands of a similar description in neighbouring villages. We must call for a fresh finding on issue No. 3 from the present District Judge on the evidence on record, the decision to be based on the considerations laid down in section 40 of the Act.

The finding should be returned within one month of the re-opening of the District Court of Tanjore after the mid-summer recess. Seven days will be allowed for filing objections to the finding of the District Court after notice of the return of the said finding shall have been posted up in the High Court.

In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

FINDING.— * * * * * * * * * * * * * * *

ABJAL MAJHI *v.* INTU BEPARI.

I record a finding, therefore, that the proper rate of rent is 125 *kalams* $6\frac{3}{8}$ *marakals* of *kuruvai* per *veli* for 1st crop and 62 *kalams* and $9\frac{3}{8}$ *marakals* of *sambha* per *veli* of 2nd crop on double crop lands and 68 *kalams* $10\frac{3}{8}$ *marakals* of *sambha* per *veli* on single crop lands.

The High Court has held, in the order of remand, that Rs. 1-6-0 is the proper price per *kalam* of paddy. I find, therefore, that the money-rent payable on commutation is Rs. 172-9-8 per *veli* for *kuruvai* 1st crop and Rs. 86-5-2 per *veli* for *sambha* 2nd crop on double crop lands and Rs. 94-11-0 per *veli* for *sambha* on single crop lands, and return a finding accordingly.

This second appeal coming on for final hearing this day after the return of the finding of the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—We accept the finding, the result of which will be that from *fasli* 1321 the tenant will have to pay a money-rent at the rate of Rs. 172-9-8 per *veli* for the first crop and Rs. 86-5-2 per *veli* for the 2nd crop in the case of double crop lands, and Rs. 94-11-0 per *veli* in the case of single crop lands. Each party will bear their own costs throughout.

*Appeal allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1392 OF 1914.

July 27, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

ABJAL MAJHI AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

INTU BEPARI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appeal by plaintiff against partial decree—No appeal or cross-objection by defendant—Appellate Court, whether can dismiss suit entirely*

Order XLI, rule 33, of the Civil Procedure Code is very widely expressed but it is not to be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statutes like those which relate to limitation or payment of Court-fees. [p. 495, col. 1.]

Order XLI, rule 33, should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. [p. 495, col. 2.]

In a suit for arrears of rent the plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants did not prefer an appeal, nor did they file a cross-objection. The lower Appellate Court dismissed the entire suit:

*Held*, that the lower Appellate Court was not justified in dismissing the suit entirely on the appeal of the plaintiffs. [p. 495, col. 2.]

*Held*, further, that the judicial discretion vested in the Court of Appeal below was not properly exercised. [p. 495, col. 2.]

Appeal against the decree of the District Judge of Backergunge, dated the 19th February 1914, reversing that of the Munsif of Barisal, dated the 24th September 1913.

Babu *Abinash Chunder Guha*, for the Appellants.

Babu *Nakuleswar Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for arrears of rent. The plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance decreed the suit in part and allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants were satisfied with this decree; they did not prefer an appeal nor did they file a cross-objection as provided in the Code. But the District Judge on the appeal by the plaintiffs has dismissed the entire suit. The plaintiffs have now appealed to this Court and have argued that the District Judge should not on their appeal have deprived them of the benefit of the decree of the Trial Court. In support of this contention, reliance has been placed upon the cases of *Rangamlal* v. *Jhundu* (1) and *Ganga Dhar Muradi* v. *Banabashi*

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 111.

PIRAPPA MALKAPPA *v.* ANNAJI APPAJI.

*Padhari* (2). On behalf of the defendants-respondents, reliance has been placed upon rule 33 of Order 41 of the Code, which authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. The rule further lays down that this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

This rule is, no doubt, very widely expressed; but, clearly, it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statute, like those which relate to limitation or payment of Court-fees. Rule 22 of Order 41 of the Code provides that any respondent, who has not appealed from any part of the decree, may take cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service, on him or his Pleader, of notice of the day fixed for hearing the appeal or within such further time as the Appellate Court may deem fit to allow. Court-fee *ad valorem* is also required to be paid on the memorandum of cross-objection under Article, 1 Schedule I, of the Court Fees Act, 1870. In the case before us, the defendants not only did not prefer an appeal against the decree of the Trial Court in so far as it was adverse to them, they did not file a memorandum of cross-objection. When the District Judge permitted them to contend before him that the decree against them should be discharged on the appeal preferred by the plaintiffs, he allowed them in substance to evade the provisions of the Civil Procedure Code, the Limitation Act and the Court Fees Act. We are of opinion that even if it be assumed that rule 33 is applicable to a case of this description, the judicial discretion vested in the Court of Appeal below has not been properly exercised. We may also observe that, as was pointed by Jenkins, C. J., in *Ganga Dhar Muradi* v. *Banabashi Padhari* (2), ordinarily rule 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. This is the rule recognised in England under Order 58, Rule 4, Rules of Supreme Court, which furnished the basis for Order XLI, rule 34 of our Code [*Attorney-General* v. *Simpson* (3); *Middlemas* v. *Wilson*(4)]; though a different rule was possibly recognised in earlier decisions [*Rawlins* v. *Powel* (5); *Watts* v. *Symes* (6)]. If the course followed by the Court of Appeal below were approved, a party would be penalised merely because he had preferred an appeal against the decree of the Court of first instance. We cannot persuade ourselves to hold that this could have been the intention of the Legislature.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

*Appeal allowed.*

(2) 24 Ind. Cas. 208; 22 C. L. J. 390.

(3) (1901) 2 Ch. D. 671; 70 L. J. Ch. 828; 85 L. T. 325; 17 T. L. R. 768.

(4) (1875) 10 Ch. App. 230; 44 L. J. Ch. 476; 32 L. T. 105; 23 W. R. 301.

(5) (1715) 1 P. Wms. 297 at p. 299; 24 E. R. 397.

(6) (1851) 1 De G. M. & G. 240; 21 L. J. Ch. 713; 16 Jur. 114; 42 E. R. 544; 91 R. R. 69.

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## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 232 OF 1914.

September 1, 1915.

*Present*:—Mr. Justice Batchelor and Mr. Justice Hayward.

PIRAPPA MALKAPPA AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

ANNAJI APPAJI MAHOLKAR—PLAINTIFF—RESPONDENT.

*Dekkhan Agriculturists' Relief Act* (*XVII of* 1879),

PIRAPPA MALKAPPA v. ANNAJI APPAJI.

*s.* 72, *applicability of—'Person', meaning of—Cause of action—Agriculturist, bond executed by—Suit for recovery on bond—Limitation.*

The word 'person' in section 72 of the Dekkhan Agriculturists' Relief Act is equivalent to the word 'defendant' which occurs in section 3, clause (*w*), of the Act.

The words 'cause of action' in section 72 of the Act refer to the whole bundle of material facts which it is incumbent upon a plaintiff to prove in order to establish his case.

The defendant's father executed a registered bond on the 19th June 1900 when the defendant was not born. The plaintiff sued for recovery on the bond in 1912. The defendant resisted the suit as barred by limitation on the ground that he not having been born when the cause of action arose was not an agriculturist:

*Held*, that the suit fell under section 72 of the Dekkhan Agriculturists' Relief Act and was not barred by limitation.

Second appeal from the decision of the First Class Subordinate Judge, Sholapur, in Appeal No. 11 of 1913, reversing the decree passed by the Joint Subordinate Judge, Sholapur, in Civil Suit No. 462 of 1912.

Mr. *D. A. Tulzapurkar*, for the Appellants.

Mr. *P. D. Bhide*, for the Respondent.

JUDGMENT.—The question raised in this appeal is one of some nicety upon the construction of section 72 of the Dekkhan Agriculturists' Relief Act, a section which, as it seems to us, is somewhat unfortunately worded.

The bond in suit is registered, and was executed on the 19th June 1900. Ordinarily the period of limitation would have expired in 1907, that is, six years from the accrual of the cause of action in 1901. The suit was not filed till 1912, but it is sought to save it by virtue of section 72 of the Dekkhan Agriculturists' Relief Act, which, if it can properly be applied, extends the period to twelve years. The lower Appellate Court has upheld the plaintiff's contention on this point.

It is now contended by Mr. Tulzapurkar for the appellants that section 72 cannot be invoked in the plaintiff's favour, because the suit is brought not against the person who originally executed the bond in 1900, but against his sons. It is, therefore, urged, following the strict words of the section, that this suit cannot be said to be brought against a person who, at the time when the cause of action arose, was an agriculturist in the named districts. For, the argument runs, the cause of action arose in 1901, and at that time the persons against whom the suit is brought were not only not agriculturists within the named districts, but were not in existence at all. That, no doubt, is a construction to which a rigorous adherence to the mere words of section 72 does lend some countenance, but it is not, we think, a construction which the Court ought to favour, if only out of respect for the Legislature. For, if we followed that construction, the result would be that a suit brought against an agriculturist father would receive the concession afforded by the section, but the concession would be refused if the suit were brought against the agriculturist sons upon the death of the father; and a result so repugnant ought not lightly to be attributed to the Legislature. Rather, we think, it must be taken that the word 'person' in section 72 is equivalent to the word 'defendant' which occurs in section 3, clause (*w*), that clause being referred to in the section.

It may also be contended with less violence than Mr. Tulzapurkar's argument would involve that the words 'cause of action' must be read in their proper sense as referring to the whole bundle of material facts which it is incumbent upon the plaintiff to prove in order to establish his case. In such an instance as this, therefore, the cause of action as against the present defendants would be compounded partly of the fact of the execution of the bond and partly of the fact that the present defendants succeeded to the liabilities of their father on his death in 1909. In that view also the suit would fall within the scope of section 72, and plaintiff would be entitled to the extended limitation.

On these grounds we think the lower Appellate Court was right, and the appeal is dismissed with costs.

*Appeal dismissed.*

KALU *v.* MEHRU MAL.

## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 257 OF 1913.

December 4, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

KALU AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MEHRU MAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), ss 19, 14 - Recital of past events, whether acknowledgment—Exclusion of time—Proof, necessary.*

Recitals of past events cannot be construed as acknowledgments of existing liability. [p. 498, col 1.]

Where, therefore, in a previous suit between the parties, the defendants in their written statements merely recited that they had received a certain amount as earnest money and then said that the said amount had been more than re-paid by delivery of goods:

*Held*, that there was no such acknowledgment of liability on the part of the defendants as to extend the time under section 19 of the Limitation Act. [p. 498, col. 1.]

*Maniram Seth* v. *Seth Rup Chand*, 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 2 N. L. R. 130; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300 (P. C.); 33 I. A 165, distinguished.

*Periavenkan Udaya Tevar* v. *Subramania Chetti*, 20 M. 239; *Shaik Meera Sahib* v. *Sheik Nainar Lubbay Marcayar*, 21 Ind. Cas. 30; (1913) M. W. N. 682; 25 M. L. J. 259 at p. 261; *Hingan Lal* v. *Mansa Ram*, 18 A. 384 at p. 385; A. W. N. (1896) 101, followed.

A person who claims an exclusion of time during which a former proceeding was pending must prove two things, *first*, that he had prosecuted the former proceeding with due diligence and, *secondly*, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. [p. 498, col. 2; p. 499, col. 1.]

Where, therefore, each of the two plaintiffs in a suit came into Court originally to sue separately in respect of a contract which gave them a joint but not a several right and their error was pointed out to them and they were given every opportunity of rectifying it; but they elected to proceed with their suits as then framed, and by the time they were dismissed on the ground of non-joinder the period of limitation had expired:

*Held*, that the plaintiffs had not exhibited that degree of diligence which alone could entitle them to the benefit of section 14 of the Act. [p. 499, col. 1.]

*Ram Chand* v. *Shadi Ram*, 19 P. R. 1888, followed.

Second appeal from the decree of the Divisional Judge, Gujranwala Division, dated the 29th October 1912, modifying that of the Munsif, 1st Class, Gujranwala, dated the 29th March 1912, decreeing the claim for Rs. 750.

Mr. *Oertel*, for the Appellants.

Lala *Rama Nand*, for the Respondents.

JUDGMENT.—The sole question before us on this second appeal from the decree of the Divisional Judge is whether the plaintiffs' suit was barred by limitation on the date of its institution in the Court of the Munsif, 1st Class. The claim was based on the allegation that the defendants, 11 in number, agreed by one and the same document, dated 21st *Katak Sambat* 1964 (*i. e.* 6th November 1907). to sell the whole of their cotton crop of certain season to the two plaintiffs at a specified rate. The sum of Rs. 1,000 was advanced in two instalments to the defendants who undertook to deliver the crop at the end of the season. One defendant, Arura, admittedly delivered 250 maunds of cotton at the time agreed upon and plaintiffs state that they settled matters with him and have no further cause of action as against him. The other defendants, however, failed to deliver any cotton and plaintiffs accordingly sue to recover Rs. 750 being the balance of the earnest money after allowing 250 maunds delivered by Arura and for interest. The claim was decreed except as regards interest by the Munsif against all the defendants but the Divisional Judge on appeal held that the claim was barred as against two of the defendants, Taja and Dulla. In all other respects the Munsif's decree was upheld.

It is admitted that the plaintiffs' suit as now brought must be held to be barred by time, unless (1) the written statement signed by all the defendants except Taja, Dulla and Arura, and filed in two separate suits previously brought by the plaintiffs separately, can be held to contain an acknowledgment of liability within the meaning of section 19 of the Limitation Act, 1908, or (2) the plaintiffs can be held entitled to an extension of time under section 14 of the said Act.

As regards the *first* point, we are unable to agree with the lower Appellate Court that at the time when the written statement was filed, it contained any acknowledgment of a liability then subsisting. Paragraph 3 recited a past event, namely, that Rs. 1,000 had been taken by defendants as earnest money, and paragraph 4 proceeded to set out that the said sum had been more than repaid by delivery of cotton to the value of

Rs. 3,000. We find it difficult to understand how a statement of this kind can be construed into an admission of then existing liability in respect of the Rs. 1,000. In *Maniram Seth* v. *Seth Rup Chand* (1) their Lordships of the Privy Council held that an admission by defendants that a sum of money had been received by them and that there were open and current accounts between their creditor and themselves amounted to an acknowledgment that they were liable to pay the amount received by them if, upon taking accounts, it were found that they were indebted to that extent to the creditor. In the present case there is no admission that open and current accounts were in existence between the plaintiffs and the defendants at the time when the written statement was filed, nor is there any admission from which a liability to pay the sum of Rs. 1,000 can be implied. In our opinion the decisions of the Madras High Court reported as *Periavenkan Udaya Tevar* v. *Subramanian Chetti* (2) and *Shaik Meera Sahib* v. *Shaik Nainar Lubbay Marcayar* (3) are authorities directly in point and support the view that we take. As observed by Edge, C. J., in *Hingan Lal* v. *Mansa Ram* (4) if mere recitals of past events are to be construed in cases such as the present into acknowledgments of existing liability, defendants will be exceedingly reluctant to file written statements and will in any case see that they are as bald and as brief as they possibly can be.

We accordingly hold that there is no such acknowledgment of liability in this case on the part of the defendants as to extend the time under the provisions of section 19 of the Limitation Act.

The *next* question is whether plaintiffs are entitled to an exclusion of time under section 14 of the Indian Limitation Act. Admittedly the contract was made in favour of Mehru Mal and Larka (who are erroneously described by the Divisional Judge as father and son) jointly, but on the 7th of July 1908 Mehru Mal as sole plaintiff sued to recover one-half of the earnest money paid by himself and Larka to the defendants. The latter in the written statement filed by them took as their first objection the plea that the contract being in favour of Mehru Mal and Larka jointly, it was not competent to Mehru Mal to bring the suit in his own name. Larka when examined stated that he would not join Mehru Mal as a co-plaintiff, but subsequently in November 1910 he brought a separate suit as sole plaintiff and in it sought to recover the other half of the said earnest money. In his suit also the objection was taken by defendants that Larka could not sue alone in respect of the joint contract, but his replication was that the contract was not joint and he refused to implead Mehru Mal as a co-plaintiff. As a result the plaints in both suits were rejected on the ground of non-joinder. Thereafter Mehru Mal and Larka brought the present suit as co-plaintiffs but, as we have pointed out already, the claim had become time-barred before its institution and the only question which we have now to decide is whether in the circumstances above set forth, plaintiffs can be said to have been prosecuting "with due diligence" another civil proceeding founded on the same cause of action and prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature was unable to entertain it. Upon the view that we take, it is unnecessary to consider whether non-joinder of parties comes within the purview of explanation (*iii*) of section 14 of the Limitation Act of 1908. In our opinion, plaintiffs cannot be said to have prosecuted the previous proceedings with due diligence. In *Ram Chand* v. *Shadi Ram* (5) it was held that plaintiffs cannot be held to have *bona fide* prosecuted a case with due diligence when there was such a palpable flaw in their plaint that it had to be dismissed because it failed to disclose a cause of action and further, that the person who claims an exclusion of time during which a former proceeding was pending must prove two things, *first*, that he had prosecuted the former proceedings

(1) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 2 N. L. R. 130; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 700 (P. C.); 33 I. A. 165.

(2) 20 M. 239.

(3) 21 Ind Cas. 30; 25 M. L. J. 259 at p. 261 (1913) M. W. N. 682.

(4) 18 A. 384 at p. 385; A. W. N. (1896) 101.

(5) 19 P. R. 1888.

with due diligence and, *secondly*, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. In the course of their judgment the learned Judges remarked: "If a plaintiff rushes into Court with a plaint which discloses no cause of action, or complains of the infringement of a right which has not yet accrued to him, and his suit is dismissed in consequence, he cannot with justice say that it is owing to a defect of jurisdiction on the part of the Court, or other cause of a like nature, that it has refused to entertain it. He has in reality only himself to blame for the unfructuous result of his litigation, and if he has exhausted the period of limitation in fighting such a case through a series of Courts, until he is finally set right by the highest Court of Appeal, he can hardly expect to have his wrong-headedness accepted as proof of diligence." So in the present case each plaintiff came into Court originally to sue separately in respect of a contract which gave them a joint but not a several right and their error was pointed out to them and they were given every opportunity of rectifying it. They elected, however, to proceed with their suits as then framed and by the time that those suits were decided the period of limitation had expired. It is impossible to hold in these circumstances that the plaintiffs exhibited that degree of diligence which alone could entitle them to claim the benefit of section 14 of the Act.

We must accordingly hold that the present suit is barred by limitation, and accepting the appeal we dismiss plaintiffs' claim with costs throughout.

*Appeal allowed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 493 OF 1908.

August 15, 1915.

*Present:*—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice N. R. Chatterjea.

AKIMANNESSA BIBI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BEPIN BEHARI MITTER—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 33, applicability of—Suit partly decreed—Appeal by defendant—No appeal or cross-objection by plaintiff—Leave to withdraw from suit, if allowable.*

Order XLI, rule 33, must be cautiously applied and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e. g.*, the Limitation Act and the Court Fees Act. [p. 500, col. 1.]

A suit for recovery of possession of land on declaration of title was decreed in part. The defendants appealed against the decree in so far as it was adverse to them. The plaintiff neither preferred a cross-appeal nor presented a memorandum of cross-objections. On the appeal coming up for hearing a local investigation was ordered. After the investigation the appeal came up for final disposal. After the arguments on behalf of the appellants had been concluded and while the arguments on behalf of the plaintiff-respondent were in progress, an application was made on behalf of the plaintiff to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action:

*Held*, that leave under Order XLI, rule 33, of the Civil Procedure Code, 1908, ought to be granted with respect to that portion of the plaintiff's claim which had not been decided adversely to him, inasmuch as the plaintiff did not ask for a relief which had been denied to him by the Court below but he merely sought to be relieved from the position of embarrassment in which he had been placed by the decree of the primary Court. [p. 500, col. 2; p. 501, col. 1.]

*Obiter dictum.*—Where a plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the plaintiff but the entire suit should be dismissed. [p. 500, col. 2.]

Appeal against the decree of the Subordinate Judge of Barisal, dated the 8th January 1908.

Babus *Dwarka Nath Chakrabarti* and *Romes Chunder Sen*, for the Appellants.

Babus *Mahendra Nath Ray*, *Baranasibasi Mukherjee* and *Hari Charan Gangooly*, for the Respondent.

### JUDGMENT.

MOOKERJEE, J.—This is an appeal in a suit for recovery of possession of land on declaration of title. The Trial Court decreed the suit in part. The defendants have appealed against the decree in so far as it is adverse to them. The plaintiff has neither preferred a cross-appeal nor presented a memorandum of cross-objections. On a previous occasion, a Division Bench of this Court directed a local investigation. That investigation has now been made and the appeal is before us for final disposal. After the arguments on behalf of the appellants had been concluded and while the arguments on behalf of the

respondent were in progress, an application was made to us on behalf of the plaintiff for leave to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action. This application has been opposed by the appellants on two grounds, namely, *first*, that as a portion only of the subject-matter of the controversy is before us, it is not competent to this Court to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit upon the same cause of action; and *secondly*, that the circumstances do not justify the grant of the prayer of the plaintiff.

As regards the *first* objection, it is plain that rule 33 of Order XLI of the Code entitles us to allow the plaintiff to withdraw from the entire suit with liberty to bring a fresh suit, although the plaintiff has not preferred an appeal against the decision of the Court below. Rule 33 authorises the Appellate Court to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require; and the rule explicitly states that this power may be exercised by the Court, notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. The latter part of the rule is expressed in very comprehensive language, and unquestionably covers a case of the description now before us. We are not unmindful that, as has been repeatedly observed, for instance, in the cases of *Rangamlal* v. *Jhandu* (1); *Ganga Dhar Muradi* v. *Banabashi* (2), *Abjal Majhi* v. *Intu Bepari* (3) and *Ananga Mohun* v. *Bijoy Chandra* (4), this power must be cautiously exercised and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e.g.*, the Limitation Act and the Court Fees Act. To take one illustration, where the plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the plaintiff but the entire suit should be dismissed. It is not necessary, however, to apply that doctrine to the case before us. Here, the plaintiff does not ask for a relief which has been denied to him by the Court below; he seeks merely to be relieved from the position of embarrassment in which he has been placed by the decree of the primary Court. In our opinion, rule 33 of Order XLI may justly be applied to the case before us. We are thus brought to a consideration of the *second* objection, namely, that in the circumstances of the present case, the plaintiff should not be allowed to withdraw from the entire suit with liberty reserved to institute a fresh suit upon the same cause of action. An examination of the protracted proceedings in this litigation has convinced us that the plaint is open to objection and that the mode of trial in the Court below has not been conducive to a correct determination of the real controversy between the parties. It was for this reason that this Court was constrained on the last occasion to direct a local investigation. The result of that investigation has been placed before us; we need only say that it is by no means satisfactory, and that if the appeal were heard on the merits to its final stage, possibly a further investigation might be necessary. In these circumstances, we feel no doubt that the plaintiff should be allowed to withdraw from the suit. But we are not prepared to allow the plaintiff liberty to bring a fresh suit in respect of the portion which has been decided against him by the Court below. The defendants frankly conceded that they were anxious to retain the judgment in respect of the portion which has been decided in their favour, not merely because they have got a favourable decree but also because they might use it against the plaintiff in another litigation not now before us. We are of opinion that this is a consideration which should not weigh with us in determining whether the

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.
(2) 24 Ind. Cas. 208; 22 C. L. J. 390.
(3) 32 Ind Cas. 494; 22 C. L. J. 391.
(4) 32 Ind. Cas 49?; 22 C. L. J. 39 ,

plaintiff should be allowed to withdraw from the suit. We, therefore, allow the plaintiff to withdraw from this suit with liberty to bring, subject of course to the law of limitation, a fresh suit in respect of the same cause of action, only with regard to the lands which have been decreed in his favour by the Subordinate Judge; but such liberty is not reserved to him with respect to that portion of his claim which has been decided adversely to him. This order is made on the condition that the costs in the Court below, namely, Rs. 413-11 and the costs subsequent to the decree, namely, the costs of the local investigation, *i.e.*, Rs. 48, and the costs of this appeal are deposited by the plaintiff in the Court below within three months from this date. The amount to be deposited will be specified in the order of this Court to avoid possible dispute. If the amount is not deposited as directed, this appeal will stand decreed and the suit will stand dismissed with costs in both Courts. We asses the hearing fee in this Court at ten gold *mohurs*.

As one of the respondents is an infant, we desire to add that in our opinion the application for withdrawal is undoubtedly for his benefit.

*Suit allowed to be withdrawn.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1424 OF 1912.

December 7, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

PANGI ACHAN—PLAINTIFF—APPELLANT

*versus*

P. N. BHEEMAN ACHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Malabar Law—Power of* tarwad *to limit* karnavan's *powers—Family* karar, *binding nature of—Abstention of one member, effect of*—Karar, *whether revocable—Power of* karnavan *to create* melcharth.

It is in the power of a *tarwad* to limit the ordinary powers of a *karnavan* by means of a family *karar*, which the *karnavan* is not entitled of his own authority to set aside. [p. 502, col 1.]

*Kanna Pisharodi* v. *Kombi Achan*, 8 M. 381; *Komu* v. *Krishna*, 11 M. 134, followed.

Where a *karnavan* is a consenting party to a family *karar*, he is bound by its terms unless the other contracting parties are willing to release him from his obligations or he can show that the *karar* is no longer beneficial to the interests of the *tarwad*. [p. 502, col. 1.]

Abstention for personal reasons of one member of the family cannot affect the binding character of the *karar* on those who are parties to it. [p. 502, col. 1.]

*Kalliyani* v. *Narayana*, 9 M. 236, referred to.

A family *karar* among members of a *tarwad* restricting the ordinary powers of a *karnavan* with a view to settle family disputes or to provide against mismanagement is not merely a delegation of the powers of the *karnavan* to other members of the family revocable at the will of the *karnavan*. [p. 502, col. 2.]

A *karnavan* with powers of *melcharth* thus limited has no power to grant a *melcharth* without the concurrence of other members of the *tarwad*. [p. 502, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 655 of 1910, preferred against that of the District Munsif of Alatur, in Original Suit No. 140 of 1909.

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—Appellant sues on a *melcharth* obtained from Dharman Achan, the late *karnavan* of his and respondents' *tarwad*, and the only question for determination now is whether this *melcharth* is valid or not, respondents' contention being that Dharman Achan was not empowered to grant such a *melcharth* owing to the provisions of the family *karar*, Exhibit I. This *karar* was executed by Dharman Achan, who was then *karnavan*, the second *anandravan*, and the two senior ladies of the *tarwad*, and we have the finding of fact, which we must accept, that it was executed at the *edom* or family house and was approved by all the members of the family, except the senior *anandravan*, who is now 26th respondent. About 6 months before granting the suit *melcharth* to plaintiff Dharman Achan purported to cancel the *karar* by the notice Exhibit II, and it is contended for appellant that he was entitled to cancel Exhibit I, which was merely a delegation of part of his rights as *karnavan* to three other members of the *tarwad*. While conceding that under a family *karar* a *karnavan's* powers of alienation may be restricted, Mr. Ananthakrishna Aiyar contends that when the *karar* relates merely to a delegation of powers by the *karnavan* it is competent to the *karnavan* to revoke it at any time, more

especially in a case where it has not been assented to by all the members of the *tarwad*, although he does not go so far as to contend that any family *karar* to which the *karnavan* is a party could be revoked by the latter without the consent of the other members of the *tarwad*.

So long as the *karar*, Exhibit I, was in force, and admittedly it was in force and was acted upon for 14 years (*i. e.*, until the revocation in 1907), the *karnavan* Dharman Achan had no power to grant a *melcharth* for *tarwad* property without the concurrence of the other signatories to the *karar*, and consequently the sole question for determination now is whether the revocation (Exhibit II) is valid.

Ordinarily, of course, a *karnavan* has the right to grant a *melcharth*, but it has always been held that it is in the power of the *tarwad* to limit the ordinary powers of a *karnavan*, and this limitation may be effected by a family *karar* [*Kanna Pisharodi* v. *Kombi Achan* (1)] which the *karnavan* is not entitled of his own authority to set aside [*Komu* v. *Krishna* (2)]. The usual object of a *karar*, whereby a *karnavan's* ordinary powers are restricted, is to settle family disputes or to provide against mismanagement by an incompetent or unscrupulous *karnavan*, and is often a means of averting a suit to remove the *karnavan* from his office. When, therefore, a *karnavan* is a consenting party to such a *karar* he is bound by its terms, unless the other contracting parties are willing to release him from his obligations, or he can show that the *karar* is no longer beneficial to the interests of the *tarwad*. This view is in accordance with a long series of decisions of this Court (*vide* Moore's Malabar Law, pages 117 *et seq.*)

In the present case the then senior *anandravan* (26th defendant) was not a party to the *karar* (Exhibit I), but the abstention for personal reasons of one member of the family cannot affect the binding character of the *karar* on those who were parties to it, and in this case we have the finding that not only the four executants, but also all the other members of the family were consenting parties. It was thus undoubtedly a family *karar*, that is, an agreement come to by the members of the family conclave after due consideration. Although 26th defendant himself may not be bound by the *karar*, so far as his personal rights are concerned, the abstention of one member of the family cannot alter the validity of the contract as between the parties to it. Even, in regard to an alienation of *tarwad* property, it was held in *Kalliyani* v. *Narayana* (3) that the factious or capricious dissent of a single *anandravan* ought not to be allowed to invalidate a sale-deed in pursuance of a family conclave. Much less can it be held to invalidate a *karar* which does not affect the personal rights of the dissenting member. In the view then, that Exhibit I is a family *karar* binding on the *karnavan* and other members of the family (except possibly 26th defendant) the argument put forward for appellant that it is a mere delegation of authority, in fact a power-of-attorney, and as such is revocable at any time by the *karnavan*, cannot be accepted. If the agreement were one entered into by the four executants alone, there might be some force in the argument, although the language of the document is hardly consistent with such a construction, but the approval of the other members shows clearly that it was a family arrangement whereby the *karnavan's* powers were restricted with his own consent.

A further contention is raised that plaintiff as a junior member of the *tarward* is entitled to redeem the plaint properties on behalf of the *tarwad*, and it is urged that a decree should be passed for redemption and possession decreed to the *tarwad*. To allow this plea would be to alter the whole nature of the suit, for there is no such prayer in the plaint and consequently we cannot allow it in second appeal.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 8 M. 381.
(2) 11 M. 134.
(3) 9 M. 266.

HARI MOHON PAL *v.* ATUL KRISHNA BOSE.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1260 OF 1913.
December 12, 1913.

*Present*:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

HARI MOHON PAL—PETITIONER

*versus*

ATUL KRISHNA BOSE AND OTHERS—OPPOSITE PARTY.

*Bengal Tenancy Act (VIII of* 1885), *ss.* 11, 18, 85, 170 (3)—*Lease, permanent and at fixed rate*—Raiyat, *rights of—Sub-lease, if permitted—Sub-lessee, right of, to apply under s.* 170 (3).

A lease was granted upon a rent of Rs. 5 a year and it was provided that the tenant would enjoy the land from generation to generation and that the landlord would not claim more rent than what was settled:

*Held*, that the lessee was a *raiyat* at a fixed rate of rent and, therefore, under section 18 of the Bengal Tenancy Act his interest was subject to the same provisions with respect to the transfer of, and succession to, the holding as that of a permanent tenure-holder. [p. 503, col. 2.]

A sub-lessee from such a lessee acquires a valid interest and is competent to make a deposit under sub-section (3) of section 170 of the Bengal Tenancy Act to avoid a sale in execution of a decree for rent obtained by the landlord against the permanent lessee. [p. 504, col. 1.]

The term "transfer" as used in section 11 or section 18 of the Bengal Tenancy Act includes a lease. [p. 503, col 2.]

The provisions of section 85 have no application to a case where section 18 applies. [p. 503, col. 2.]

Civil Rule against an order of the Munsif, Satkhira, dated the 17th June 1913.

Babu *Kali Mohan Sen*, for the Petitioner.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below has refused an application made by the petitioner under sub-section 3 of section 170 of the Bengal Tenancy Act. It appears that the landlords in execution of a decree for rent against their tenants were about to bring to sale the defaulting tenures. Thereupon the present petitioner applied under sub-section 3 of section 170 as a person who had taken a sub-lease from the judgment-debtors on the 24th February 1889, and who had thus acquired an interest in the tenure voidable on the sale. The Court below has held that his position is that of an under-*raiyat* and that he is not entitled to apply under sub-section 3 of section 170.

It is not disputed that on the 22nd November 1859 the landlords granted a lease to the predecessor-in-interest of the judgment-debtors. The interest thus created was transferred on the 23rd May 1869 to persons from whom the judgment-debtors have derived title. The question raised before us relates to the nature of the interest created by the lease of the 22nd November 1859. It has been found that the lease was for agricultural purposes; and it has also been held that the status of the tenant was that of a *raiyat*. The only point for determination is whether the grantee became a *raiyat* at a fixed rate of rent. In our opinion, there is no room for controversy that the grantee was a *raiyat* at a fixed rate of rent. The lease states explicitly that it was granted upon a rent of Rs. 5 a year, that the tenant would enjoy the land from generation to generation and that the landlord would not claim more rent than what was settled. It is clear, therefore, that the lessee was a *raiyat* at a fixed rate of rent. Consequently under section 18 of the Bengal Tenancy Act his interest was subject to the same provisions with respect to the transfer of, and succession to, the holding, as that of a permanent tenure-holder. Now, section 11 provides that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred and bequeathed "in the same manner and to the same extent as other immoveable property." The Court below has held that the term "transfer", as used in section 11 or section 18, does not include a lease. In our opinion, there is no foundation for this view. A lease is a transfer of an interest in immoveable property and there is no good reason why a permanent tenure-holder or a *raiyat* at a fixed rate of rent should be held competent to alienate absolutely the tenure or holding and at the same time be deemed to be under a disability in so far as the grant of a sub-lease is concerned. The Court below has held that if this view is adopted, section 85 cannot be reconciled with section 18. But it is plain that the proper method of construction is to hold that the provisions of section 85 are subject to those of section 18; in other words, that section 85 has no application to a case where section 18 applies. In the case before us, as the lessor of the petitioner was a *raiyat* at a fixed rate of rent, the sub-lease granted by him on the 24th February 1889 is not subject to the

operation of section 85. Consequently the interest created in favour of the applicant in 1889 is a valid interest, and as it is liable to be avoided on the sale to be held at the instance of the superior landlord, it is competent to the petitioner to seek protection under sub-section 3 of section 170 of the Bengal Tenancy Act.

The result is that this Rule is made absolute, the order of the Court below discharged and the application made by the petitioner to that Court granted. We make no order as to costs.

*Rule made absolute.*

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PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 90 OF 1913.
November 25, 1915.
*Present*:—Mr. Justice Rattigan and
Mr. Justice Shadi Lal.
HAR PARSHAD AND ANOTHER—DEFENDANTS—APPELLANTS
*versus*
SADHU AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Religious trust*—Mahant, *whether can alienate trust property without authority—Legal necessity—Dispute* inter partes *adjudicated upon in earlier suit—Pecuniary value of subsequent suit beyond jurisdiction of Court trying previous suit-Finding, whether* res judicata—*Judgment, admissibility of.*

A trust was created by the *Nai* community for the maintenance of a *Samadh* and a *Shiwala* and other houses and shops were subsequently built in one enclosure so that the entire enclosure constituted one tenement. The *Mahant* alienated certain shops. The plaintiffs, as representatives of the *Nai* community, sued for a declaration that the alienation, being without authority and without consideration and valid necessity, was void. It was found that succession to the entire property was from *guru* to *chela*:

*Held*, (1) that the trust was a religious trust, and that the property alienated being a part and parcel of the institution, the plaintiffs, as representatives of the author of the trust, were entitled to restrain the trustee from making an improper disposal thereof; [p. 505, col. 2.]

(2) that the building of a house not being such a necessary purpose as would justify an alienation of trust property, the alienation was not binding on the plaintiffs. [p. 505, col. 2.]

Where the pecuniary value of a suit is beyond the jurisdiction of a Court which adjudicated upon the dispute between the same parties sometime before, any finding then arrived at cannot be treated as *res judicata* in the subsequent suit, though the judgment of that Court is admissible in evidence. [p. 505, col. 1.]

First appeal from the decree of the District Judge, Lahore, dated the 3rd December 1912, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Dhanraj Shah* and Diwan *Mehr Chand*, for the Appellants.

Kanwar *Dalip Singh* and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The dispute in this appeal and the connected Appeal No. 1016 of 1914 relates to the power of defendant *Bawa* Sham Gir to alienate four shops and a *kothri*, which are situated in the Anarkali Bazar of the Lahore town. Sham Gir is undoubtedly the *mahant* of a religious institution and he effected two mortgages of the above property for Rs. 1,000 and Rs. 1,300, respectively, in favour of one Mohan Lal, and subsequently sold it for Rs. 6,500 to Har Parshad. All these alienations are contested by the plaintiffs, who, as the representatives of the *Nai* community, claim to be interested in the maintenance of the trust.

The important point for determination in both the appeals is whether the property constitutes a part of the religious trust and is consequently inalienable except for necessity. Now, the plan on the record shows that the shops in dispute are on the northern side of an enclosure which includes a *Shiwala*, some houses, a well and a vacant plot of land. Adjoining the shops there is a *Samadh* and next to it is a house, which led to the litigation in 1871, to be referred to hereafter. Now the defendants admit that the *Samadh* belongs to the *Nais* and so also the house adjoining it, but they deny that the shops have anything to do with the *Samadh* or that the plaintiffs have *locus standi* to contest the disposal thereof. It is alleged that Sham Gir is the *mahant* of only the *Shiwala*, but it is not stated whether the property in dispute belongs to the *Shiwala*, and, if not, how Sham Gir or his predecessors acquired it. The contention that the *Samadh* is a separate institution from the *Shiwala* appears to us to be an

after thought and it is absolutely clear that this allegation was never made at any time previously, though there have been at least two law suits in connection with this shrine. In fact, upon the documentary evidence there can be little doubt that the entire enclosure constitutes one tenement, and that the site with the *Samadh* originally belonged to the *Nais*, who created a trust for the maintenance of the *Samadh*, and that the *Shiwala* and other houses were erected subsequently, either with the income of the shrine, or by persons who wanted to make charitable gifts.

The most important piece of evidence, which practically settles the matter in favour of the plaintiffs, is a judgment of a Civil Court, dated the 16th June 1871. It deals with the title to the entire enclosure and it is beyond dispute that the decision is *inter partes*. It appears that the pecuniary value of the present suit is beyond the jurisdiction of the Court which adjudicated upon the dispute in that case, and any finding then arrived at cannot, therefore, be treated as *res judicata*. But there is no doubt that the judgment is admissible in evidence and fully supports the plaintiffs' claim. The Court, after considering the evidence before it, decided that the whole enclosure was a trust and gave a brief history of its development in the following words:—

"It appeared that about forty years ago the plaintiffs, *Hajjams*, built a *Samadh* in memory of *Sain* Bhagat, *Hajjam*, with a *pacca* well in the site in dispute, and began to hold there an annual fair. After that 7 or 8 years ago some one built a *Shiwala* there with the consent of the barbers. This added to the grandeur of the place. About 20 or 22 years ago the barbers appointed defendant No. 1 (the predecessor of the present *mahant*) as *pujari* of the institution."

This quotation shows how the buildings were constructed on the site attached to the *Samadh*, and it will be observed that in that case there was no suggestion that the *Samadh* was separate from the *Shiwala*. And the same remark applies to the litigation which ended in the judgment of the Munsif, dated the 27th November 1885. The only document, upon which reliance has been placed by the appellants, is an entry in the Settlement papers of 1868, which describes the property as *Dharmsala*, well, *Shiwala* and passage, and mentions the name of Shib Charan Gir, disciple of Lachhman Gir, in the column of ownership. This record is equally consistent with the allegation that Shib Charn Gir held the property as trustee, and does not, in our opinion, mean that he was the private owner thereof.

The oral evidence on the point is altogether worthless; but the fact that the succession to the entire property has been, admittedly, from *Guru* to *Chela*, irresistibly points to its being a religious trust. Upon the evidence referred to above we have no hesitation in endorsing the finding of the District Judge that the property alienated is a part and parcel of the institution called *Bawa* Sain Bhagat, and that plaintiffs, as the representatives of the authors of the trust, are entitled to restrain the trustee from making an improper disposal thereof.

The question of consideration and necessity does not require much discussion. The learned District Judge has dealt with the matter at length at pages 65 and 66 of his judgment, and the learned Counsel for the appellants has not seriously attempted to challenge the finding against his clients. Conceding for the sake of argument that consideration on the mortgages did pass, it is abundantly clear that there was absolutely no necessity for encumbering the property. The shops in dispute had been built during the time of the late *mahant*, and there is no reliable evidence to show how the money borrowed on mortgages was spent. The sum expended in making repairs must be very small indeed and could have been met out of the current income. The building of a house, if the allegation on this point is correct, does not constitute a necessary purpose, such as would justify an alienation of trust property.

As regards the sale in favour of Har Parshad, the only items said to have been paid by the vendee are Rs. 700 and Rs. 600, and the District Judge has shown very clearly that the alleged payment was a mere myth and that the vendor received practically nothing on the cheques for these sums. As observed already, the conclusion

of the lower Court has not been controverted, and it would be an act of supererogation if we repeat here the confused statements made by Sham Gir on different occasions with respect to these two items. Suffice it to say that we fully accept the view that the vendee has failed to establish any payment.

The result of the above discussion is that we uphold the decision of the learned District Judge and dismiss the appeal with costs.

*Appeal dismissed.*

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## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 321 OF 1915.

September 3, 1915.

*Present*:—Mr. McColl, A. J. C.

MI HLA YIN—DEFENDANT—APPELLANT

*versus*

MI HMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage—Redemption, effect of—Sale by mortgagee of his rights, whether extinguishes mortgage—Transfer of mortgage—Purchaser, rights of.*

When a mortgage is redeemed by the mortgagor or by some one having a right under section 91 of the Transfer of Property Act to redeem, the original contract is completed and all the mortgagee's rights created under it cease. The mortgage is also extinguished when the mortgagor's rights are invaded and some one having no right to redeem redeems in opposition to the wishes of the mortgagor. [p. 506, col. 2.]

*Nga Kyaw Dun* v. *Mi Min Sin*, U B. R. 1904-06, II; Limitation, p. 9, followed.

A contract of mortgage does not cease to exist merely by the mortgagee selling his rights to another. The mortgage is only transferred and the purchaser can exercise the mortgagee's rights. [p. 507, col. 1.]

Mr. *R. K. Banerjee*, for the Appellant.

Mr. *S. Mukerjee*, for the Respondents.

JUDGMENT.—The plaintiff-respondent, Ma Hman, and two others sued to redeem some land which they alleged had been mortgaged by Maung Paing, the deceased husband of Ma Hman, to Maung Shwe Maung and had been redeemed from his heirs after his and Maung Paing's death by the defendant-appellant, Ma Hla Yin.

Ma Hla Yin is the daughter of Ma Nyet Thu, daughter of Maung Paing by his first wife. She, therefore, is entitled to a share of the land and thus had a right under section 91, Transfer of Property Act, to redeem it. The Township Judge accordingly held that the suit for redemption must fail and that the plaintiffs' remedy was to sue for partition.

On appeal the learned Additional Judge of the lower Appellate Court held that by Mi Hla Yin's redemption, the mortgage had been transferred and not extinguished, and that the plaintiffs, therefore, had a right to redeem. He cited *Maung Po Myin* v. *Ma Daw* (1) as his authority, but it apparently did not strike him to consider why one heir should have a better right to possession than another. He has failed to understand the ruling he cited and has gone astray.

In *Maung Po Myin's* case (1) the persons who redeemed the land were the son and daughter-in-law or daughter and son-in-law of the mortgagors, and they redeemed during the life-time of the mortgagors. They were not entitled to do this in their own right, and they did it with the permission of the mortgagors and not in opposition to them, and, therefore, the mortgage was transferred and not extinguished.

In the present case Mi Hla Yin had a right to redeem, and she redeemed in exercise of that right, and, therefore, the mortgage was extinguished.

When a mortgage is redeemed by the mortgagor or by some one having a right under section 91, Transfer of Property Act, to redeem, the original contract is completed and all the mortgagee's rights created under it cease. The contract of mortgage is no longer in existence and the mortgage is said to be extinguished.

The same thing happens when the mortgor's rights are invaded and some one having no right to redeem redeems in opposition to the mortgagor: *Nga Kyaw Dun* v. *Mi Min Sin* (2). The mortgage is then extinguished because the mortgagee recognizes the title of the person redeeming and allows redemption in view of the terms of the original contract. He does not give up his rights of his own free will, but because he thinks that by the terms of his contract he is legally bound to do so. The contract is, therefore, at an end and the rights created by it cease.

(1) U. B. R. 1897-1901, II, p. 473.
(2) U. B. R. 1904-1906 II; Limitation p. 9.

MAUNG THEIN v. MA THET HNIN.

But a mortgagee may either sell or mortgage his rights under the contract. When he mortgages them the transaction is a sub-mortgage and the mortgagee may redeem his rights so long as the mortgagor does not exercise his paramount right of redemption. When the mortgagee sells his rights those rights do not cease to exist; they become the rights of the purchaser; the original contract is still in force just as in the case of the negotiation of a negotiable instrument. The mortgage is then said to be transferred. This is what happens when a person having no right to insist on redemption redeems either with the permission of the mortgagor or without such permission but recognizing the mortgagor's title. He merely purchases the mortgagee's rights.

In the present case Mi Hla Yin redeemed in her own right and the other defendants could not have legally resisted redemption by her. The original contract, therefore, was at an end and the mortgage was extinguished and the suit was not maintainable.

It has been urged that the suit instead of being dismissed should be turned into a partition suit.

It is not improbable that such a suit would involve fresh parties and the bringing into hotch potch of other property, and the rule usually followed is not to allow an amendment of the plaint of such a character at this stage, but over and above this objection there is a further one that is insuperable. The land is now under mortgage to a stranger who is not a party to the suit. The land cannot be partitioned until that mortgage has been redeemed. The plaintiffs' remedy is to sue Maung Than for redemption.

The decree of the lower Appellate Court is set aside and the suit is dismissed with costs.

*Appeal accepted*; *Suit dismissed.*

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 345 OF 1914.

December 6, 1915.

*Present*:—Sir Charles Fox, KT., Chief Judge.

MAUNG THEIN AND ANOTHER—PLAINTIFFS —APPELLANTS

*versus*

MA THET HNIN AND ANOTHER—DEFENDANTS —RESPONDENTS.

*Buddhist Law, Burmese—Minor—Marriage—Marriage, compensation for breach of contract of—Parents, promise of, to marry their children, if enforceable.*

Under the Burmese Buddhist Law a male whether a minor or not cannot be married without his consent or against his will. If parents promise to make or compel their child to marry, the Court cannot enforce such promise or give compensation for breach of it, because by so doing it would infringe the essential principle that the consent of parties to a marriage must be free. [p. 508, col. 2; p. 509, col. 1.]

*Maung Taik* v. *Ma Cho*, U. B. R. 1897-1901, II, 197, referred to.

Mr. *A. C. Dhar*, for the Appellants.

Mr. *Ko Ko Gyi*, for the Respondents.

JUDGMENT.—The first plaintiff is a spinster of over 20 years of age; the 2nd plaintiff is her adoptive mother. The 1st defendant is a bachelor who is also above the age of minority; the 2nd defendant is his father. The suit was for Rs. 300 as compensation for breach of promise of marriage. It presents novel features.

The plaint sets out that in the spring of 1913 the young man and woman loved each other, and went off and lived together as husband and wife by mutual consent for about a week. In other words, they eloped without the consent of their parents, and behaved or rather misbehaved in the manner in which eloping couples may be presumed to do. It is not alleged that the young man promised the young woman marriage either before or after the elopement. The second plaintiff's husband found out the runaways and according to the plaint he called away the young woman and looked after her. According to the written statement he took her away and hid her, and in consequence the young man was not able to continue living with her. The plaint alleges that shortly after this the second defendant went to the second plaintiff, and promised her that he would choose a propitious day, provide suitable marriage

presents for the young couple, and would give his son in marriage to the young woman. In her evidence the second plaintiff said he asked her to allow him to make his son marry her daughter. She consented. When, however, she sent an intermediary to ask the second defendant to carry out his promises he refused to do so, and said that the plaintiffs might take any action they chose. Rupees 300 was claimed because the second defendant had property worth between Rs. 3,000 and Rs. 4,000 and according to second plaintiff and her father, it was customary in their part of the country and considered proper that a father with such means should on his son's marriage give the young couple property worth what would be about a tenth of his own property. The second defendant repudiated having made the promises alleged. His version of what happened was that when a Sub-Inspector of Police came to him about the matter, presumably about a possible charge of abduction against the young man, he told the officer that he would make the young man and woman marry if they consented to do so. Subsequently his son refused to marry the young woman. The Courts have found that the father did make the promises alleged by the second plaintiff and have given decrees in favour of both plaintiffs against both defendants. The Township Court's decree was for Rs. 200 but this was reduced by the District Court to Rs. 100 with costs. Both sides have appealed to this Court, the defendants on the ground that neither of them was liable, and the plaintiffs on the ground that the District Court was wrong in reducing the compensation, and in not sufficiently taking into account the injury done to the young woman's future prospects of marriage, and to her feelings. affections and social position. One of the witnesses called by the plaintiffs said that he did not think that the young woman's reputation was affected in consequence of her having eloped with a bachelor. The ideas prevailing in the particular part of the country appear to be peculiar. The claim was based not upon injury to reputation, injured feelings or anything remotely connected with love and romance, but upon the monetary and, some may think, sordid aspect of matrimony. Wounded feelings at promises made by the father not being carried out must have weighed less with the plaintiffs than the hope of getting as much as they could out of him.

The legal question involved in the case is whether the breach by the father of his promises to give his son in marriage to the young woman or to make his son marry her, and to give the couple marriage presents suitable to his position in life, afforded the plaintiffs jointly, or afforded either of them, a cause of action on which the Courts could make a decree for compensation. The Township Judge gave both plaintiffs a decree because he understood the Burmese Buddhist Law to allow compensation to be given for breach of promise of marriage to the parents of the party injured as well as to that party. The District Judge was led to uphold the decree by reference to sub-section 2 of section 25 of the Contract Act, but he does not work out in his judgment how that can be applicable to the case.

No doubt some texts in some Dhammathats, for instance those in sections 54 and 56 of the Kinwun Mingyi's Digest, contemplate penalties on parents who refuse to carry out a promise to give a child in marriage, but these texts apply to parents of a girl only. I can find no similar provision penalizing parents of a male child. But even if there were one, the provision would be one which it would not be possible for our Courts to carry out in these days. Our Courts must recognize that the free consent of the actual parties is essential to a marriage between an adult man and an adult woman. No giving in marriage by parties in such a case can be recognized as constituting a marriage unless the actual parties consent to be married. In *Maung Taik* v. *Ma Cho* (1) it was held that among Burmese Buddhists a woman, whether a minor or not, cannot be legally married without her consent or against her will; *a fortiori*, a male, whether a minor or not, cannot be married without his consent or against his will. If the second defendant's promise was

(1) U. B. R. 1897-1901, II, 197.

to give his son in marriage to the first plaintiff, the fulfilment of the promise by his informing the plaintiffs that he gave the son in marriage to the first plaintiff would have no legal effect, consequently the plaintiffs could not be given compensation for breach of a promise the fulfilment of which would be useless and of no effect. If his promise was to make or compel his son to marry the girl, the Court could not enforce such promise or give compensation for breach of it, because by so doing it would infringe the essential principle that the consent of parties to a marriage must be free.

Neither Court stated the ground on which it made the first defendant liable. It was not alleged that he had ever made a promise to marry the girl. He clearly was not liable for any breach of promise to marry.

For the reasons I have stated, his father cannot be held liable to compensate either or both of the plaintiffs for breach of the promises he was held to have made.

The appeal is allowed. The decrees of both the lower Courts are set aside, and the suit is dismissed with costs.

*Appeal allowed.*

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## LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 362 OF 1914.

November 16, 1915.

*Present*:—Sir Charles Fox, KT., Chief Judge.

KO BAT AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MAUNG KYA BAW AND ANOTHER—DEFENDANTS RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 151, scope of—Decree—Specific performance—Contract of sale—Deposit of money—Extension of time fixed—Application after expiry of time, if allowable.*

When an appeal is filed against a decree or order directing deposit of money by a certain date, an application for extension of such time should be made before the expiry of the time; but a Court may extend such time on an application made even after such date under section 151, Civil Procedure Code, if it is necessary to do so for the ends of justice*.

Mr. *Munshi*, for the Appellants.

Mr. *Rutledge*, for the Respondents.

JUDGMENT.—The suit was, *inter alia*, for specific performance of a contract for sale of land. On the 30th July 1913 a decree was passed ordering that on the plaintiffs depositing in Court Rs. 400 before the end of the Burmese year 1275 (the 14th April 1914) the 1st defendant should execute a deed of sale to the plaintiffs of the land, and in default of the deposit being made the suit would stand dismissed. An appeal was preferred against the decree but it was dismissed on the 7th April 1914. The plaintiffs did not deposit the money payable by them until the following month. Their reason for not depositing the money until then was that they did not hear of the result of the appeal until shortly before doing so. They applied that the defendants should be ordered to execute a transfer document. Objection was taken that not having deposited the money within the time mentioned in the decree the plaintiffs were not entitled to the order they asked for and the suit stood dismissed. The Sub-Divisional Judge did not think it was within his power to extend the time allowed for the deposit of the money, and dismissed the plaintiffs' application. They appealed to the Divisional Court, and the Judge considered that it was open to him to extend the time even at that stage.

The procedure was, no doubt, irregular. The plaintiffs should have applied before the 14th April 1914 for extension of time, and the Divisional Judge should have fixed a new period within which the deposit should be made, seeing that the date of his giving judgment was so near the time fixed in the original decree.

There can be no question that he would have had power to do this.

An extension of time, after the period fixed by the original decree had passed, can only be upheld as an order contemplated by section 151 of the Code as necessary for the ends of justice.

I am not prepared to hold that it was not within the power of the Divisional Court to extend the time by virtue of that provision. The appeal is dismissed with costs, two gold *mohurs*. Advocate's fee allowed.

*Appeal dismissed.*

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* *See* 32 Ind. Cas. 401 in which a contrary view has been held.—*Ed.*

GANDO PATUNI *v.* SARAT PATUNI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1122, 1298 AND 1299 OF 1912.

August 19, 1914.

*Present:*—Mr. Justice Woodroffe and Mr. Justice Coxe.

IN NO. 1122 OF 1912

GANDO PATUNI AND ANOTHER—DEFENDANTS—APPELLANTS

IN NO. 1298 OF 1912

RAJU PATUNI—DEFENDANT—APPELLANT

IN NO. 1299 OF 1912

KISHORI PATUNI—DEFENDANT—APPELLANT

*versus*

SARAT PATUNI AND OTHERS—PLAINTIFFS—RESPONDENTS IN ALL.

*Bengal Landlord and Tenant Procedure Act (VIII of 1869 B. C.), s. 27, applicability of—Tenant dispossessed by a co-sharer landlord—Suit for recovery—Limitation.*

When a tenant is ousted by a co-sharer landlord, the special limitation provided in section 27 of Act VIII of 1869 B C. has no application to the tenant's suit for recovery of possession. [p. 511, col. 1.]

*Brojo Mohun De Sircar* v. *Sheikh Dengu*, 7 C. L. R. 141, followed.

Appeals against the decrees of the Subordi-Judge, 2nd Court, Sylhet, dated the 30th January 1912, modifying that of the Munsif, Additional Court, Sunamgunj, dated the 19th June 1911.

FACTS material to the report are these :—

Three suits were brought by the plaintiffs for the recovery of possession of some lands on establishment of their *jote* rights thereto. They alleged that the lands in suit were their paternal *jotes* held by them under the *malics* Rashamay Chowdhuri, Krishna Kumar Chowdhuri and others and that in 1312, B. S., the defendants wrongfully dispossessed them from the same.

The defence set up by the defendants was the same in all the three suits and it was that the plaintiffs had abandoned the lands in suit, whereupon they were settled with them by Krishna Kumar Chowdhuri and his nephew, whom they alleged to be the sole landlords of the disputed lands. The defendants also contended that at any rate the suits were barred by the special law of limitation provided in section 27 of Act VIII of 1869, as they had been instituted more than one year after the plaintiffs had been ousted by the landlords, Krishna Kumar Chowdhuri and his nephew.

It was found by the lower Appellate Court that the story of abandonment set up by the defence was false and that Krishna Kumar Chowdhuri and his nephew were not the sole landlords but they were co-sharer landlords. On the question of limitation the Court of first instance held, relying upon the decision reported as *Brojo Mohun De Sircar* v. *Sheikh Dengu* (1), that the special limitation of one year as provided in section 27 of Act VIII of 1869 did not apply and he refused to consider the rulings on the point under the Bengal Tenancy Act, on the ground that that Act was not in force in the place (within District Sylhet). This decision of the Munsif was upheld by the Subordinate Judge in appeal. The material portion of his judgment on the question of limitation is the following :—"From the evidence there can be no doubt that the co-sharer landlord Krishna Kumar Chowdhuri dispossessed the plaintiffs from the lands in suit through the defendants in *Pous* 1312 B.S. But as the plaintiffs' ouster was caused only by a co-sharer landlord, and as the plaintiffs claim the disputed lands on the strength of their title, which is denied by the defendants, the special limitation of one year, provided in section 27 of Act VIII of 1869, has no application to the present suits. The present suits are clearly governed by the general limitation of 12 years, and they are, therefore, clearly within time." The result was that the plaintiffs' suits were decreed with mesne profits by both the lower Courts. The defendants thereupon preferred these second appeals to the High Court, the main question of law argued being whether the rule of limitation provided in section 27 of Act VIII of 1869 applied to the suits or not.

Babu *Kali Kinkar Chackerbarty*, for the Appellants.

Babu *Hemendra Kumar Das*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—The point which has been taken before us is this, that the Judge was

(1) 7 C. L. R 141.

wrong in holding that section 27 of Act VIII of 1869 did not apply to the present suit. In so holding, he is supported by a decision referred to by the Munsif reported as *Brojo Mohun De Sircar* v. *Sheikh Dengu* (1).

We are invited, as was the Munsif, to consider some decisions under the Bengal Tenancy Act. Those decisions are not relevant and I would follow the reported decision and hold that the Judge was right.

Moreover, it has been pointed out in the present case that there is a finding that the evidence shows that the plaintiffs and the other tenants have been in occupation of their respective lands without payment of rents for a considerable time, as they had to excavate a *khal* to drain off water from the fields at their own expense and trouble. And then further, there is a ground of appeal which is inconsistent with the rest and which the learned Pleader does not press, that the Courts below ought to have held that as no rent was payable for the lands in suit, from which the plaintiffs were dispossessed, no tenancy in the eye of law can be said to have been created.

The appeal is dismissed with costs.

This judgment will govern the other two appeals (Second Appeals Nos. 1298 and 1299 of 1912).

COXE, J. —I agree. On the appellant's own showing the plaintiffs were not dispossessed of the land by "the person entitled to receive rent for the same" within the meaning of section 27, Act VIII (B. C.) of 1869.

*Appeals dismissed.*

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## LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 74 OF 1915.

December 23, 1915.

*Present*:—Mr. Justice Parlett.

*Shaik* SADIK MAISTY—PLAINTIFF—APPLICANT

*versus*

MAHOMED AUZAM—DEFENDANT—RESPONDENT.

*Contract Act (IX of 1872), s. 70, applicability of—Express and implied contract—Compensation.*

Where there is an express contract between *A* and *B* that *A* would deliver certain goods to *C*, *C* is not bound to compensate or pay to *A* though he makes use of those goods.

Section 70 of the Contract Act applies only in the absence of an express contract.

Mr. *Campagnac*, for the Applicant.

Mr. *N. M. Cowasji*, for the Respondent.

JUDGMENT.—Applicant obtained a decree against respondent, but the latter successfully applied for review of judgment and got the decree set aside. It was contended here that the review should not have been allowed. It was allowed on the ground of an error apparent upon the face of the record, namely, that the suit was based upon an express contract which was held not proved, and the decree was granted upon an implied contract. The only question, therefore, is whether there was such an error. As I understood the original judgment, the decree against the respondent was based upon the facts that he had received the bricks and had made no payment for them, section 70 of the Contract Act apparently being in view. The record, however, showed that respondent had in fact made a payment, though not to the applicant, and this seems to have been the main ground on the application for review, though not expressly dealt with in the judgment on review. Not understanding how the question of a payment to a person other than the applicant or some one authorized by him was material, I have had the matter further argued with reference to section 70 of the Contract Act and have come to the conclusion that that section applies where the delivery is made in the absence of any express contract at all. In this case it has been found in fact that there was an express contract between the applicant (plaintiff) and the 2nd defendant, to which respondent (1st defendant) was not a party. It has never been alleged that the second defendent was 1st defendant's agent.

Upon the facts found, therefore, the judgment on review was correct. This application is dismissed with costs. Advocate's fees two gold *mohurs*.

*Application dismissed.*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 23 OF 1909-10 OF GORAKHPUR DISTRICT.

August 1, 1910.

*Present*:—Mr. Reynolds, J. M.

SHEORAJ SINGH—DEFENDANT—APPELLANT

*versus*

B. KOULHAN SINGH—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. VI, r. 17—Ejectment—Number of plot incorrect—Clerical error—Amendment.*

An error in the number of the plot from which ejectment is sought is a clerical error liable to amendment under Order VI, rule 17, Civil Procedure Code 1908.

Second appeal from the order of the Commissioner of Gorakhpur Division, dated the 3rd November 1909, reversing that of the Assistant Collector of Gorakhpur District, in a case of ejectment under section 58 of Act II of 1901.

JUDGMENT.—In this case the suit originally filed was for ejectment from No. 17-8/1 measuring 1 *bigha*. It appeared subsequently that No. 17-8/1 was in the cultivation of another tenant and measured 5 *bighas* and that the correct number should have been 17-9/1. This is a mere clerical amendment allowable under Order VI, rule 17, and it no more prejudices appellant. I dismiss this appeal with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 858 OF 1913.

December 16, 1915.

*Present*:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

*Syed* AHMAD SAHIB SHUTTARI—PLAINTIFF—APPELLANT

*versus*

MAGNESITE SYNDICATE, LTD., BY THEIR AGENT AND MANAGER, MR. G. TURNER, AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 8—RESPONDENTS.

*Landlord and tenant—Tenant-in-common, whether can sue for his share—Penal provisions, construction of—Lease providing for re-entry on breach of covenants—Forfeiture once incurred, effect of—Muhammadan Law—Intestate—Succession.*

The rights possessed by the members of a Muhammadan family in an intestate's estate are those of tenants-in-common. [p. 513, col. 2.]

*Jogeswar Narain Deo* v. *Rama Chandra Dutt*, 23 C. 670; 23 I. A. 37, referred to.

A tenant-in-common is, in the Madras Presidency, entitled to sue for his share of the property demised, when a forfeiture has been incurred. [p. 514, col. 1.]

*Sri Raja Simhadri Appa Rao* v. *Prattipati Ramayya*, 29 M. 29; *Korapalu* v. *Narayana*, 20 Ind. Cas. 930; (1913) M. W. N. 655; 38 M. 445; 25 M. L. J. 315, followed.

Penal provisions providing for re-entry on failure to perform the conditions of a lease should be strictly construed without favour to either side. [p. 514, col. 2.]

*Goodtitle, Lessee of Charles Luxmore* v. *Saville*, 16 East 87; 14 R. R. 305; 104 E. R. 822, *Doe d Davis* v *Elsam*, (1828) Mood. & Mal. 189; 31 R. R. 729; *Doe d Anglesea* v. *Rugeley*, (1844) 6 Q. B. 107; 13 L. J. M. C. 137; 8 Jur. 615; 115 E. R. 41; 66 R. R. 305, *Doe d Lloyd* v. *Ingleby*, (1846) 15 M. & W. 465; 153 E. R. 933; 71 R. R. 731, *Balambhat Ravjibhat Joshi* v. *Vinayak Ganpatrao Patwardhan*, 10 Ind. Cas. 746; 13 Bom. L. R. 154; 35 B. 239, referred to.

In a mining lease the interests of the Government also are in jeopardy and therefore a forfeiture once incurred cannot be relieved against. [p. 515, col. 1.]

Where the plaintiff and the defendants owning undivided shares in the property in dispute jointly gave a mining lease, which made the rent due thereunder payable in certain proportions individually to them all and provided for re-entry in case of the lessee's failure to perform the conditions, and the plaintiff, on the breach of certain covenants, sued for a declaration that the lease had terminated and for possession of his share:

*Held*, that the suit was maintainable [p. 514, col. 1.]

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 25 of 1912, preferred against that of the Principal District Munsif of Salem, in Original Suit No. 17 of 1911.

Messrs. *M. O. Parthasaradhy Aiyangar*, *T. Rangachariar* and *P. R. Narayanasamy Aiyar*, for the Appellant.

Messrs. *King* and *Partridge*, for the Respondents.

This second appeal coming on for hearing on the 8th March 1915, and having stood over for consideration till the 18th March 1915, the Court delivered the following

JUDGMENT.—The plaintiff and defendants Nos. 2 to 8 own undivided shares in the property in dispute. Plaintiff is entitled to a 120/480 share. Defendants Nos. 2 to 8 are entitled to the remaining share. On the 26th January 1899, they jointly gave a lease

of the entire property to Mr. G. G. Arbuthnot for 30 years. The present 1st defendant is the successor-in-title of the said lessee. The lease was for quarrying magnesite and chalk. It made the rent due thereunder payable in certain proportions individually to the plaintiff and defendants Nos. 2 to 8. It provided for the keeping of accounts for the weighment of the magnesite and chalk in the presence of the lessors and the lessee, and contained provisions for re-entry and for the forfeiture of the lease on certain contingencies. The plaintiff complains of the breach of three covenants (see paragraph 5 of the plaint) and prays that it may be declared that the lease had terminated, and for possession of either the entire property or the share of the plaintiff. The 1st defendant denied that he failed to fulfil any of the conditions. He admits in paragraph 13 of his written statement that a certain sum of money is still due to the plaintiff. The other defendants remained *ex parte*.

The Munsif upheld the plaintiff's contention and decreed possession of the plaintiff's share. The District Judge on appeal has reversed that judgment.

The first question argued by Mr. T. Rangachariar for the appellant is that the District Judge's view that one only of the lessors is not competent to maintain a suit in ejectment is not the law in this Presidency. In the case of *Sri Raja Simhadri Appa Rao* v. *Prattipati Kamayya* (1) and in the case of *Korapalu* v. *Narayana* (2) this High Court held that one of the several tenants-in-common can sue to recover possession of his share from the joint lessee. The case of *Ebrahim Pir Mahomed* v. *Cursetji Sorabji De Vitre* (3) takes the same view. On the other hand, the Calcutta High Court in a long course of decisions maintains the position that all the co-owners must sue together. Having regard to this conflict of authorities, and to the guarded language used by Mr. Justice Sankaran Nair in *Sri Raja Simhadri Appa Rao* v. *Prattipathi Ramayya* (1), we had the question fully argued before us It was contended that under the English Law, it is open to a tenant-in-common to sue for the recovery of his share of the land demised, and that there is nothing in the Statute Law of this country which restricts such a right. The view maintained by jurists that "joint tenants are seized *per my et per tout* (by the half, or moiety, and by all)" has been commented upon in the note to *Murray* v. *Hall* (4) and its limitations have been explained. It is said in English books that the right to bring separate suits is due to the conception that it is a concession to the lessee that he should be allowed to take a joint lease, and that by the mere fact of joining in the lease, the several owners are not debarred from enforcing their individual rights. It is not necessary to cite all the English authorities which recognise the rights of a tenant-in-common to sue to recover his share of the holding demised. They are collected together in Cole on Ejectment, page 286. See also Williams on the Law of Ejectment, page 194. Freeman in his book on Co-tenancy and Partition points out the distinction in this respect between joint tenants, tenants-in-common or co-parceners. See sections 329, 330, 331 and 341. The general rule is stated to be, "whenever the title of the co-tenants, as in case of joint tenancy and co-parcenary, is joint, the action must also be joint; and whenever, as in tenancy-in-common such tenant is deemed to possess a separate and distinct estate, the remedy of each must be distinctly and separately pursued." An exception even in the case of several tenants has been maintained from the earliest times to the effect that "where the thing to be recovered in a real or mixed action is entire, there, of necessity, tenants-in-common must join." That is the reason for the distinction in this respect between actions for the recovery of real and of personal property.

There can be no doubt that the rights possessed by the members of a Muhammadan family in an intestate's estate are that of tenants-in-common. As was pointed out by the Judicial Committee of the Privy Council, there is no presumption of joint tenancy in this country except in the case

(1) 29 M. 29.

(2) 20 Ind. Cas. 930; 25 M. L. J. 315; (1913) M. W. N. 655; 38 M. 445.

(3) 11 B. 644.

(4) (1849) 7 C. B. 441 at p. 455; 18 L. J. C. P. 161; 13 Jur. 262; 137 E. R. 175; 78 R. R. 708.

of co-parceners under the Hindu Law [*Jogeswar Narain Deo* v. *Rama Chandra Dutt* (5)]. Therefore, unless there is something in the conditions of this country which warrants a departure from the principles applicable to tenants-in-common both in England and in America, we must hold that the plaintiff is entitled to sue for his share. On the other hand we find that the rule of law as obtains in England is accepted by the Legislature in this country in sections 37 and 109 of the Transfer of Property Act. The view of the Calcutta High Court that the English decisions do not apply to India may be traceable to the suggestion thrown out by Mr. Justice Rampini in the course of the argument in the case of *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (6) that under the Bengal Tenancy Act a fractional share-holder is not entitled to maintain an action in ejectment against the joint lessee. So far as we are aware, this principle is not recognised in the tenancy legislation of this Presidency. Nor has our attention been drawn by Counsel to any provision to that effect. Mr. Chamier tried to distinguish the Madras decisions on the ground that they are within the strict letter of sections 37 and 109 of the Transfer of Property Act, as in both the cases there was a transfer of the lessor's interests since the demise. We fail to see on what principle the transferee can acquire a better title to sue for the share sold to him than the transferor himself. Our conclusion is, a tenant-in-common is entitled in this Presidency to sue for his share of the property demised, where a forfeiture has been incurred. Of course this right must be found in the terms of the contract. Mr. Chamier contended that Exhibit A contemplates a joint action. The canon of construction regarding forfeiture has not been uniform. Lord Ellenborough said in *Goodtitle, Lessee of Charles Luxmore* v. *Saville* (7): "In the construction of covenants of this sort they are neither entitled to favour or disfavour, whether they are to create a forfeiture or to continue an estate; but we are to put the fair construction upon them, according to the apparent intention of the contracting parties." Lord Tenterden in *Doe d Davis* v. *Elsam* (8), emphasises that position. He says: "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view of cases of this sort, the provisoes ought to be construed according to the fair and obvious construction, without favour to either side." On the other hand, many other eminent Judges have held that a proviso for re-entry ought to be construed strictly *Doe d Anglesea* v. *Rugeley* (9); *Doe d Lloyd* v. *Ingleby* (10). In this country, the Legislature inclines in favour of holding provisions as penal even when a definite sum is mentioned as payable in cases of the breach. The aim of law generally is in favour of giving relief against forfeiture. We think the safer course will be to act on the principle that penal provisions providing for re-entry should be strictly construed. Even in this view, we are unable to hold that Exhibit A provides for the institution of a joint action where there has been an infraction of individual rights. The document has been drawn up by English solicitors and the whole scheme of it suggests that the English doctrine of separate action was in the contemplation of those who drafted the lease-deed. We are, therefore, forced to the conclusion that the general right of individual action is not taken away by the terms of this contract. See the decision in *Balambhat Ravjibhat Joshi* v. *Vinayak Ganpatrao Patwardhan* (11).

There is one other consideration which confirms our view that the forfeiture

(5) 23 C. 670 at p. 679; 23 I. A. 37.
(6) 35 C. 807; 7 C. L. J. 483.
(7) 16 East 87 at p. 95; 14 R. R. 305; 104 E. R. 1022.
(8) (1828) Mood. & Mal. 189 at p. 191; 31 R. R. 729.
(9) (1884) 6 Q. B. 107; 13 L. J. M. C. 137; 8 Jur. 615; 115 E. R. 41; 66 R. R. 305.
(10) (1846) 15 M. & W. 465; 153 E. R. 933; 71 R. R. 731.
(11) 10 Ind. Cas. 746; 35 B. 239; 13 Bom. L. R. 154.

should be enforced if it had been incurred. Under the English Conveyancing Acts of 1881 and 1892, which were passed with the object of affording relief against forfeiture, one of the exceptions relates to "Covenants in a mining lease to allow the lessor to have access to, or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or workings."

In the Indian Mines Act (Act VIII of 1901) there is no provision either in favour of or against forfeiture. The principle of the English rule must, therefore, ordinarily apply. The reason of the rule is apparently that in a mining lease, the interests of the Government are also in jeopardy. Consequently, it is not a matter depending entirely upon the rights of the actual parties to the contract. For this reason also, we must hold that the forfeiture cannot be ordinarily relieved against.

On the merits, we are not satisfied with the way the facts have been dealt with by the lower Appellate Court. In the view the learned Judge took of the law, there was no necessity for giving clear and definite findings on the questions of fact involved in the case. As we differ from him on the question of law, it is desirable that the District Judge should be asked to submit revised findings upon the question whether the plaintiff has proved that there has been a forfeiture of the covenants in the lease as alleged by him. He must return findings on issues 1, 2 and 3 on the evidence on record and also upon the further question to what relief the plaintiff is entitled within six weeks from this date.

The District Judge has also held that the suit as brought must be construed as one for partition and that the District Munsif had no jurisdiction to entertain it. The relief claimed is to eject the 1st defendant and to such a suit section 7, clause XI (*cc*), of the Court Fees Act applies. The suit must be held to have been rightly valued and that it was properly instituted in the Court of the District Munsif.

In compliance with the order contained in the above judgment, the District Judge of Salem submitted findings on the following issues:—

I. Whether the first defendant has made default in the payment of rents and royalties due to the plaintiff or not?

II. Whether due notices of weighment have been given by the first defendant to the plaintiff or not?

III. Whether correct accounts have been maintained by the first defendant as required by paragraphs 8 and 10 of the suit lease or not?

X. To what relief is the plaintiff entitled?

He found on the *first* issue that the defendant did not make default in the payment of royalties and rent due, and on the *second* issue that the defendant did not give notice of weighment to the plaintiff and on the *third* issue that no proper accounts were maintained and that the defendant was not entitled to be relieved against forfeiture.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings, reverse the decree of the District Judge and modify the decree of the District Munsif by adding a direction for partition and delivery of the share of the plaintiff. The respondents will pay the costs of the appellant in this and in the lower Appellate Court.

*Appeal allowed; Suit decreed.*

QASIM ALI KHAN *v.* AHMAD SHAH.

## OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 133, 150, 153 AND 154 OF 1911.

July 5, 1915.

*Present*:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

*Nawab* QASIM ALI KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

*Saiyed* AHMAD SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Gift, invalidity of a portion of, effect of, on other separable portions—Gift in lieu of dower*—Hiba-bil-ewaz, *essentials of—Consideration—Oudh Estates Act (I of 1869), ss. 8, 10, 15—Presumption of primogeniture, applicability of, to alienees from* taluqdar—Waqf *of profits only, validity of*—Wasiat—*Shia Law.*

If a gift in regard to a portion of a property is invalid, its invalidity would not affect another and separable portion of it. [p. 517, col. 2.]

*Ram Lal* v. *Musammat Jani Begam*, 2 O. C. 244, referred to.

A gift made in lieu of dower is a *hiba-bil-ewaz*, for the validity of which delivery of possession is not essential. The consideration of a *hiba-bil-ewaz* may or may not be adequate; it is enough for such a gift that some *ewaz* or consideration should be given and there should be an intention to divest oneself *in præsenti* of all interest in the property. [p. 517, col. 2.]

*Muhammad Esuph Ravutan* v. *Pattamsa Ammal*, 23 M. 70; *Khajooroonissa* v. *Rowshan Jehan*, 2 C. 184 at p. 198; 26 W. R. 36; 3 I. A. 291 (P. C.); *Chaudhri Mehdi Hasan* v. *Muhammad Husan*, 28 A. 439 at p. 448; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 33 I. A. 68; 9 O. C. 106; 1 M. L. T. 106 (P. C.), referred to.

The presumption raised by sections 8 and 10 of Act I of 1869 does not apply to property which has been alienated by a *taluqdar* in his life-time, nor has it any concern with the alience or the family of such an alienee. [p. 519, col. 2.]

*Asghari Khanam* v. *Raj Bibi*, 22 Ind. Cas. 267; 16 O. C. 277, referred to.

The Muhammadan Law does not recognise a *waqf* of the profits of the land apart from the land itself. But where the intention is, though the disposition, *prima facie*, appear to convey an immediate interest, not to give it operation during the life-time of the testator, the disposition will take effect as a *wasiat*. Such a bequest under the Shia Law may take effect in favour of some of the heirs without the consent of the other heirs, if it does not affect more than one-third of the estate, or if it exceeds one third, it is made for the performance of such religious duties as are incumbent upon the testator. [p. 521, col. 1.]

*Mofazzul Karim* v. *Mohammed*, 2 C. L. J. 166, referred to.

Appeals against orders of the Subordinate Judge, Sitapur, dated 25th August 1911.

Messrs. *Salig Ram*, *Aditya Prasad* and *Bhairon Prasad*, for the Appellants.

Messrs. *Moti Lal Nehru*, *C. F. S. Oehme*, *Chhotey Lal* and *Bishun Kumar*, for the Respondents.

JUDGMENT.—These appeals arise out of four suits brought by certain persons for the recovery of different items of property, which originally formed part of the Qutubnagar estate, and for mesne profits. The Qutubnagar estate, according to the history given in the *wajib-ul-arz* of 1870, was first owned by *Thakurs*, from whom it passed into the possession of the ancestors of a Mughal named Subhan Ata. Subhan Ata adpoted Ibrahim Beg and made him the owner of the estate in his life-time. Ibrahim Beg had no issue. In 1241 *fasli* he adpoted Ahmad Ali Beg, his wife's brother's son, and made him the owner of the *talqua*. At the time of the annexation of Oudh, Ahmad Ali Beg was in possession of the estate, and the summary settlement was made with him by the British Government. A *sanad* was also subsequently granted to him under the hand and seal of Mr. George Udny Yule, the then officiating Chief Commissioner of Oudh, but the original *sanad*, which was probably made over to the Land Mortgage Bank of India, since defunct, is not now available. There are references to that *sanad* in a mortgage-deed executed by Ahmad Ali Beg in favour of the Land Mortgage Bank of India, dated the 17th March 1873 (Exhibit Ahmad 17), and in the papers relating to the enquiries made by the Settlement Officer in 1866 in regard to some of the villages compromised in the *sanad*. The name of Ahmad Ali Beg, who was known as Ahmad Beg, was entered in List I at No. 75 and in List II at No. 24, appended to Act I of 1869. The parties do not agree as to whether it was an ordinary *sanad* in the form given in Sykes' Compendium of the Oudh Taluqdari Law at page 385, or was a primogeniture *sanad* in the form given at page 386 of the same book, but in view of the historical fact that the old *sanads* were withdrawn by the British Government and pri-

mogeniture *sanads* granted in their places wherever the holders of the *sanads* agreed to the substitution, and the evidence afforded by the letter of the Commissioner of the Khairabad Division to the Secretary to the Chief Commissioner of Oudh, which refers to the grant of a primogeniture *sanad* to Ahmad Ali Beg in respect of *taluqa* Qutubnagar, there can be no doubt that what was granted to him was a primogeniture *sanad* in the form above mentioned concerning *taluqa* Qutubnagar (*vide* Exhibit Ahmad 47 and Ahmad 48). The original *sanads* issued at the Darbar held by Lord Canning were signed by the Chief Commissioner, Sir Charles Wingfield During his absence on leave, the primogeniture *sanads* were issued in their places, signed by Mr. George Udny Yule, who was then officiating as the Chief Commissioner of Oudh. The reference in the mortgage-deed, executed by Ahmad Ali Beg in favour of the Land Mortgage Bank Limited, to the said *sanad* having been under the hand and the seal of Mr. Yule, read with the evidence of Alopi Prasad, who was then the agent of the Bank, confirms the conclusion that Ahmad Ali Beg held a primogeniture *sanad* in respect of the estate. The entry of his name in List No. II shows that there was a custom in his family under which the estate devolved on a single heir, and there is no reason to imagine that he would have been unwilling to accept a primogeniture *sanad*.

Ahmad Ali Beg was married to a lady called *Musammat* Hurmuzi Begam. He had by her five sons, Ahsan Ali, Haidar Ali, Azam Shah, Nadir Mirza and Aulad Ali, and four daughters, *Musammat* Amir Begam, *Musammat* Lado Begam, *Musammat* Sughra Begam and *Musammat* Kazimi Begam. The eldest son, Ahsan Ali, is stated to have been blind from birth. On the 14th September 1861 he executed a Will, nominating his second son, Haidar Ali, as a successor to the estate. He appears to have subsequently in effect revoked the Will by executing and registering a deed of gift on the 27th September 1877 in favour of his wife, *Musammat* Hurmuzi Begum, giving her the entire estate in lieu of her dower. There is no reference in that deed of gift to the Will. The property comprised in the Will included the entire estate of Qutubnagar, which was situated partly in the Sitapur District and partly in the Hardoi District. Mutation was effected in favour of the lady in respect of the property situated in the Sitapur District in the life-time of the donor, and the gift in regard to it became complete. There is nothing to show that possession was delivered or mutation effected in respect of the property situated in the Hardoi District, and if the gift in regard to it was invalid under section 17 of Act I of 1869, the interpretation placed on that section in *Ram Lal* v. *Musammat Jani Begam* (1) upholding the contrary view, its invalidity would not affect another and a separable portion of the gift. It is not alleged that the gift was not made in good faith. According to the Muhammadan Law, a gift made in lieu of dower is a *hiba-bil-ewaz*, for the validity of which the delivery of possession is not essential [*Muhammad Esuph Ravutan* v. *Pattamsa Ammal* ( ).] The consideration of a *hiba bil-ewaz* may or may not be adequate, and as pointed out in *Khajoroonissa* v. *Rowshan Jehan* (3) and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (4) it is enough to perfect such a gift that some *ewaz* or consideration should be given, and there should be an intention to divest oneself *in præsenti* of all interests in the property.

Ahmad Ali Beg died in about 1880. A dispute then arose between Haidar Ali and *Musammat* Hurmuzi Begam in regard to the succession to the estate, and a compromise was arrived at, whereby *Musammat* Hurmuzi Begam agreed to take the 15 villages, situated in the Sitapur District, to which Haidar Ali relinquished his claim, and the latter agreed to take the six villages, situated in the Hardoi District, with the village of Newalpur in the Sitapur District and the *phulwari* land of Qutubnagar.

On the 2nd June 1884, *Musammat* Hurmuzi Begam executed a *tamliknama* or deed

(1) 2 O. C. 244.
(2) 23 M. 70.
(3) 2 C. 184 at p. 198; 26 W. R. 36; 3 I. A. 291 (P. C.).
(4) 28 A. 439 at p. 448; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 33 I. A. 68; 9 O. C. 106; 1 M. L. T. 106 (P. C.).

of family settlement, by which she divided the greater portion of her property among her sons and daughters.

The village Gularha, including Nabinagar, and 65 *bighas* of land in Karwa Jog were given by her to her eldest son Ahsan Ali. The said property was then held by Niranjan Lal under a mortgage effected by *Musammat* Hurmuzi Begam. Ahsan Ali died on the 19th January 1893 without redeeming that mortgage. He left no issue. *Musammat* Hurmuzi Begam, therefore, revoked the *tamliknama* in his favour. In 1899 the village Gularha was sold in execution of a mortgage-decree, obtained by Niranjan Lal, and was purchased by Aulad Ali. Aulad Ali also purchased the 65 *bighas* of land in Karwa Jog from *Musammat* Hurmuzi Begam. The village Sahebnagar was given by her to Aulad Ali, who remained in possession of it till his death.

The village Qutubnagar, excluding the land of Karwa Jog, the land held by Sheo Sahai and 300 *bighas* of *sir* land, was bequeathed by her to her three sons, Ahsan Ali, Haidar Ali, and Aulad Ali. The *sir* land was given to Azam Shah and Aulad Ali. Ahsan Ali having died in her life-time, the said village was divided by Haidar Shah, Azam Shah and Aulad Ali in equal shares on the death of *Musammat* Hurmuzi Begam.

The village Lohar Khera was bequeathed by her to Azam Shah and Aulad Ali, subject to a charge of Rs. 500 per year for the performance of certain religious ceremonies and for the upkeep of her tomb and that of her husband.

The village Satnapur was given by her to her son Nadir Mirza in full satisfaction of all his claims to her estate.

She gave the villages Bilahia and Jamunia to her four daughters, who divided them among themselves by a deed of partition, dated the 4th June 1887, under the terms of which *Musammat* Amir Begam and *Musammat* Lado Begam were given Bilahia and *Musammat* Sughra Begam and *Musammat* Kazimi Begam took Jamunia. On the very day the partition took place, *Musammat* Lado Begam mortgaged her 8-annas share in Bilahia with possession in favour of *Rani* Jani Begam of Ant, whose heirs are now in possession.

*Musammat* Hurmuzi Begam made no disposition in regard to the villages of Bijauli and Deogawan. She had sold Deogawan in her life-time to Haidar Ali by a deed of revocable sale (*bai khayar*), dated the 31st January 1885, subject to the condition that she would take back the property on re-paying the sale consideration after the lapse of ten years.

She had made certain other dispositions also, but with them these suits have no concern. She died on the 1st December 1902. On her death mutation was effected in respect of Bijauli in favour of her three sons, Haidar Shah, Azam Shah and Aulad Ali, and in respect of Deogawan in favour of Haidar Shah.

The dispute in these cases relates to the estate, left by *Musammat* Lado Begam and Aulad Ali. *Musammat* Lado Begam died on the 4th November 1903, leaving a husband, Qasim Ali Khan, four brothers Haidar Shah, Azam Shah, Nadir Mirza and Aulad Ali, and three sisters *Musammat* Amir Begam, *Musammat* Sughra Begam and *Musammat* Kazimi Begam.

In suit No. 294 of 1909, Qasim Ali Khan and his transferee, Damodardas, claim a half share in the estate of *Musammat* Lado Begam. She is described as having been the owner of an eight-annas share in the village Bilahia, under the *tamliknama* and the deed of partition aforesaid, and of a 1/12th share in the villages of Bijauli and Deogawan by inheritance from *Musammat* Hurmuzi Begam. It is admitted that she mortgaged her eight-annas share in the village Bilahia with *Rani* Jani Begam on the 4th June 1887, and that the heirs of mortgagee are in possession of that share. In regard to that village, the claim is, therefore, for a declaration that the claimants are entitled to a four-annas share therein. In regard to the other two villages, the claim is for possession of a half of a one-twelfth share with mesne profits for the three years preceding the suit.

Haidar Shah died after the institution of the above suit on the 10th August 1909, and is now represented by his sons and daughters, who are parties to the suit. Aulad Ali died on the 2nd December 1909, leaving two brothers, Azam Shah and Nadir Mirza, and

three sisters, *Musammat* Amir Begam, *Musammat* Sughra Begam and *Musammat* Kazimi Begam. Besides the property above referred to, he left two houses in Lucknow, and is stated to have left some moveable property also, the existence of which is disputed.

In suit No. 13 of 1910, Saiyid Azam Shah claims a right to succeed to the management of the trust, alleged to have been created by the *tamliknama* of the 2nd June 1884 in respect of the village Lohar Khera and contends that he and his brother, Aulad Ali, were appointed trustees to take charge of the management, and that on the death of Aulad Ali he became exclusively entitled to manage the same. He alleges that Ahmad Shah, the eldest son of Haidar Shah, is wrongfully interfering with the management of the trust, and has improperly realized Rs. 600 from the tenants. In the alternative he claims to be the legal heir of Aulad Ali. On either ground he seeks possession of the eight-annas share of Lohar Khera, which stood in the name of Aulad Ali, with Rs. 600, damages and future mesne profits.

In suit No. 14 of 1910, Saiyid Azam Shah claims a 2/7th share in the other property of Aulad Ali with mesne profits.

In suit No. 91 of 1910, *Musammat* Kazimi Begam, a sister of Aulad Ali, claims a 1/7th share in the estate of Aulad Ali with mesne profits. She includes Lohar Khera, and some other properties, not included by Saiyid Azam Shah, in her claim.

One of the main defences to all these suits was that the estate in the hands of *Musammat* Hurmuzi Begam was governed by the *sanad* and the custom of the family, and devolved, on her death, according to the rule of primogeniture, on Haidar Shah, her eldest surviving son. Ahmad Shah, the eldest son of Haidar Shah, similarly lays claim to the entire estate, left undisposed of by *Musammat* Hurmuzi Begam or Aulad Ali in succession to his father.

The learned Subordinate Judge found that the property obtained by *Musammat* Hurmuzi Begam by virtue of the said gift was governed by the rule of primogeniture laid down in the *sanad*. But as held in the Maniyarpur case, the judgment of which has been delivered to-day, that rule does not apply to persons to whom the estate had been alienated in whole or in part by the holder thereof in his life-time. The presumption raised by section 8 and 10 of Act I of 1869 is that Ahmad Ali Beg was a *taluqdar* whose estate, according to the custom of the family, ordinarily devolved upon a single heir, but that custom does not apply to property which had been alienated by the *taluqdar* in his life-time. The custom applied to the family of Ahmad Ali Beg, and governed the devolution of his estate, but had no concern with an alienee or the family of such an alienee. There is no reliable evidence to prove a general custom. The property in question on going into the hands of *Musammat* Hurmuzi Begam was not, therefore, governed by the rule of descent laid down in the *sanad*, or by the custom referred to in section 8 of the Act. The gift was made when Act I of 1869 was in force, section 15 of which provided that if a *taluqdar* or grantee transferred or bequeathed the whole or any portion of his estate to a person, not being a *taluqdar* or grantee, who would not have succeeded according to the provisions of the Act to the estate or to a portion thereof, if the transferor or testator had died without having made a transfer and intestate, the transfer of, and the succession to, the property so transferred or bequeathed would be regulated by the rules, which would have governed the transfer of, and succession to, such property, if the transferee or legatee had bought the same from a person not being a *taluqdar* or grantee. *Musammat* Hurmuzi Begam was not one of the persons who would have succeeded to the estate had Ahmad Ali Beg died intestate without making a transfer, for her sons were alive [*cf. Asghari Khanam* v. *Raj Bibi* (5)]. The property held by *Musammat* Hurmuzi Begam was, therefore, governed by the Muhammadan Law. The family custom referred to in section 8 impressed the property with the character of impartibility, so long as it was in the hands of the family of Ahmad Ali Beg; but the effect of the *sanad* was to render it partible, when the property passed by alienation to a third person not entitled to succeed to the estate under the *sanad* or family custom. The mere fact that the

(5) 22 Ind. Cas. 267; 16 O. C. 277

alienee was the wife of the alienor made no difference, because property given to a woman becomes under the Muhammadan Law an independent stock of descent. The character of impartibility ceased to be applicable to it, because the custom was not one by which an alienee could be bound. The conclusions upon which the learned Subordinate Judge decided the suits cannot, therefore, be sustained.

It is necessary under the circumstances to go into the other defences raised in these suits.

In the suit relating to the estate of *Musammat* Lado Begam, the defendants pleaded that by virtue of a family custom, *Musammat* Lado Begam was excluded from inheritance, that *Musammat* Hurmuzi Begam had sold her right, title and interest in Deogawan to Haidar Ali on the 31st January 1885 under an agreement that she would take back the property on re-paying the sale consideration after ten years, and that the plaintiffs or their predecessors-in-interest had not chosen to sue for redemption. The learned Subordinate Judge found that the sale effected by *Musammat* Hurmuzi Begam in favour of Haidar Ali was really a mortgage, and that no custom excluding daughters from inheritance was established.

The evidence adduced in support of the custom consists of certain documents, in which a reference is made to the *gaddinashini* custom obtaining in the family of the *talukdars* of Aurangabad and Qutubnagar, and of certain statements made by Haidar Ali in 1905 and by Ahmad Mirza and certain other witnesses in this case. Their evidence does not, however, establish that, apart from any *gaddinashini* rule applicable to the *talukas*, there was any custom excluding females from the property of their mothers. The instances, cited by some of the witnesses, do not exclude the possibility of the daughters having allowed their brothers to retain the property out of love and affection or other cause. A custom relating to a *taluka* or *gaddi* would not, as pointed out above, necessarily apply to portions split out of it by voluntary alienation, and the entries in the *wajib-ul-arz*, relating to the custom of exclusion in regard to *talukas*, are not, therefore, of any value. The sale-deed, executed by *Musammat* Hurmuzi Begam in favour of Haidar Ali was accompanied by an agreement (Exhibit Ahmad 16) for the return of the property on re-payment of the consideration money, which included some money left for payment to certain prior mortgagees in any fallow season after ten years, and the proper remedy of Qasim Ali Khan was to have filed a suit for redemption of the mortgage. The limitation for redemption has not yet expired. Qasim Ali Khan and his vendee cannot, therefore, recover possession of the property mortgaged, and are only entitled to a declaration that they hold the equity of redemption with regard to a one-fourth share out of what was inherited by *Musammat* Lado Begam in Deogawan from her mother.

In regard to the village Bilahia, they are similarly entitled to a declaration that they hold the equity of redemption to the extent of half of the eight-annas share held by *Musammat* Lado Begam in the village. That village is in the possession of the heirs of *Rani* Jani Begam, with whom it was mortgaged by *Musammat* Hurmuzi Begam, and the proper remedy of the plaintiff is to sue the heirs of the mortgagee for a redemption of that mortgage. In regard to Bijauli, Qasim Ali Khan and his vendee are entitled to a decree for possession of the half share claimed by inheritance from *Musammat* Lado Begam, who inherited a 1/12th share in the village on the death of her mother.

In regard to the suit relating to an eight-annas share of the village Lohar Khera, it is contended on behalf of the respondents that there was no valid transfer or dedication of the village by *Musammat* Hurmuzi Begam, that *Musammat* Hurmuzi Begam subsequently cancelled the transfer by mortgaging the property elsewhere, and that the plaintiffs had no right of suit. The *tamliknama* does not, however, show that *Musammat* Hurmuzi Begam made a gift of the village in her life-time or dedicated the *corpus* of the village for any religious or charitable purpose. What she declared was: "This village is kept by me during my life in my possession. *Thereafter it is given* (*diya*) to Saiyid Azam

Shah and Mir Aulad Ali. The condition is that out of its profits Saiyid Azam Shah and Mir Aulad Ali shall, after paying the Government revenue, spend Rs. 500 per year, as per detail given below, over the expenses connected with my tomb and that of my deceased husband (Mirza Ahmad Ali) and of *moharram* and *majlis* (celebrations). After that what (profit) may be left shall be divided between the two brothers in equal shares. And the management of the expenses connected with the tombs and the *durul* and *fateha* (ceremonies) shall be vested in Saiyid Azam Shah and Mir Aulad Ali. The other heirs shall have no concern or connection with the same. The *lambardari* of this village after me shall remain in the name of Haidar Shah according to the terms and conditions specified in clause (3)."

The grant was obviously intended to take effect after her death. It was burdened with a trust for the discharge of certain obligations specified therein. The *corpus* of the property was not, however, conveyed for the discharge of the trust. As pointed out by Mookerjee, J., in *Mofazzul Karim* v. *Mohammed* (6), the Muhammadan Law does not recognise a *waqf* of the profits of land, apart from the land itself. (See Wilson's Muhammadan Law, 4th Edition, page 480).

The deed conveys the *corpus* to the legatees, and creates a charge upon the land or a trust to the extent of the income endowed, but does not render the land inalienable or impartible.

"In some cases," says Amir Ali, "the disposition may, *prima facie*, appear to convey an immediate interest, and yet the intention may not be to give it operation during the life-time of the testator; when that is so, the disposition will take effect as a *wasiat*" (Ameer Ali's Muhammadan Law, Volume I, 4th Edition, page 572). According to the Shia Law, such a bequest may take effect in favour of some of the heirs without the consent of the other heirs, if it does not affect more than one-third of the estate, or if it exceeds one-third, it is made for the performance of such religious duties as are incumbent upon the testator. There is nothing to show that the bequest was revoked by *Musammat* Hurmuzi Begam in her life-time. A subsequent mortgage is not necessarily inconsistent with the rights conferred by a bequest. The mortgage-deed executed by *Musammat* Hurmuzi Begam and Aulad Ali in favour of Lachman Das on the 21st June 1902 (Exhibit Ahmad 25) comprised Lohar Khera excluding the hamlet of Chandanpur, and described it as the property of *Musammat* Hurmuzi Begam. No mutation of names was effected in favour of Aulad Ali and Azam Shah in respect of this village during her life-time (Exhibit Qasim 12). The property compromised in the bequest formed a much smaller part than one-third of her entire estate, and the bequest is, therefore, valid and legally enforceable.

On the death of Aulad Ali, his half share devolved on Azam Shah and his brothers and sisters then alive. Under the bequest Azam Shah had a right to realize the profits and to superintend the application of Rs. 500 per year for the purposes specified in the bequest. He was also entitled to a 2/7ths share out of the 8-annas held by Aulad Ali. Ahmad Shah had no right to make any collections because his father had died in the life-time of Aulad Ali. There is no evidence to show how much rent was collected by him from the tenants of *Mouza* Lohar Khera during the period in suit. The amount can be ascertained later. Azam Shah is, therefore, entitled to a decree for possession with mesne profits of the 8-annas share belonging to Aulad Ali, subject to the conditions contained in the *tamliknama*.

With reference to the claim of Azam Shah to a 2/7ths share in the other property of Aulad Ali with mesne profits, the defence of Ahmad Shah was that Aulad Ali had no interest in the village Qutubnagar.

It appears from the *tumliknama*, dated the 2nd June 1884, that the village in question, excluding some land and other plots, was bequeathed by *Musammat* Hurmuzi Begam to Ahsan Ali, Haidar Shah and Aulad Ali. Ahsan Ali having died without leaving any issue in the life-time of the testator, the property devolved on Haidar Ali, Azam Shah and Aulad Ali. The subsequent revocation of the bequest or re-grant to Haidar Shah by an alleged deed of the 5th April 1893 is not proved. Aulad Ali

(6) 2 C. L. J. 166.

was thus the owner of a one-third in that village, and Azam Shah is entitled to a 2/7ths of one-third share therein along with a 2/7ths share in the remaining properties. The claim of *Musammat* Kazimi Begam, a sister of Aulad Ali, to a 1/7th share in the estate of Aulad Ali covers much more property than what is included in the previous claims. She alleges that Aulad Ali got the village of Sahebnagar under a deed of gift executed by *Musammat* Hurmuzi Begam, that he purchased the village Gularha from Niranjan Lal, that he similarly purchased 65 *bighas* of Karwa Jog from *Musammat* Hurmuzi Begam, and that he obtained an 8-annas share in the village Lohar Khera and a 5-annas 4-pies share in the village Qutubnagar by virtue of a *tamliknama* executed by *Musammat* Hurmuzi Begam, and constructed a *pacca kothi* and a *pacca* house in Lucknow, in all of which she claims a 1/7th share. She also claims a share in certain moveable property, alleged to have been left by Aulad Ali. The defendants denied the existence of the moveables. The rest of the defence was the same as that raised in the other cases, except in so far that Lachman Das, who was impleaded as a usufructuary mortgagee of Sahebnagar, Gularha and Lohar Khera, claimed that his rights as a mortgagee should be protected. It has already been found that *Mauza* Lohar Khera was given to Aulad Ali and Azam Shah by *Musammat* Hurmuzi Begam by way of bequest, and that that bequest is legally valid and enforceable. There is no proof that nay moveables were left by Aulad Ali or that they were appropriated by Ahmad Shah. The title of Aulad Ali to the other property is not disputed. It has also been found that there was no custom in the family excluding females from inheritance and that the estate in the hands of *Musammat* Hurmuzi Begam was governed by the Muhammadan Law. The plaintiff is, therefore, entitled to the share claimed, except in Lohar Khera which is burdened with a trust, and the moveable property in regard to which no proof has been afforded. No mesne profits can be allowed in respect of the property in the possession of the mortgagees.

The appeal of Qasim Ail Khan and Damodar Das is, therefore, allowed in so far that they will get a decree for possession of a half share of 1 *biswa* 13 *biswansis* 6-2/3 *kachwansis* of the village Bijauli, and a declaration that they hold a half of 1/12th share in the equity of redemption of the villages Deogawan and Bilahia. The appeal of Azam Shah is allowed in so far that he will get possession of the 8-annas share belonging to Aulad Ali in the village Lohar Khera with mesne profits from the date of the death of Aulad Ali till the recovery of possession, subject to the discharge of the trust created by the *tamliknama* and the terms and conditions as to the distribution of the surplus profits contained therein. The appeals of Azam Shah and *Musammat* Kazimi Begam in the properties specified in their claims with the exception of Lohar Khera and the moveable property, the existence of which is not proved, will similarly be decreed to the extent of a 2/7ths share in favour of Azam Shah and a 1/7th share in favour of Kazimi Begam. These decrees will not affect the rights of the mortgagees. The amount of mesne profits will be determined by the Court below in accordance with Order XX, rule 12, of the Code of Civil Procedure and will be payable by the persons, other than mortgagees, who may be proved to have been in possession during the period in question. The appellants will get their proportionate costs in each appeal from Azam Shah in both the Courts. Ahmad Shah will bear his own costs throughout.

*Appeals partly allowed.*

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 968 OF 1913.

July 17, 1915.

*Present*: Mr. Justice Chevis and
Mr. Justice LeRossignol.

MOTI SINGH AND OTHERS DEFENDANTS—APPELLANTS

*versus*

*Musammat* JAMNA DEVI—PLAINTIFF, AND ANOTHER—DEFENDANT—RESPONDENTS.

*Hindu Law—Widow's estate—Custom—Burden*

MOTI SINGH *v.* JAMNA DEVI.

*of proof—Widow, whether can challenge alienation by husband—Agreement declaring rights of parties, whether compulsorily registrable.*

Both under Hindu Law and agricultural custom a widow is entitled to a life-interest in her husband's estate and, therefore, the burden of proving a special custom to the contrary is on those who assert it. [p. 523, col. 2.]

A widow is not competent to challenge any disposition of property by her husband. [p. 524, col. 1.]

*Maqsud-ul-Nissa* v. *Kaniz Zohra*, 135 P. R. 1908; 194 P. W. R. 1908, *Musammat Mehtab Bibi* v. *Musammat Hussain Bibi*, 15 Ind. Cas. 556; 124 P. W. R. 1912; 249 P. L. R. 1913; 17 P. R. 1913, referred to.

A document executed by several brothers which declares the rights and interests of the brothers in estates of large value and also that their widows shall not inherit a life-estate but shall recieve only a maintenance allowance, is an agreement *inter vivos* and is inadmissible in evidence without registration. [p. 524, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Rawalpindi, dated the 30th April 1913.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Mr. Beechey and Sardar *Kharak Singh*, for the Respondents.

JUDGMENT.—The plaintiff, who is the widow of one of the sons of Gurdit Singh, sued the surviving brothers and the nephew of her late husband for possession of her husband's share in certain villages.

The defence to the suit was that by a custom of the family the plaintiff was entitled solely to maintenance, further, that the plaintiff was bound by an agreement subscribed to by all the brothers in 1884. Mehr Singh, the senior brother, before the Court below compromised the case with the plaintiff, by receiving from her a certain area in recoguition of his right of *sardari* or headship of the family and conceding to her the balance of her late husband's share.

This compromise was followed by a decree which was *ex parte* against the defendants other than defendant No. 1, but on the application of the remaining defendants, that decree was subsequently set aside and the whole question re-opened.

The lower Court has found for the plaintiff, on the grounds that the alleged family custom has not been established and that the agreement of 1884 required registration and not having been registered was inadmissible as evidence.

From the Subordinate Judge's decree, Mehr Singh appeals to this Court and prays that the compromise be maintained so far as he is concerned.

The remaining male defendants in a separate appeal challenge the decree on the grounds that the family custom has been established and that the agreement of 1884 has been acted upon, is admissible and is binding on the plaintiff, who is not competent to challenge her husband's disposition of his property. The parties belong to a family of *jagirdars* and though they own land they are not agriculturists in the strict sense of the term. They are of the *Khatri* tribe.

Both under Hindu Law and under agricultural custom, a widow is entitled to a life-interest in her husband's estate, so that the proof of establishing a special custom to the contrary was rightly laid on the defendants

On the question of special custom, we may say at once that we find the defendants have failed to establish it.

In the family two cases are cited, that of *Musammat* Bishen Devi, widow of S. Jiwan Singh, but this instance is beside the point, for her husband Jiwan Singh left a son Gurdit Singh. On the death of S. Narinjan Singh in 1889 his widow received only maintenance, but only after there had been a dispute which was settled by arbitration.

A few instances are quoted from other families, but these cannot be regarded as going to establish a special custom in the parties' family.

A special custom directly opposed to the personal law of the parties requires much stronger evidence than is here produced before it can be declared to exist and although one of the plaintiff's witnesses, P. W. No. 2, says that the ladies of this family never receive a share of the land, he is a Muhammadan tenant only and not in a position to have any intimate knowledge of the subject, in fact the oral evidence on both sides is of no value.

Although it is admitted by *Musammat* Har Kaur, widow of Niranjan Singh, that she got only *maintenance* on her husband's

death, we nevertheless find her recorded as a sharer in Dadhambar (page 29 of paper-book) and in Wazirabad (page 17 of ditto).

The next point is the admissibility of the agreement of 1884 and its binding effect on *Musammat* Jamna Devi.

If the document is admissible, it would appear to bind *Musammat* Jamna Devi, for a widow is not competent to challenge any disposition of property by her husband, *cf. Maqsud-ul-Nissa* v. *Kaniz Zohra* (1), *Musammat Mehtab Bibi* v. *Musammat Hussain Bibi* (2).

The appellants contend that the instrument as a whole does not require registration, but that whether it does or not, clause VI of the instrument is complete in itself, that it is separable from the rest of the document and that it deals with the rights of the widows of the family.

It is further contended that it is of a testamentary character. We are unable to accept these contentions. The clause VI is not of a testamentary character inasmuch as it is not unilateral and is not revocable. Once the brothers had subscribed to it, each one was bound by it and one was not competent to resile from it without the assent of the others. It is in fact an agreement *inter vivos*.

The clause constitutes an agreement between all the brothers whereby they declare that their widows shall not inherit a life-estate but shall receive only a maintenance allowance of Rs. 25 per mensem.

Even in the case of *Musammat* Har Kaur, as we have noted above, this rule was not followed for she was mutated a full sixth share in Dadhambar.

Similarly the rest of the instrument declares the right and interest of the brothers in estates of large value.

We hold that the instrument is not admissible in evidence for the reason that it is not registered, and its registration was compulsory before it could be effective.

The result is that this appeal fails and is dismissed.

As for Mehr Singh's appeal, his only contention is that his compromise with plaintiff should be maintained.

(1) 135 P. R. 1908; 194 P. W. R. 1908.
(2) 15 Ind. Cas. 556; 17 P. R. 1913; 124 P. W. R. 1912; 249 P. L. R. 1913.

The Subordinate Judge refused to maintain it on the ground that when the case was re-opened, he hotly contested plaintiff's claim. This is scarcely correct. In his pleas he relied on the compromise and he appeared as a witness for the defendants only after a bailable warrant had issued for his attendance.

He then denied the plaintiff's right to a share, but admitted that his grandmother's case was the only instance he could cite.

We see no good reason for setting aside the compromise between plaintiff and Mehr Singh which they reached between them without reference to the other defendants.

We accordingly accept Mehr Singh's appeal, and decree for the plaintiff by modifying the lower Court's decree, so as to bring it into harmony with the compromise aforementioned but we allow Mehr Singh no costs. The plaintiff's costs throughout shall be paid by the remaining defendants.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 37 OF 1915.

January 10, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

MOHINI MOHAN MOZUMDAR CHOUDHURY—OPPOSITE PARTY—APPELLANT

*versus*

SURENDRA CHANDRA DEY—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 47, cl. (3); O. XXI, r. 16—Decree, purchase of, question of—Decision—Appeal—Separate paras. in s. 47, effect of.*

The question as to the genuineness of the purchase of a decree, arising between the purchaser who applied for execution on the substitution of his name as decree-holder and a judgment-creditor of the decree-holder who, having attached the decree, opposes the application, comes within the purview of section 47, clause (3), Civil Procedure Code, and as such its decision is appealable as a decree, even though the judgment-debtor does not take any part in the dispute. [p. 525, col. 2.]

The fact that an application was made under Order XXI, rule 16, of the Civil Procedure Code does not prevent section 47 of the Code, from being applied for the decision of a question falling within its scope [p. 525, col. 2.]

MOHINI MOHAN *v.* SURENDRA CHANDRA DEY.

*Semble.*—The object of separately numbering the sub-sections of section 47, Civil Procedure Code, is to make the several sub-sections independent of each other [p 525, col. 2.]

*Ram Chunder* v. *Musammat Hamiran*, 11 C. W. N. 433; 6 C. L. J. 437, distinguished.

Appeal against the decree of the Subordinate Judge of Mymensingh, dated the 29th October 1914, reversing the order of the 4th Munsif, Netrokona, dated the 2nd June 1914.

Babu *Kali Kinkar Chakraberty*, for the Appellant.

Babu *Bir ndra Kumar Dey*, for the Respondent.

JUDGMENT.

D. CHATTERJEE, J.—One Ram Kanai obtained a decree for money against the judgment-debtor. The respondent Surendra purchased this decree and applied to have his name substituted as a decree-holder and to execute the decree. The appellant Mohini, having a decree against Ram Kanai, having attached the said decree of Ram Kanai and as an attaching creditor, opposed the application of the respondent on the allegation that the *kobala* was fraudulent and *benami*. The first Court allowed the objection. On appeal the District Judge has held the *kobala* to be good and valid and allowed the objection of the respondent. The attaching creditor appeals on the ground that no appeal lay to the District Judge. This would depend upon whether the case comes within the purview of section 47, clause 3, of the Code of Civil Procedure. The question is whether the applicant Surendra was a representative of the decree-holder and was as such entitled to execute the decree. This question would apparently come within section 47, clause 3, and if it does so come within that clause the appeal lay to the District Judge. It is contended, however, on the authority of the case of *Ram Chunder* v. *Musammat Hamiran* (1), that in order that the case may be brought within the purview of section 47 clause 3, the dispute in question must be one in which the judgment-debtor was interested. In this case it appears that the judgment-debtor did not appear to oppose the application of either of the parties. The case referred to was decided upon the old section 244, Civil Procedure Code. In that section there was no numbering of the several sub-sections and the clause as to representation was dependent upon the previous part of the section which refers to the dispute between the parties to the suit. In the present Code section 47 has been divided into three sub-sections and the sub-sections are numbered separately. The object of that numbering seems to have been to make the several sub-sections independent of each other. In any case the three sub-sections can be read each by itself and if this is done, then clause 3 provides for the decision of a question like that which was the subject-matter of the present dispute.

It is further contended that the application was made apparently under Order XXI, rule 16, and if that was so there was no provision for any appeal to lie against the order that has been passed. Under the proviso to that rule, notice is to be served upon the transferee and the judgment-debtor and if the transferee, that is, the original decree-holder and the judgment-debtor have notice, then the case becomes one in which all the parties are represented. If all the parties are represented, the case may, very well, be treated as one in which the question arising for decision under section 47 may be decided and taking it for granted that rule 16 was entirely applicable, still there was nothing to prevent section 47 from being applied for the decision of the question as to who is the representative of the particular party to the proceeding. Rule 16 of Order XXI provides that a decree shall not be executed until the Court has heard their objections (if any) to its execution, that is, the objection of the transferor and the judgment-debtor. Here a third person also comes in whose objection may not be within the purview of Order XXI, rule 16. Here the third person is Mohini who is the attaching creditor of Ram Kanai. That question, however, can very well be determined under sub-section 3 of section 47. We think, therefore, that, on the whole, the decision is one which comes within sub-section 3 of section 47 and is, therefore, appealable. As expressly stated in the section this decision is for the purpose of execution only.

In this view of the case we dismiss the appeal with costs, hearing fee two gold *mohurs*.

The Rule is discharged.

BEACHCROFT, J.—I agree.

*Rule discharged.*

(1) 11 C. W. N. 433; 6 C. L. J. 437.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1563 OF 1914.

December 13, 1915.

*Present*:—Mr. Justice Napier and Mr. Justice Srinivasa Aiyangar.

NARAYANA AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

KASHAPPAYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Rent, payment of—Days of, grace—Forfeiture on non-payment—Court, power of, to relieve against forfeiture.*

As between landlord and tenant a Civil Court has a discretionary jurisdiction to relieve against forfeiture of tenancy in all proper cases, whether days of grace are allowed or not

*Narayana Kamti* v. *Handu Shetty*, 15 M. L. J. 210; *Naraina Naika* v. *Vasudeva Bhatta*, 28 M. 389; 15 M. L. J. 208; *Adiraya Shetty* v. *Billa Tyampu*, 8 Ind. Cas. 438; 8 M. L. T. 108; (1910) M. W. N. 419; 20 M. L. J. 944, referred to.

*Appayya Shetty* v. *Mahammade Beari*, 30 Ind. Cas. 596; 18 M. L. T. 336; (1915) M. W. N. 857; 29 M. L. J. 381, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Canara, in Appeal Suit No. 393 of 1913, preferred against that of the District Munsif of Karkal, in Original Suit No. 289 of 1912.

Mr. *T. R. Ramachandra Aiyar*, for the Appellants.

Mr. *B. Sitarama Rao*, for the Respondents.

JUDGMENT.

SRINIVASA AIYANGAR, J.—It is argued that if days of grace are allowed for payment of the rent, Courts have no jurisdiction to relieve the tenant from a proviso for re-entry on non-payment of rent, and the decisions in *Narayana Kamti* v. *Handu Shetty* (1) and *Naraina Naika* v. *Vasudeva Bhatta* (2) and *Adiraya Shetty* v. *Billa Tyampu* (3) are relied on. This case and the earlier cases and the later cases in this Court as well as English cases were exhaustively reviewed in *Appayya Shetty* v. *Mahammade Beari* (4), and the conclusion was arrived at that the Court has jurisdiction to relieve against forfeiture in all proper cases, whether days of grace are allowed or not. I respectfully agree. In this case it is impossible to say

(1) 15 M. L. J. 210.

(2) 28 M. 389; 15 M. L. J. 208.

(3) 6 Ind. Cas. 438; 20 M. L. J. 944; 8 M. L. T. 108; (1910) M. W. N. 419.

(4) 30 Ind. Cas. 596; 29 M. L. J. 381; 18 M. L. T. 336; (1915) M. W. N. 857.



that the lower Courts have not properly exercised their discretion. I think that this appeal fails and must be dismissed with costs.

NAPIER, J.—I agree.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

CIVIL APPEAL No. 2005 OF 1912.

July 22, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Shah Din.

*Musammat* RUKMAN DEVI—PLAINTIFF—APPELLANT

*versus*

*Musammat* SHIB DEVI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 1, scope of—Suit by different sets of plaintiffs claiming in the alternative, whether maintainable*—Aroras *of Sialkot—Custom—Burden of proof.*

The provisions of Order I, rule 1, Civil Procedure Code, contemplate, even if they do not encourage, claims by different plaintiffs in the alternative, provided that there is a common question of law or of fact which would arise if such plaintiffs brought separate suits. [p 527, col. 1.]

Where, therefore, two sets of plaintiffs, one the nephews and the other the daughters of the last male owner, sued to recover property from the widow of his grandson, alleging that either the nephews or the daughters were the legal heirs of the deceased owner and that they had agreed among themselves to divide the property in the event of either set of plaintiffs succeeding in the suit:

*Held*, (1) that the suit could not be dismissed on the ground that the plaint contained contradictory allegations and made inconsistent claims; [p. 527, col. 1.]

(2) that the parties being *Aroras* of Sialkot City were probably governed by Hindu Law and the burden of proving a special custom to the contrary lay upon the defendant. [p. 527, col. 1.]

*Premi* v. *Khushal Singh*, 1 Ind. Cas. 608; 28 P. L. R. 1909; 30 P. R. 1909; 42 P. L. R. 1909, referred to.

Second appeal from the decree of the Divisional Judge, Sialkot, dated the 10th August 1912.

Mr. *Nand Lal*, for the Appellant.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—The Divisional Judge has devoted a considerable part of his judgment to criticising adversely the action of the plaintiffs in presenting a joint plaint in this case, and has indeed dismissed their suit on the ground

that the plaint contains contradictory allegations and makes inconsistent claims. It appears to us that the learned Judge has overlooked the provisions of Order I, rule 1, Civil Procedure Code, which contemplate, even if they do not actually encourage, claims by different plaintiffs in the alternative, provided that there is a common question of law or of fact which would arise if such plaintiffs brought separate suits. The parties are as follows: (1) one set of plaintiffs comprises the nephews (brother's sons) of Lachhman Shah, deceased; (2) the second set of plaintiffs are the daughters of the said Lachhman Shah; (3) the defendant *Musammat* Shib Devi is the widow of Nand Lal, the grandson of Lachhman Shah. Both Nand Lal and his father Narain Das predeceased Lachhman Shah. The parties are *Aroras* of Sialkot and are said ordinarily to reside in that city. The suit relates to the properties of Lachhman Shah, and the plaintiffs claim that either the nephews or the daughters are the legal heirs of the deceased and they set out that they have by agreement among themselves arranged to divide the property in the event of either set of plaintiffs succeeding in the suit. It is urged on their behalf that if Hindu Law applies the daughters are undoubtedly Lachhman Shah's heirs, and that if custom is to be applied, then under the ordinary rule as laid down in paragraph 9 of the Digest of Customary Law the widow of a grandson who predeceased his grandfather would have no claim to succeed as heir in the presence of the nephews of the deceased.

In our opinion the probabilities are that the family is governed by Hindu Law. The members of it are *Aroras* and, so far as we can see, have little or no connection with agriculture. Such being the case the daughter would admittedly succeed in preference to the defendant. Assuming, however, that custom obtains among the parties, the burden of proving a special custom such as that which was held to have been established in *Premi* v. *Khushal Singh* (1), among *Ranhawa Jats* of Amritsar, would rest upon the defendant. She had ample opportunity of proving the existence of any such special custom but was unable to discharge the onus resting upon her. From whatever point of view, therefore, that we look at the case, it is clear that one or other of the plaintiffs must succeed, and we cannot agree with the Divisional Judge that their plaint contained such contradictory allegations as to justify the dismissal of the suit.

The Divisional Judge has found as a fact, and this finding is binding on us on second appeal, that Narain Das was not joint with Lachhman Shah. As a result of this finding we must hold that such part of the property in suit as belonged to Narain Das must be excluded from the decree to be given to the plaintiffs. Counsel on both sides agree that Narain Das' property consists of (1) a plot of 7 *kanals* 11 *marlas* of land situate in Mahal Rangpur and (2) one house situate in Sialkot town. These two properties must accordingly be excluded from the decree, but in all other respects the decree in plaintiffs' favour will be as given by the District Judge. The appeal is accepted, but we direct that the parties bear their own costs throughout.

*Appeal accepted.*

(1) 1 Ind. Cas. 608; 30 P. R. 1909; 42 P. L. R. 1909; 28 P. W. R. 1909.

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 436 OF 1914.

November 16, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri.

PARAMASIVAM PILLAI—PLAINTIFF—PETITIONER

*versus*

PERIYANAYAGATHAMMAL—DEFENDANT—RESPONDENT.

*Madras Village Courts Act (I of* 1889), *s.* 73—*District Munsif, power of, to review judgment set aside by mistake—Review—Inherent power—Civil Procedure Code (Act V of* 1908), *s.* 115.

Every Court has an inherent power to review its judgment by setting aside orders passed either under a mistake of the Judge or obtained by a fraud upon the Court. [p. 528, col. 1.]

*Badaricharya* v. *Ramchandra Gopal Savant*, 19 B. 113; *Ramsingh* v. *Babu Kisansingh*, 19 B 116, followed.

*Damodara Nadar* v. *Manicka Vachaka Dasika Pandara Sannadhi*, 3 Ind. Cas. 463; 6 M. L. T. 177; 19 M. L. J. 725; 33 M. 65; *Giddayya* v. *Jagannatha Rau*, 21 M. 363; *Ranga Row* v. *Emperor*, 16 Ind. Cas. 518;

JAGAT RAM *v.* MEHR DIN.

12 M. L. T. 350; 13 Cr. L. J. 710; (1912) M. W. N. 982; 23 M. L. J. 371, distinguished.

A District Munsif can, therefore, review a judgment which he, acting under section 73 of the Village Courts Act, set aside by mistake, though that Act provides for no such review. [p. 528, col. 1.]

*Quære* – Whether the Code of Civil Procedure applies to applications made under section 73 of the Village Courts Act? [p. 528, col. 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tiruvadi, in Original Petition No. 130 of 1914, preferred against that of the Court of the Village Munsif of Somerwarapuram, in Civil Suit No. 1 of 1913.

Mr. *G. S. Ramachandrier*, for the Petitioner.

Mr. *S. Muthiah Mudaliar*, for the Respondent.

JUDGMENT.—The only question is whether the District Munsif has jurisdiction to review an order made by him under the Village Courts Act (I of 1889). The Act does not provide for review of order passed by the District Munsif on applications made to him under section 73, and it is argued that he has no power to set aside an order even though made by him under a mistake.

I am of opinion that every Court has an inherent power to set aside orders passed either under a mistake of the Judge or obtained by a fraud upon the Court. Whatever doubt might exist where the review is sought on grounds outside the record, I do not see any grounds for holding that Courts are bound to allow a decree or order passed under a mistake to stand. *Badaricharya* v. *Ramchandra Gopal Savant* (1) and *Ramsingh* v. *Babu Kisansingh* (2) are authorities in point.

Reference has been made by the appellant's Vakil to *Damodara Nadar* v. *Manicka Vachaka Dasika Pandara Sannadhi* (3); *Ranga Row* v. *Emperor* (4) and *Giddayya* v. *Jagannatha Rao* (5). These cases do not touch the question as to the inherent power of the Court to set aside an order passed by it under a mistake. In *Damodara Nadar* v. *Manicka Vachaka Desika Pandara Sannadhi* (3) the review was not granted owing to any mistake the Collector laboured under where he dismissed the first application. In the judgment Justices Munro and Sankaran Nair cited *Badaricharya* v. *Ramchandra Gopal Savant* (1) and *Ramsingh* v. *Babu Kisansingh* (2), but only distinguished the case they were dealing with from the two Bombay cases cited and all that was decided in *Giddayya* v. *Jagannatha Rao* (5), was that section 73 of Act I of 1889 did not empower the District Munsif to sit in appeal over the judgment of the Village Court. The case of *Ranga Row* v. *Emperor* (4) relates to the power of the High Court to restore a criminal revision petition dismissed for default.

In the view I take it is unnecessary to consider if the provisions of the Civil Procedure Code apply to applications made to the District Munsif under section 73 of the Village Courts Act. It is argued by the appellant's Vakil that they do not apply, but if this is so, it is difficult to see how he presents this petition under section 115 of the Civil Procedure Code.

I dismiss the petition with costs.

*Petition dismissed.*

(1) 19 B. 113.
(2) 19 B. 116.
(3) 3 Ind. Cas. 463; 33 M. 65; 6 M. L. T. 177; 19 M. L. J. 725.
(4) 6 Ind. Cas. 518; 23 M. L. J. 371; 12 M. L. T. 350; 13 Cr. L. J. 710; (1912) M. W. N. 982.
(5) 21 M. 363.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1153 OF 1913.

July 22, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Shah Din.

JAGAT RAM—PLAINTIFF—APPELLANT

*versus*

MEHR DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Punjab Pre-emption Act* (*II of* 1905), *s.* 11, proviso—"*Recorded*," *meaning of Entry by* patwari *in mutation register, whether sufficient.*

The word "recorded" in the proviso to section 11 of the Punjab Pre-emption Act of 1905 means entered in the Record of Rights. [p. 530, col. 1.]

A person cannot be properly said to be entered in the Record of Rights as the owner of land if only his name has been entered in the register of mutations by the *patwari* and a report has been put up in his favour in the appropriate column of that register. [p. 530, col. 1.]

*Hari Ram* v. *Allah Ditta*, 28 Ind. Cas. 695; 186 P. L. R. 1915; 17 P. R. 1915, distinguished.

JAGAT RÁM *v.* MEHR DIN.

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 3rd May 1913.

Messrs. *Dalip Singh* and *Bahadur Chand*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Messrs. *Dhanpat Rai*, *Durga Das* and *Balwant Rai*, for the Respondents.

JUDGMENT.—The suit which has given rise to this second appeal was brought by the plaintiff-appellant, Jagat Ram, against the defendants-respondents, Mehr Din, Hussain Bakhsh and Puran Chand for possession, by pre-emption, of 43 *kanals* 19 *marlas* of land situate in village Jia Musa, Tahsil Lahore, which had been sold by a registered deed, dated the 21st February 1911, by Puran Chand to Mehr Din and Hussain Bakhsh for Rs. 5,600. The plaintiff, who is a brother of Puran Chand, vendor, is by caste a *Khatri* and is admittedly not a member of an agricultural tribe. He claims to have a right of pre-emption in respect of the land sold by his brother to the above-mentioned vendees under the proviso to section 11 of the old Punjab Pre-emption Act, II of 1905. Both the Courts below have dismissed the suit on the ground that at the date of sale the plaintiff was not recorded as the owner of agricultural land in village Jia Musa, and that he is not, therefore, entitled to the benefit of the proviso to section 11 aforesaid.

The sole question for decision in this second appeal is whether or not the lower Courts are right in holding that the plaintiff was not recorded as owner of agricultural land in the village at the date of sale within the meaning of section 11 of the Pre-emption Act, II of 1905. The material facts bearing upon this question are these. It seems that prior to 1910 the plaintiff was not recorded as an owner of agricultural land in village Jia Musa; but on the 14th February 1910 the *patwari* entered a report in the register of mutations proposing that a certain area of land should be mutated in the plaintiff's name. The facts relating to the proposed mutation have not been stated by the Courts below and it is unnecessary to set them out in this place. The mutation was not sanctioned by the Revenue Officer until the 15th June 1911, but meanwhile, on the 21st February 1911, the land in dispute was sold by the plaintiff's brother, Puran Chand, in favour of the present vendees, Mehar Din and Hussain Bakhsh.

The plaintiff's learned Counsel has argued that since on the 14th February 1910 the *patwari* had put up the mutation in favour of the plaintiff in the register of mutations, the plaintiff was on that date "recorded" as the owner of agricultural land in village Jia Musa within the meaning of the proviso to section 11 of the Pre-emption Act, 1905, and that he was, therefore, entitled to a right of pre-emption in respect of the sale in dispute which took place on the 21st February 1911. In support of this contention the learned Counsel has relied on the recent decision of this Court in *Hari Ram* v. *Allah Ditta* (1). That decision, however, is not in point. There the question was whether the father of the plaintiff (who was an *Arora* by caste and, therefore, not a member of an agricultural tribe) had been recorded as an owner of agricultural land in the estate in which the property sold was situate for twenty years previous to the date of sale. It was found that mutation in respect of a plot of land in the village had been attested in his favour on the 9th September 1889, more than twenty years prior to the date of sale, and since the *jamabandis* of 1889-90 had been destroyed it was presumed under section 114 of the Evidence Act that proper entries in pursuance of the mutation order must have been made in the *jamabandi* papers. The remark made by the learned Judges in that case to the effect that "a mutation register is certainly a record within the meaning of the proviso" to section 11 of the Pre-emption Act, must be read in the light of the contest and in relation to the facts of the case before the Court, and when so read it in no way helps the plaintiff in the present case.

Admittedly, no mutation had taken place in favour of the present plaintiff before the sale in dispute, and we are

(1) 28 Ind. Cas. 695; 17 P. R. 1915; 186 P. L. R. 1915.

quite clear that the mere fact that the *patwari* entered a report in the mutation register in favour of the plaintiff on the 14th February 1910 is wholly insufficient to justify a finding that the plaintiff was "recorded" as the owner of agricultural land at the date of sale. It is well known that when a *patwari* makes an entry in his register of mutations under the provisions of sub-section (3) of section 34 of the Punjab Land Revenue Act, he does so either in pursuance of a report made to him under sub-section (1) of the said section or of his own motion under certain circumstances. After the entry has been made by the *patwari* its correctness is enquired into by a competent Revenue Officer, who makes such order as he thinks fit with respect to the entry in the annual record of the right acquired and to which the *patwari's* report relates. After the Revenue Officer has made an order under sub-section 4 of section 34 aforesaid an entry is made in the annual record under the provisions of sub-section (5) thereof, and it is obvious that until at least mutation has been properly attested by competent authority the person in whose favour the *patwari* has put up the mutation in the register of mutations cannot be said to be "recorded" as the owner of land in the estate to which the register relates.

In our opinion the word "recorded" in the proviso to section 11 of the Pre-emption Act means entered in the Record of Rights, and nothing is clearer than that a person cannot be properly said to be entered in the Record of Rights as the owner of land if only his name has been entered in the register of mutations by the *patwari* and a report has been put up in his favour in the appropriate column of that register.

For these reasons we agree with the lower Courts that the plaintiff was not recorded as the owner of agricultural land in village Jia Musa at the date of the sale in dispute; and that being the case, it is clear that he had no right of pre-emption in respect of the land in suit under the proviso to section 11 of the Pre-emption Act, II of 1905. We accordingly maintain the decree of the lower Appellate Court and dismiss this appeal with costs.

*Appeal dismissed.*

## SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 422 OF 1912.

March 15, 1915.

*Present*:—Mr. Fawcett, A. J. C.

HIRJI TOKARSI—PLAINTIFF

*versus*

GORDHANDAS AND OTHERS—DEFENDANTS.

*Trusts Act (II of 1882), s. 84—Fraudulent transfer—Creditors delayed—Right of transferor to have transfer set aside, effect of.*

In order to disentitle a person from having set aside a transfer made by him for an illegal purpose *e.g.*, with a view to screen his property from his creditors, it is not necessary that the whole fraud contemplated should have been carried into effect; but it is sufficient if the illegal purpose has been carried into effect in a material part, *e.g.*, by delaying the creditors for a long time. [p. 534, col. 1.]

*Rangammal* v. *Venkatachari*, 18 M. 378 at p. 389; *Muthuraman Chetty* v. *Krishna Pillai*, 29 M. 72, followed.

*Jadu Nath Poddar* v. *Ruplal Poddar*, 4 C. L. J. 22; 10 C. W. N. 650; 33 C. 967 at p. 979; *Pethermal Chetty* v. *Maniandy Servai*, 35 C. 551; 35 I. A. 98; 5 A. L. J. 290; 7 C. L. J 528; 18 M. L. J. 277; 12 C. W. N. 562; 10 Bom. L. R. 590; 14 Bur. L. R 108; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.), referred to.

Mr. *Lalchand Hasomal*, for the Plaintiff.

Mr. *Rupchand Bilaram*, for Defendants No. 1*a* and *b*.

Mr. *Kalumal Pohlumal*, for Defendants No. 2*b* and *c*.

Mr. *Dipchand Chandumal*, for Defendants No. 1*c* and 3.

JUDGMENT.—The plaintiff sues, as a member of a joint Hindu family, for partition of his share in the two immoveable properties mentioned in the schedule to the plaint, and joins as defendants his brothers (defendants No. 1), the trustees and executors of a Will alleged to have been executed by his uncle, Visram, (defendants No. 2), and his step-mother (defendant No. 3). In the plaint plaintiff refers to a release-deed executed by himself in 1909 and denies that this release-deed is a genuine transaction, asserting that it was a sham and bogus one intended to screen family property, that it has never been acted upon and is of no effect whatever.

On the other hand, the defendants Nos. 1 and 2 deny that the release-deed is not a genuin document and has not been acted upon, and plead that, even if the plaintiff's contention

that it was executed to screen the famiiy property against the creditors of the plaintiff be true he cannot get the relief sought. On this particular point an issue had been framed, whether "even if the release-deed was executed with the object of screening family property from the creditors of the plaintiff, has the fraud been carried out so as to disentitle the plaintiff to the relief sought?" And the trial has, in the first instance, been confined to the determination of this issue only (Exhibits 35 and 40).

There can be no doubt that if this release-deed (Exhibit 20) is a valid document as against the plaintiff, it debars him from obtaining the relief sought, for thereby he has relinquished all his rights, interests, claims and shares in the immoveable property in suit in favour of his father Tokarsi, his uncle Visram, and his brothers. The plaintiff states that in 1908-09 he had contracted debts which came to the knowledge of his father and uncle and that it was in order to screen the family property from his creditors that this release-deed was executed on 2nd March 1909, although it purports to have been executed on the 23rd December 1903. He further says that, when it was executed, a suit had already been filed against him by one of his creditors, by name Lokumal. He had also before March 1909 contracted other debts to his creditor Doulatram, a brother of Lokumal. In pursuance of this arrangement to defeat his creditors, the plaintiff says, he went to a place called Gojra in the Punjab at the end of April 1909, but returned to Karachi after some two months. This, nc doubt, was in connection with Lokumal's and Doulatram's suits against the plaintiff which were decided in July 1909, when Lokumal obtained one decree and Doulatram three decrees against the plaintiff. The latter after his short stay in Karachi returned again to Gojra, where he says he stopped till September 19 0. He then came to Karachi and remained there till about the beginning of 1912 when he went to the Central Provinces. He returned to Karachi in March 1912 when his uncle Visram died. In August 1912 his father Tokarsi also died. Prior to that plaintiff, on the 29th March 1912, applied to be adjudicated an insolvent, as he was threatened with arrest at the instance of one of his creditors. In that application he alleged that he had no property except some moveables of the value of Rs. 25. His application was, however, dismissed on the 29th May 1912, on the ground that it was an abuse of the process of the Court. Up to this time no application for execution had been made by any of his creditors except one by Lokumal for the arrest of the plaintiff in November 1910. This was, however, unsuccessful as the warrant could not be executed owing to plaintiff's absence from Karachi. After the insolvency application had been dismissed, Doulatram in June 1912 made three applications for execution, two by attachment of moveable property of the plaintiff and one for his arrest. The two former applications were, however, subsequently dropped. In the other one plaintiff tried to defeat the application by pleading poverty. But this plea was rejected by the Court and in November 1912 he was committed to Jail. Some four months afterwards he was released on payment of the amount due on the decree in execution of which he had been arrested. Before he was sent to Jail, the plaintiff filed the present suit in October 1912.

These are the main facts asserted by the plaintiff himself or proved so far as they are necessary for determination of the present issue. There can be no doubt that the object of screening family property from the plaintiff's creditors has been effected, at any rate, in so far as no attempts have been made by any of the plaintiff's creditors to attach plaintiff's interests in the immoveable property in suit, and admittedly none of them have recovered anything out of their dues, with the exception of the one decretal amount paid up after plaintiff's arrest to Doulatram. On the other hand, plaintiff's three creditors have kept their decrees alive by making occasional applications for execution. The question for the Court to determine is, whether the contemplated fraud has been carried out to an extent which disentitles the plaintiff to the relief sought. The main rule in cases of this kind is that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed. This is based on the maxims "no man can take advantage of his own wrong";

and that "the person who alleges his own turpitude is not to be heard." The Courts, however, in England and in this country have recognized an exception to this general rule, which is that the mere intention to defraud, if not carried into effect, affords a *locus pœnitentiæ* to the fraudulent transferor, sufficient to justify his being given relief. In India this exception is provided for by Statute in section 84 of the Indian Trusts Act, and accordingly the best course in dealing with the issue is to have regard to the language of that section, which provides that "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor." An "illegal purpose" is, of course, any purpose which is prohibited by law, and on this point we have the provisions of section 206 of the Indian Penal Code which penalize any fraudulent transfer of property to another with the intention of thereby preventing such property from (among other things) being taken in execution of a decree or order which has been made, or which the transferor knows to be likely to be made, by a Court of Justice in a civil suit. Section 207 provides also for the punishment of an accomplice who accepts such a transfer, and sections 421, 423 and 424 further deal with fraudulent transfers or releases of the kind in question. There is no doubt, therefore, that the purpose for which the plaintiff alleges this release-deed was executed, was an illegal purpose. On the other hand the question arises whether, before it can be said that such an illegal purpose has been "carried into execution," it is necessary that the creditors should be entirely defeated, or whether it is sufficient that, as in this case, they have been merely delayed. In connection with this point Mr. Rupchand contends that a suit by any creditor to avoid the release-deed under section 53 of the Transfer of Property Act must, under Article 91 of the Limitation Act, be brought within three years from the time when he knew of its execution, which admittedly was very shortly after the time it was executed. As this period of three years has elapsed, he argues that they are now absolutely debarred from obtaining any benefit out of the plaintiff's share in the family property. If, however, the view taken in *Khanchand* v *Kodumal* (1) is correct, Article 91 does not apply to such a suit by creditors, and it may be, therefore, that it is still open to any of the creditors to seek relief under section 53. But in any case I think this point is quite immaterial. There is, I think, no possible doubt that material delay of creditors by fraudulent deeds of this kind does come under the general rule already mentioned and is not saved by the provisions of section 84 of the Indian Trusts Act. The old Statute 13 Eliz. C. 5, on which section 53 of the Transfer of Property Act and similar provisions are based, provided against alienations intended not only to defraud creditors but also to delay or hinder them, and enacted that every such alienation made for any such intent or purpose "shall be, as against that person, his heirs, successors, executors, administrators, or assigns, whose actions, suits, debts, etc., are or might be *in anywise disturbed, delayed, hindered* or defrauded by such practices, utterly void." (Encyclopædia of Laws of England, Volume 5, page 505). Section 53 of the Transfer of Property Act expressly covers such delay. Sections 206 and 421, Indian Penal Code, would also clearly extend to a temporary, as well as a permanent, prevention of the kind there specified. In the present case the facts show beyond all dispute that, with the exception of one decretal amount, all plaintiff's creditors have been delayed and have not recovered anything out of their dues. Of course if this result was due to mere negligence on their part or neglect of their own interests, then the plaintiff would not be responsible (*cf.* Gour's Law of Transfer in British India, 3rd Edition, Volume I, page 485, paragraph 779). But it is clear from the evidence of Lokumal, Doulatram and Ramaji that the existence of this release-deed was really what deterred them from making any attempt to recover their decretal dues by attachment of plaintiff's interest in the properties in suit. It is obvious that these witnesses are

(1) 15 Ind. Cas. 819; 5 S. L. R. 240 at p. 241.

interested in plaintiff's obtaining the relief sought, so that his share in the properties may be available for satisfaction of their decrees, and they have clearly attempted to make their statements as favourable as possible to his case. But at the same time they all admit that they knew of this release-deed and refrained from applying for attachment of plaintiff's share because of the expense that would have been entailed, had they done so. This is natural, as the release-deed would have put a serious obstacle in the way of attachment and sale of plaintiff's share, and considerable litigation would have been entailed in any attempt to get rid of that obstacle. The suggestion that they abstained from taking any step of this kind merely because they knew the deed to be a false one or because they preferred to await developments are, I think, absurd, especially in a case of this kind where the creditors admit they had to borrow money for their business at a higher rate than that allowed on their decrees. Mr. Lalchand for the plaintiff contends, however, that, as plaintiff did nothing in the way of himself raising any objection on the strength of this release-deed, he is in no way to blame for the creditors abstaining from attachment, etc., and is not responsible for any fears of the creditors that may have deterred them. I think a very slight consideration suffices to show that this contention is fallacious. If *A* goes to his own house and *B* stands in the door-way and flourishes a dagger at him so that *A* desists from trying to enter, then *B* undoubtedly does carry out his illegal purpose of preventing *A* from entering, even although *A* has not attempted to enter and *B* has not actually attacked him with the dagger. The same applies even if *D* only stands at the entrance and *A* knows that he has a dagger on him and is ready to use it, should he attempt to enter. In this case the release-deed was a weapon with which plaintiff and his family had provided themselves, in order to defeat any attempts that might be made to attach the plaintiff's share in the family property, which otherwise would be available to satisfy the creditors' dues. So the analogy is one that applies. And in this case there is also evidence that the plaintiff and his friends brought the deed of release prominently to the notice of the creditors, and it is very likely true that (as it asserted) they attempted to obtain reductions of the creditors' claims on the strength of it. It is quite clear that their sole purpose in getting this release-deed executed was not merely to obtain such reductions, and any such contention would be contrary to the pleading of plaintiff himself that the object was to screen family property; but in any case such a purpose would also be an illegal purpose, for although a person is justified in trying to obtain a reduction by any legitimate means, he is certainly not justified in doing so by means of a fraudulent deed of the kind in suit. Then there is the evidence showing the persistent efforts of the plaintiff to defeat his creditors as far as possible by avoiding arrest, and his conduct was such that the Court considered that in spite of poverty he should be sent to Jail (Exhibit 45). It was only when his insolvency application failed that he brought this suit, and in that insolvency petition he plainly asserted and relied on this release-deed as against his creditors. If he had in that petition admitted what he now does, and offered to place his share of the property at the disposal of the Official Receiver, then no doubt there would be more ground for granting him the relief now sought. But on the contrary he persisted in trying to defeat any attempt which might he made to recover the decretal amounts from that property. In my opinion, therefore, the case cannot be said to be one which falls within the general principles regarding an intended but unaccomplished fraud that are recognized by the Courts. In *Jadu Nath Poddar* v. *Ruplal Poddar* (2), it is said that "mere intention, not carried into effect, ought not to be sufficient to deprive the party of the assistance of the Court in enforcing his rights; and if he either abandons his fraudulent purpose before it is accomplished, or pays his debts to the full value of the property conveyed, the fraud should be regarded as purged." This is certainly not a case of that kind. Nor is it a case like that in *Petherpermal Chetty*

(2) 4 C. L. J. 22; 10 C. W. N. 650; 33 C. 937 at p. 979.

v. *Maniandy Servai* (3), where an attempt to defraud had been successfully defeated. The cases of *Rangammal* v. *Venkatachari* (4) and *Muthuraman Chetty* v. *Krishna Pillai* (5) and the English authorities which they follow, show that it is not necessary that the whole fraud contemplated should be carried into effect, but that it is sufficient if the illegal purpose has beeen carried into effect in a material part or, as it is put in *Muthuraman Chetty's* case (5), there has been part performance of a substantial character. In this case I have no hesitation in holding that the illegal purpose has been substantially carried into execution, inasmuch as the creditors have been prevented from obtaining satisfaction of their dues for over five years by this release-deed, and that plaintiff cannot claim the benefit of the exception contained in section 84 of the Trusts Act. That section also provides for the case of a transferor not being as guilty as the transferee. This plea has not been urged by the plaintiff's Pleader, and in any case I do not think it can be relied on here. The ordinary cases to which that provision would apply are where one party acts under circumstances of oppression, imposition, undue influence, or great inequality of age or condition, so that his guilt may be far less in degree than that of the other party, see Kerr on Fraud and Mistake by S. E. Williams (1910), 4th Edition, page 438. The only circumstances in the plaintiff's favour in the present case are his youth and the fact that he no doubt acted under the influence of his father and uncle, the transferees. On the other hand he threw himself whole-heartedly into this plot to defraud his creditors and has done everything he could to carry it out, so that the guilt is not far less in degree than that of the transferees.

For the above reasons I hold that the fraud, or illegal purpose, contemplated by the release-deed has been carried into execution so as to disentitle the plaintiff to the relief sought.

(3) 35 C. 551; 35 I. A. 98; 5 A. L. J. 290; 7 C. L. J. 528; 18 M. L. J. 277; 12 C. W. N. 562; 10 Bom. L. R. 590 (P C.); 14 Bur. L. R. 108; 4 M. L. T. 12; 4 L. B. R. 266.

(4) 18 M. 378 at p. 389.

(5) 29 M. 72.

The suit is, therefore, dismissed with costs.

*Suit dismissed.*

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## LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 135 OF 1914.

January 6, 1916.

*Present*:—Mr. Justice Twomey and Mr. Justice Ormond.

THE SHANGHAI LIFE INSURANCE CO., LTD.,—DEFENDANT—APPELLANT

*versus*

MRS. HELEN CONSTANCE BROWN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Insurance, life—Refusal by insurer to accept premiums, effect of—Court Fees Act (VII of 1870), s. 5—Additional Court-fees, levy of, after decision of case, whether allowable.*

Once the insurer refuses to accept premiums, the insured is not bound to go on tendering successive premiums in order to save the right to recover the amount insured; he can sue for damages at that time or refuse to treat the contract as at an end, as the insurer's refusal to accept premium is a continuing refusal. [p. 535, col. 2.]

*Honour* v. *Equitable Life Assurance Society of the United States*, (1900) 1 Ch. D. 852, 69 L. J. Ch. 420; 82 L. T. 144; 48 W. R. 347, referred to.

The provisions of the Court Fees Act relating to the levy of additional fees apply only to cases which are pending and cannot be enforced in cases which have been finally decided. [p. 536, col. 1.]

*Mahadei* v. *Ram Kishen Das*, 7 A. 528; A. W. N. (1885) 140, followed.

Mr. *McDonnell*, for the Appellant.

Mr. *Villa*, for the Respondent.

### JUDGMENT.

ORMOND, J. (*November* 25, 1915.)—Three "incontestable" policies of insurance upon the life of the plaintiff's debtor were effected with the defendant Company and were handed over by the defendant to the plaintiff, the insured debtor having been passed by the Company's doctor and accepted by the defendant as a first-class life. The original premiums were paid by the plaintiff on the 30th November 1909 and the second premiums were paid by her to the Company on the 1st March, 1910. When the plaintiff tendered the next premiums, they were refused on the ground that the insured debtor was not a first class life, he having previously applied for a policy to this office when he was offered a "lien" policy only, as he was then

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not considered to be a first class life. The Company cancelled the policies unless the insured submitted to further medical examination and was again passed as a first class life. The insured debtor was away. Correspondence ensued; the plaintiff repeated her tender and held the Company to their contract. On the 3rd May 1913, the assured debtor died and the plaintiff instituted this suit to recover the amount due on the policies. The plaintiff obtained a decree and the defendant appeals.

The defence is that although the defendant purported to terminate the contract, the plaintiff could not recover the amount insured, because she did not tender the successive premiums and that her only remedy, therefore, was to sue for damages as at the time when the defendant cancelled the contract; and in support of that contention, the defendant's Advocate refers us to a passage in May on Insurance at page 1346, which says that, upon a refusal to receive a further premium, the policy-holder has three-fold remedies (1) to treat the policy as rescinded and sue for its present value, (2) to continue to tender premiums, and, on the death of the insured, sue for the amount insured, (3) to go into equity and ask to have the policy declared in force. He also cites a passage from Macgilliveray on Insurance at pages 247 and 248, which refers to some American decisions which are not before us. He also refers us to the case of *Honour* v. *Equitable Life Assurance Society of the United States* (1). That case only shows that the assured is not entitled, on account of the insurer's refusal to receive the premiums, to a declaration of the Court that his policy is valid; because the plaintiff has then no claim against the defendant and the Court refuses to determine the right before the time has arrived at which the right is enforceable. In that case the suit was dismissed on the defendants' undertaking that if any action is thereafter brought on the policy they would not rely as a defence on the non-payment of the premiums on the dates. That case does not amount to a decision that, after the cancellation of the contract by the insurer, it would be necessary for the policy-holders to go on tendering premiums in order to save the right to recover the amount insured. The tender is merely evidence of readiness and willingness to perform the contract. The plaintiff, no doubt, could have accepted the repudiation by the defendant and have sued him for damages as at that time; but the plaintiff refused to treat the contract as at an end and she kept the defendant to the contract. The defendant in effect said: "It is no good going on tendering the premiums; the policies are cancelled." The defendant's refusal to perform his part of the contract was a continuing refusal; and the plaintiff having kept him to his contract, the defendant could at any time perform the contract by intimating to the plaintiff that he was willing to receive the premiums; *i. e.*, it was open to the defendant also to treat the contract as subsisting; but, in order to do so, he would have to give notice to the plaintiff of his change of mind, in order that the plaintiff might tender the premiums. The plaintiff alleges that she was ready and willing to pay the premiums, and that is not refuted. She is, therefore, entitled to the amount insured less the amount of premiums unpaid, *i. e*, she is entitled to the decree she has obtained.

I would dismiss the appeal with costs.

TWOMEY, J.—(*November* 25, 1915.)—I concur.

[After the judgment in appeal was delivered the Assistant Registrar in the Appellate Side brought to the notice of the Court that the proper Court-fee should be Rs. 525, and not Rs. 425 only ordered to be paid on the Original Side and Appellate Side, both the suit and appeal being *in forma pauperis*.

The Advocates for the appellant and respondents both argued that in the absence of one of the Judges who heard the appeal a single Judge cannot pass any order, relying on the provision in the Lower Burma Courts Act requiring two Judges to hear an appeal from the Original Side of the Chief Court and also on *Mahadei* v. *Ram Kishen Das* (2), which states that the provisions of the Court Fees Act regarding the levy of additional Court-fees apply only to pending cases.

(1) (1900) 1 Ch. D. 852; 69 L. J. Ch. 420; 82 L. T. 144; 8 W. R. 347.

(2) 7 A. 528; A. W. N. (1885) 140.

MA SHWE ON v. MAUNG KYWET.

On the 6th January 1916. Twomey, J., passed the following

ORDER.—After hearing Counsel in this matter, I am of opinion that I have no power in the absence of Mr. Justice Ormond to pass orders unless by consent of parties. But I note that I concur in the opinion of the learned Judge in *Mahadei* v. *Ram Kishen Das* (2) that the provisions of the Court Fees Act relating to the levy of additional fees apply only to cases which are still pending and cannot be enforced in cases which have been finally decided.

No further action will be taken to recover the additional Court-fees in this case.

*Appeal dismissed.*

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## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 1 OF 1915.

November 16, 1915.

*Present:*—Sir Charles Fox, KT., Chief Judge.

MA SHWE ON—PLAINTIFF—APPELLANT

*versus*

MAUNG KYWET AND ANOTHER—

DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 54—Sale, non-registration of, effect of—Land worth more than Rs. 100—Contract to sell—Specific performance, suit for—Limitation Act (IX of 1908), Sch. I, Art. 113.*

A sale of land worth more than Rs. 100 without registration, as required by section 54 of the Transfer of Property Act, is in law a mere contract to sell and does not of itself create an interest in or charge on the land contracted to be sold. [p. 536, col. 2.]

A suit for the specific performance of such a contract is governed by Article 113 of the Limitation Act and can be brought within three years from the date of the purchaser's knowledge that the vendor refused to perform the contract, where no specific date is fixed for the performance. [p 536, col. 2.]

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly. [p. 537, col. 1.]

Mr. *May Oung*, for the Appellant.

Mr. *Ba Thein*, for the Respondents.

JUDGMENT.—In 1907 the plaintiff-appellant's husband bought some lands from the respondents-defendants for Rs. 765. They delivered possession of the lands, and a report of the transaction was made to the Thugyi, but no document of sale was executed and registered. Consequently no "sale" of the lands was completed, because section 54 of the Transfer of Property Act being then in force in Lower Burma there could be no "sale" *i. e.*, "transfer of ownership of immoveable property in exchange for a price paid or promised or part-paid and part-promised", without an instrument in writing executed and registered.

In 1912 the defendants and two others, who were all heirs of one Myat Tha Dun, brought a suit against the appellant as legal representative of her husband for possession of the lands. It was held that the respondents were the owners of the lands when they sold them, these lands having been allotted to them as their share of the property left by Mya Tha Dun. The respondents admitted having sold the lands to the appellant's husband. A decree for possession was, however, made in their favour on the ground that no "sale" as defined in the Transfer of Property Act had been effected. In law the transaction had not got beyond the stage of a contract for sale, which section 54 of the Act says does not, of itself, create any interest in or charge on the land contracted to be sold.

In 1913 the appellant brought the suit in which the present appeal arises. Her claim in it is that the defendants may be ordered to execute and register a deed of sale or to make a valid transfer of the lands to her.

It is in effect a suit for the specific performance of the contract of sale entered into seven years previously. The Sub-Divisional Judge made a decree in the plaintiff's favour. This decree was reversed on appeal by the Divisional Court on the ground that the suit was barred by limitation.

The Article of the Limitation Act applicable to the case is Article 113, which prescribes three years as the period of the limitation and makes this commence from the date fixed for the performance of the contract or, if no such date is fixed, when the plaintiff has notice that performance is refused. In the present case no date was fixed for the performance of the contract, consequently the latter part of the Article is the only part applicable. So far as the record shows the suit brought against her by the respondents and other heirs of Myat Tha Dun was the first thing which occurred to give her any sort of notice that the

respondents were going to try and get back the lands. Even if the date on which she received the summons in that suit is taken as the date on which she had notice that performance was refused, her present suit having been brought within three years of that date is within time.

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly.

The decree of the Divisional Court is set aside. There will be a decree ordering the respondents to specifically perform their contract of sale of the lands described in the plaint, by whatever holding numbers they are now known, and ordering them, on the plaintiff filing in Court a properly drawn and stamped instrument of transfer of such lands to her, to execute such document, and to attend before the Registration Officer with a view to its proper registration, and ordering them also to deliver possession of the lands to the plaintiff if she is not now in possession of them, and to do all other things necessary to complete the transfer of the lands to her. The respondents must pay the plaintiff's costs in all the Courts.

If the respondents fail to comply with the decree so far as it directs them to execute a valid transfer, the Sub-Divisional Judge should execute it under Order XXI, rule 32.

*Decree set aside.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2971 AND 3479 OF 1913.

August 17, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Newbould.

GOPESWAR SAHA—PLAINTIFF—APPELLANT

*versus*

JADAB CHANDRA CHANDARAY AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Interest—Debtor and creditor—Debtor unable to pay on account of creditor's act, effect of—Interest for such period, if recoverable—Penal interest, relief against—Court, power of.*

If a creditor, by his own act, puts it out of the power of the debtor to make payment, no interest is recoverable for the period during which the debtor was thus prevented from paying the creditor. [p. 539, col. 1.]

A Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, unconscionable and extravagant that no Court should allow it. [p. 539, col. 1.]

Appeals against the decrees of the District Judge, Mymensingh, dated the 16th June 1913, affirming that of the Subordinate Judge, Mymensingh, dated the 17th February 1913.

Babus *Dwarka Nath Chakrabarti*, *Provas Chunder Mitter* and *Sures Chandra Bose*, for the Plaintiff-Appellant in No. 2971 and Respondent in No. 3479.

Babu *Biraj Mohan Mojumdar* (with him Babus *Mohini Mohan Chakrabarti* and *Krishna Kamal Maitra*) for the Defendants-Respondents in No. 2971 and Appellants in No. 3479.

JUDGMENT.

MOOKERJEE, J.—These appeals are directed against the decree in a suit to enforce two mortgage-bonds assigned by the original mortgagee to the plaintiff. The bonds were executed on the 25th July 1898 and were assigned to the plaintiff on the 16th July 1906. The principal sums secured by the bonds were Rs. 525 and Rs. 375 respectively, which carried interest at the rate of $15\frac{3}{4}$ per cent. per year with triennial rests. The plaintiff commenced this action on the 13th September 1911 for recovery of Rs. 4,979-9, namely, Rs. 900 as principal and Rs. 4,079-9 as interest thereon. He joined as principal defendants the mortgagor as also the purchaser of the equity of redemption, in whose favour the transfer was completed on the 16th September 1911. The substantial question in controversy relates to the amount of interest justly recoverable by the plaintiff. The defendants contended, *first*, that the rate of interest was penal, and, *secondly*, that the interest was suspended from the 1st November 1908 to the 16th September 1911, as during that period the debtor was prevented by the improper act of the creditor from re-paying the loan, as he would otherwise have done, by the sale of the mortgaged properties. The Subordinate Judge overruled the first contention but gave effect to the second objection and made the usual mortgage-decree for a portion of the amount claimed. The plaintiff as also the defendants

appealed to the District Judge against that decision. The District Judge has confirmed the decree of the Trial Judge and has dismissed both the appeals. Against this decree of the District Judge, the plaintiff, and the defendants have presented separate appeals to this Court. The plaintiff has contended that interest should have been allowed for the entire period from the date of the mortgage to the date fixed in the decree for redemption. The defendants have argued that the contract rate of interest was extravagantly high and unconscionable, and that interest should consequently have been decreed only at a reduced rate.

As regards the appeal by the plaintiff, there can be no doubt that where delay in the payment of the principal debt is caused by some improper act or omission of the creditor, the general rule is that the accrual of interest will be regarded as suspended during such period. In the case before us, the facts concurrently found by the Courts below may be briefly recited. The mortgagor, hard pressed by the high rate of interest on the loan, found himself in a helpless condition, and on the 6th August 1908, entered into a written agreement with the second defendant to sell the mortgaged property to him with a view to satisfy the mortgage-debt from the sale-proceeds. The plaintiff, the assignee of the mortgage-bonds, was himself anxious to purchase the property, so he forthwith intervened and urged the mortgagor to break his contract with the intending purchaser. The mortgagor was reluctant to resile from his agreement and explained to the plaintiff the obvious danger of the course proposed by him, as the contract was complete and enforceable. The plaintiff, however, successfully dissuaded the mortgagor from the contemplated sale. The result was a suit by the intending purchaser against the mortgagor for specific performance of the contract. The plaintiff did his best to defend the suit in the name of the mortgagor, but he was ultimately thwarted as the suit was decreed. The mortgagor was accordingly obliged to complete the sale in favour of the purchaser, which he did on the 16th September 1911. The plaintiff, thus foiled in his design to seize the mortgaged property, sued to enforce the securities he held. The question arises, whether, in the circumstance stated, the accrual of interest should not, in justice, be deemed to have been suspended during the period when, but for the improper intervention of the plaintiff, the mortgagor might have completed the sale of the mortgaged property and re-paid the loan from the sale-proceeds. The Courts below have concurrently answered this question against the plaintiff. The principle that if the failure to make payment of the principal debt is due to an improper act of the creditor or to such conduct on his part as prevents the debtor from repaying the loan, interest on such debt stands suspended during the time the debtor is so prevented, is of extensive application. The Courts have taken recourse in various reported decisions, both in England and in the United States, to this principle to attain the ends of justice. No useful purpose would be served by an analysis of the varying circumstances of the different cases, but reference may be made to the decisions in *Edwards* v. *Warden* (1), *Merry* v. *Rybes* (2), *Marlborough* v. *Strong* (3), *Cameron* v. *Smith* (4), *Bauer* v. *Dalzel* (5), *Anderton* v. *Arrowsmith* (6), *Laing* v. *Stone* (7), *London Chatham and Dover Railway Company* v. *South Eastern Railway Company* (8), *Webster* v. *British Empire Mutual Life Assurance Company* (9), *Hayes* v. *Elmsby* (10), *Stevenson* v. *Davis* (11), *Bowman* v. *Wilson* (12), *Pinkard* v. *Ingensoll* (13), *Union Insurance Co.* v. *Chicago Railway Company* (14), *Southern W. L. Company* v. *Hass* (15), *Watson* v. *McManus* (16), *Morford* v. *Ambrose* (17), *Hart* v. *Brand* (18), *Suffok Bank* v.

(1) (1876) 1 App. Cas. 281; 45 L. J. Ch. 713; 35 L. T. 174.
(2) (1757) 1 Eden, 1; 28 E. R. 584.
(3) (1723) 4 Bro. P. C. 539; 2 E. R. 367.
(4) (1811) 2 B. & Ald. 305; 20 R. R. 444; 106 E. R. 378.
(5) (1829) Moo. & Mal. 228.
(6) (1839) 2 Per. & Dav 408.
(7) (1829) 2 Man. & Ry. 561; Moo. & Mal. 229.
(8) (1892) 1 Ch. D. 120; 61 L. J. Ch. D. 294; 65 L. T. 722; 40 W. R. 194.
(9) (1880) 15 Ch. D. 169; 49 L. J. Ch. 769; 43 L. T. 229; 28 W. R. 818.
(10) (1893) 23 Can. Sup. Ct. 623.
(11) (1893) 23 Can. Sup. Ct. 629.
(12) (1881) 2 Mac. Crary. (U. S.) 394; 12 Fed. Rep. 864.
(13) (1847) 12 Alabama 44'.
(14) (1893) 146 Ill. 320; 34 N. E. 948.
(15) (1888) 76 Lowa 432; 41 N. W. 63.
(16) (1909) 223 Pa. 583; 72 Atl. 1066.
(17) (1830) 3 J. J. Marshall (K. Y.) 688.
(18) (1818) 1 A. K. Marshall 159; 10 Am. Dec. 715,

*Worces'er Bank* (19), *Stevens* v. *Baringar* (20), *Reid* v. *Reusselaer* (21) and *Plotner* v. *Warehouse* (22). It is obviously just that if a creditor, by his own act, puts it out of the power of the debtor to make payment, no interest should be recoverable for the period during which the debtor was thus prevented from paying the creditor; the wrong was with him and he cannot charge the effect to the other. This doctrine is based on the plainest grounds of justice, equity, and good conscience, and has been rightly applied by the Courts below for the protection of the defendants.

As regards the appeal by the defendants, the decisions of this Court in *Khagaram Das* v. *Ram Sankar Das* (23), *Abdul Majid* v. *Ksherode Chandra Pal* (24) and *Bouwang Raja Challaphroo Chowdhury* v. *Banga Behary Sen* (25) show that a Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, unconscionable and extravagant that no Court should allow it. We are not prepared to hold that the present case falls within that rule. The amount claimed as interest, if distributed over the entire period, works out at the rate of 35 per cent. per annum simple interest, while the amount actually decreed by the Courts below works out at the rate of 22 per cent. per annum simple interest. We cannot say that this rate is so excessive as to justify our interference.

The result is that both the appeals are dismissed and the decree of the District Judge is affirmed.

*Appeals dismissed.*

(19) (1827) 5 Pickering (Mass.) 106.
(20) (1835) 13 Wendell N. Y. 639.
(21) (1824) 3 (Cowan) N. Y. 393; 5 Cowan 587.
(22) (1909) 22 S. W. 443.
(23) 27 Ind. Cas 815; 21 C. L. J. 79; 42 C. 652; 19 C. W. N. 775.
(24) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.
(25) 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 408.

## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 466 OF 1915.

August 16, 1915.

*Present*:—Mr. McColl, J. C.

MI MAN AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MAUNG GYI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Buddhist Law—Adoption made shortly before death whether valid.*

Under the Buddhist Law an adoption made shortly before the death of the adopter is valid. [p. 540, col 1.]

Mr. *Maung Su*, for the Appellants.

Mr. *A. C. Mukerjee*, for the Respondents.

JUDGMENT.—On the death of Maung Hmyin, the appellant, Ma Man, applied for Letters of Administration. Her great-grandfather was Maung Hmyin's grandfather's brother. As her mother, Ma Shan, was living she had no *locus standi*. Ma Shan was added as a joint applicant, but Ma Man's name was not struck off as it should have been.

The application was contested by the respondents on behalf of their sons, Maung Gyi and Maung Nge, who they said were adopted by Maung Hmyin shortly before his death.

The District Judge found the adoption proved and dismissed the application.

The adoption was effected by a document a month before Maung Hmyin's death. The appellants have appealed, on the grounds that apart from the document there was no evidence of the taking of the children with a view to their inheriting, that strict proof should be required and that the document relied on was invalid.

I think that proof of the execution of the document wherein it was recited that the children had been brought up by Maung Hmyin's first wife, Ma Saing, and that he wished to adopt them in order that they might be his heirs, was all that was required to prove the adoption.

On the second point I would say that the document was executed in the presence of the ward elder and two other witnesses against whose credit nothing has been suggested.

On the last point it has been urged,

*first*, that Maung Hmyin was under the influence of Maung Law, the natural father of the children, and, *secondly*, that the deed of adoption was on the analogy of death-bed gifts invalid as tending to defeat Maung Hmyin's personal law.

Maung Hmyin and Maung Law were no doubt very friendly; the latter lived in the former's compound and cooked his meals for him, but there is not the slightest reason for supposing that Maung Law was in a position to dominate Maung Hmyin's will.

The personal law, which it is said the adoption tended to defeat, is the supposed rule that a Burman Buddhist may not dispose of any part of his estate by Will. It has been held for the last 35 years that Burman Buddhists have not this right, but though the Dhammathats lay down that death-bed gifts are invalid, I do not know of any express rule forbidding Burman Buddhists to dispose of their estate by Will, and as there are some texts which directly declare that such disposal must be given effect to, it may be that the question will some day have to be re-opened.

But it is unnecessary to re-open it now because, assuming that Burman Buddhists have no testamentary powers, that would not make the present adoption invalid; the adoption of a child, though it no doubt affects prejudicially the expectations of the prospective heirs cannot on that account be considered invalid any more than the marrying of a second wife could be. Moreover the adoption of a child with a view to his inheriting is recognized, and there appear to be no restrictions whatever as to persons or occasions. I know of no texts forbidding a so-called "death-bed" adoption, and, therefore, such an adoption must be held to be valid. Moreover, there cannot be the same objection to such an adoption as there is to a "death-bed" gift from the standpoint of Buddhist Law (assuming that it is averse to testamentary adoption), because a death-bed gift would enable a person to disinherit his own children in favour of a stranger, whereas a death-bed adoption, if there were natural children, would merely have the effect of diminishing their portion.

Finally I would say that the evidence does not show that Maung Hmyin was expecting death at the time he executed the deed of adoption. He was unwell but not apparently seriously ill to his knowledge; he got better and then suddenly got fever, of which he died. It is not clear that the indisposition from which he was suffering at the time of the adoption had anything to do with his death.

The appeal is dismissed with costs.

*Appeal dismissed.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 492 OF 1914.

March 30, 1915.

*Present*:—Mr. Crouch, A. J. C.

LATIFALI FADDOO ALIDINA—PLAINTIFF

*versus*

THE ROYAL EXCHANGE CORPORATION AND OTHERS—DEFENDANTS.

*Marine Insurance—"Covering note", how far contract for sea insurance—Damage—Insurers, liability of—Loss of goods on return journey—Trading custom.*

A "covering note" issued by Insurance Agents is not a contract for sea insurance, but only evidence of an agreement to issue a policy for the adventure specified therein on condition that the agreed premium is paid in cash before the departure of the vessel from the harbour. [p. 543, col. 1.]

Such a note, even if stamped subsequently, cannot be treated as a policy so as to create liability on the insurers. [p. 543, col. 2.]

The correct procedure for the owner of the goods to pursue when goods covered by a "covering note" have been lost, is to at once pay the Insurance Agents the premium and demand a policy [p. 543, col. 2 ]

Where goods were insured "from Karachi to Mombassa", including craft risks, and were carried in a native craft from the jetty to the ship in the stream and a portion of the cargo, being shut out by the steamer, was brought back to the wharf by the same craft and lay therein alongside the wharf awaiting re-shipment by another available steamer and was damaged owing to the craft springing a leak:

*Held*, that the Insurance Company could not be held liable, as this return journey was not included in the voyage from "Karachi to Mombassa." [p. 544, col. 2.]

There is no local trading custom in Karachi that after loss of goods on the return journey the shipper can, by paying a special premium, demand a policy covering such journey. [p. 544, col. 2; p. 545, col. 1.]

Mr. *Tahilram Maniram*, for the Plaintiff.

Mr. *Dipchand Chundumal*, for Defendant No. 1.

Mr. *Nadirshah Naoroji*, for Defendant No. 2.

JUDGMENT.—Plaintiff, in his plaint, alleges that on the 5th December 1913, he effected two policies of Marine Insurance with the Royal Exchange Corporation, for two separate consignments of 50 bags of rice, from Karachi to Mombassa and from Karachi to Lamoo respectively per SS. Dwarka, sling and craft risks being covered, that 70 bags were shut out, and were brought back to the Native Jetty, that on the night of the 8th December damage to the amount of Rs. 199-14-6 was suffered by the said goods owing to the craft containing them partially sinking. Defendants Nos. 2 were the carriers who undertook the transport of the goods between the Native Jetty and the ship. Plaintiff seeks relief primarily against the Insurance Corporation, or in the alternative against the carriers.

Both defendants dispute the claim, and the following issues were settled:—

1. Has the Court no jurisdiction?
2. Is the suit barred by limitation?
3. Is the suit bad for misjoinder of parties and causes of action?
4. Was there a contract of insurance in respect of the damaged bags of rice between the plaintiff and defendants No. 1.
5. If so, are the first set of defendants not liable by reason of the damaged bags not having been loaded in SS. Dwarka and Lhassa or by reason of the goods having been allowed to remain in the craft one night?
6. Are the first set of defendants exempt from liability by reason of the custom, if any, alleged in paragraph 4 of their written statement?
7. Are the first set of defendants exempt from liability by reason of the insurance being effected on F. P. A. terms?
8. Was the loss to the goods caused by the negligence of the second set of defendants? If so, are they not liable for damage caused by peril of the seas?
9. To what decree, if any, is the plaintiff entitled and against which of the defendants?
10. General.

The first three issues were raised on behalf of defendant No. 2 only and may be disposed of together. The suit was originally filed in the Small Cause Court, but was returned for filing in this Court, on the ground that the suit being on a policy of insurance was not cognizable by a Court of Small Causes. Mr. Nadirshah contends that a claim based on a policy of Marine Insurance cannot be united in the same suit with a claim for compensation against a carrier. But Order II, rule 3, Civil Procedure Code, clearly covers the case. He also contends that as plaintiff has obviously no case as against the Insurance Corporation the suit should be treated as really against his own clients, and in that case the suit is cognizable by the Court of Small Causes. This contention cannot be taken seriously and was not pressed. Nor was the issue as to limitation pressed; it was no more than suggested that the date of instituting the suit should be taken to be the date on which the plaint was presented to this Court, and not the day on which it was originally filed in the Court of Small Causes. I find on the *first* issue in the affirmative, and on the *second* and *third* in the negative.

The plaint contains so inaccurate and misleading a statement of the facts of the case that it is necessary to re-state them in detail. On the 3rd December 1913 plaintiff called at the office of Messrs. Gaddum & Co., the agents in Karachi for the Royal Exchange Corporation, and requested them to insure:

(1) 220 bags of rice, F. P. A., for Rs. 3,100 including sling and craft risks, from Karachi to Lamoo, per SS. Lhassa. Transhipment at Bombay.

(2) 150 bags of rice, F. P. A., for Rs. 2,100 including sling and craft risks, from Karachi to Mombassa per SS. Lhassa. Transhipment at Bombay.

Messrs. Gaddum and Co. agreed to grant two policies as desired and issued two covering notes. The originals have not been produced; the counterfoils are Exhibits 22 and 24.

The Lhassa sailed on the 4th December. Of the 220 bags consigned to Mombassa 170 only were shipped, and 50 were shut

out; of the 150 bags for Lamoo 70 were shut out. Plaintiff called at Messrs. Gaddum's office and informed them that only 250 bags had been actually shipped. The covering notes were accordingly at once amended, 220 being altered in one note to 150 and Rs. 3,100 to Rs. 2,100, in the other 150 was altered to 100 and Rs. 2,000 to Rs. 1,400.

On the 5th December 'plaintiff again went to Messrs. Gaddum and Co. and arranged for the re-insurance of the bags that had been shut out Ex SS. Lhassa. Two fresh covering notes were issued, one for 50 bags per SS. Lhassa to Mombassa, the other for 70 bags per SS. Dwarka to Lamoo. There are the two covering notes (Exhibits 16 and 17) referred to in the plaint. Of the 70 bags, only 50 were shipped on the SS. Dwarka which sailed on the afternoon of the 8th December; of the 20 shut out 11 were transferred to the SS. Lhassa. Of the 50 bags which were booked per SS. Lhassa, 43 only were shipped, the remaining seven being shut out. The SS. Lhassa sailed on the 11th December.

Plaintiff states that he informed the Insurance Agents that 50 only had been shipped by the SS. Dwarka and 43 and 11 by the SS. Lhassa, and got the premium proportionately reduced, the covering note, Exhibit 16, being amended so as to show only 50 bags per SS. Dwarka. A policy for the 50 bags per SS. Dwarka was issued on the 10th December (Exhibit 25). No fresh covering note was issued for the 20 bags shut out, but a policy (Exhibit 27) was issued on the 12th December (Exhibit 26). The covering note, Exhibit 17, was not altered.

On the night of the 8th-9th December the nine bags shut out from the SS. Dwarka and the seven shut out from the SS. Lhassa were so seriously damaged by sea water that on being auctioned they realised only Re. 1 per bag, their invoice value being Rs. 10. There is no evidence as to the exact manner in which the damage arose, but it is admitted by Mr. Nadirshah for the lighter contractors that the craft in which the bags were stowed sprung a leak.

The course pursued by the plaintiff in this case seems to be in full accordance with the usual practice in Karachi. When goods are shipped by British India Steam Navigation Co.'s steamers for an African port, they are ordinarily, or at any rate frequently, carried from the Native Jetty in lighters, and transferred to the ship as she lies moored in the stream. It happens occasionally that goods are shut out; in that case they return to the Native Jetty and are shipped by the next available steamer. They may or may not be landed. The shipper, if desiring to insure his goods, arranges terms of insurance with one of the local Insurance Agents and obtains a "covering note". That issued to plaintiff in this case was as follows:

THE ROYAL EXCHANGE ASSURANCE CORPORATION.

*Karachi 5th December* 1913.

*Seth Lutifali Fadoo Alidina.*

Your application is accepted as undernoted, and in completion hereof a stamped policy will be issued on application.

Rupees 700, including sling and craft risks.

On 70 bags rice M. J. F. P. A. transhipment at Bombay, per SS. Dwarka from Karachi to Lamoo at 5/8 per cent.

*N. B.* Premium in cash (war risks accepted). This acceptance will be considered null and void after departure of the vessel from the harbour and is not transferable.

*Per pro* GADDUM & CO., LTD.,
*F. G. Taders,*
*Agents.*

For the plaintiff it has been contended that this covering note is a contract of insurance; for the Insurance Company Mr. Dipchand argues that it is evidence only of a moral obligation. By virtue of section 7 of the Indian Stamp Act, 1899, no contract for sea insurance is valid unless the same is expressed in a sea policy; and no sea policy is valid unless it specifies the particular risk of adventure, or the time for which it is made, the names of the subscribers or underwriters, and the amount or the amounts insured. Every policy of insurance must bear the stamp prescribed by the Act.

But a letter of cover or engagement to issue a policy of insurance is exempt: Provided that, unless such letter or engagement bears the stamp prescribed by the Indian Stamp Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned, (Article 47).

A policy is a writing or instrument in which a contract of insurance is embodied. The covering note, in the form above given, does not purport to be a policy, and in my opinion, is not a policy. Neither of the notes on which the suit is based has been stamped; and it is the practice not to stamp such notes. There can be no doubt that, when such a note is issued and accepted, neither party considers that a policy has been issued; but the Insurance Agents have agreed to issue a policy for the adventure specified on condition that the agreed premium is paid in cash before the departure of the vessel from the harbour. The covering note is admissible to prove this agreement.

But when goods are shut out from the specified vessel, it is the practice in Karachi for the shippers to take out a policy only for the goods actually shipped. The covering note is so amended as to read as if only the goods actually shipped had been originally insured. No premium is paid in respect of them. It is stated that Messrs. Donald Graham and Co. charge a small premium to cover their risk when goods are shut out, but Messrs. Ewart Ryrie, Messrs. Anderson and Co. and Messrs. Gaddum and Co., Ltd., do not.

Now, there is no evidence to show when the 50 bags, out of the 70 included in the covering note, Exhibit 16, were put on board the SS. Dwarka, nor is there any evidence to show when the covering note was amended so as to cover only 50 bags. The amendment may have been made and probably was made before the SS. Dwarka sailed at 5 P.M. on the 8th and I cannot presume in favour of plaintiff that it was not made until the 10th December. He bases his claim on an altered document, which as altered gives him no claim to any relief; the burden is on him to show that it was altered at a time and under circumstances which entitle him to sue on it as if it had never been altered. He has made no attempt to discharge this burden. The offices were closed on the 9th for the *Moharrum*, as it appears from plaintiff's evidence. When, therefore, the damage occurred there was no covering note in existence which protected the nine bags destined for Lamoo. No policy has ever been issued in respect of them, no premium has ever been paid or tendered. So far as these goods are concerned, the allegations in the plaint have not been established. The goods were never insured (Issue 4).

But as regards the seven bags shut out Ex SS. Lhassa, plaintiff relies on the covering note, Exhibit 17, which still stands as originally written. At the hearing Mr. Tahilram has tendered the penalty under section 35 of the Stamp Act, and claimed that it should be treated as a duly stamped policy. But the stamping of a document at this late stage cannot alter its inherent nature or create fresh liabilities under it and in, my opinion, the technically correct procedure for the owner of goods to pursue when goods covered by a "covering note" have been lost is to at once go to the Insurance Agents, pay the premium and demand a policy. And where no premium has been paid or tendered, it is doubtful whether the goods can be said to be insured. But no respectable Marine Insurance Company ever refuses, on purely technical grounds, to admit its liabilities for loss which comes fairly within its undertaking as declared in the covering note, and the defendant Company in this suit has no desire to depart from this well-established custom, but it contends that, even if the covering note be treated as a duly executed and stamped policy it is still under no liability, and this contention must, in my opinion, be upheld.

This voyage for which the goods were insured was per SS. Lhassa, from Karachi to Mombassa. The voyage was, however, abandond at a very early stage, and it was on the return journey, or after the goods had actually reached the wharf of departure, that the misfortune occurred. There is nothing in the covering note which

suggests that this return journey was included in the voyage "from Karachi to Mombassa", no attempt has been made to show that in the ordinary form of policy issued by the Royal Exchange Assurance Corporation there is any clause which could be construed as extending the responsibility of the Corporation to such return journey. It cannot be treated as a deviation, for the contemplated voyage by the specified vessel was entirely abandoned. The previous practice of the parties has been to treat all goods that are shut out and which return safely as not having been insured at all. But Mr. Tahilram relies on an alleged local custom, and he has attempted, but completely failed, to prove that "sling and craft risks" cover the return journey of goods that have been shut out. Though Mr. Nicholas thinks that several claims have been paid, only one specific instance has been given of the insurance money having been actually paid in respect of goods damaged in the course of returning to the Native Jetty on being shut out. Seth Mahomedalli (Exhibit 19) was the agent in the case. He tells us that the owners, after the loss had occurred, paid their premium and took out a policy, and after much correspondence, the amount claimed was paid "as special case." He considers that there was no legal liability, but explains that Insurance Companies wish to accommodate people. This is not sufficient to establish a trading local custom. On the other hand Mr. J. I. Murray, who has had 10 years' local experience of insurance work, knows of no instance where goods have been damaged on their return journey to the Native Jetty. Mr. Travers, who represents Messrs. Gaddum and Co., considers that the outward voyage alone is covered unless there be a special arrangement. Mr. Nicholas, who has had 25 years' experience of Karachi business, considers that goods are covered for a specific voyage from one point to another, and that though, as a matter of grace, an Insurance Company might pay claim for loss suffered on a return journey, there is no legal liability. Ramzan Hashim, a frequent shipper of goods, considers that an Insurance Company is bound to pay for loss suffered on a return journey, but knows of no case where a Company has paid, and he gives no reasons for his opinion. There is, clearly, no evidence on which the Court could hold a special local custom established.

Before plaintiff could successfully establish a claim against the Insurance Corporation he would have to prove that the damage arose from an "adventure of peril" which the assurers had agreed to take upon themselves. This he has wholly failed to do. Mr. Tahilram contents himself with stating that there was apparently a leak in the lighter, and it being *Moharrum* night, the crews were possibly all away in the town. He assumed that the defendant carriers would, in the course of their defence, give a full explanation. But as defendants No. 2 have now compromised, their defence has not been heard. It is, however, admitted that the damage arose through the vessel leaking, and this is quite sufficient to justify a presumption that it was unseaworthy, and that the loss arose as a natural result of its unseaworthiness. On this ground alone, the Insurance Company would be held free of liability.

*Prima facie*, the loss was a particular average loss, only seven out of the 50 bags being damaged, and the insurance being F. P. A., the Company could not be held liable. But I refrain from giving any definite finding, for no finding is necessary in view of my decision on the other issues, and there has been no adequate attempt to show what is understood by "craft risks." It seems probable that shippers are, by custom, allowed to transport the goods covered by one covering note in more than one lighter, and treat each lot separately when determining the question whether there has been a total loss or constructive total loss.

My findings are, therefore, that there was no contract of insurance subsisting as to the nine bags shut out Ex SS. Dwarka when the damage occurred; that as to the other seven bags the Insurance Company had agreed to issue a policy of insurance covering the voyage from Karachi to Mombassa per SS. Lhassa; that the goods had not been insured for the return journey, nor was there any agreement to insure them; that no custom has been

proved that after loss of goods on the return journey the shipper can, by paying a special premium, demand a policy covering such journey.

ORDER.—Let there be decree dismissing the suit. Plaintiff to pay his own costs and those of defendant No. 1. Defendant No. 2 will bear his own costs.

*Suit dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2895 OF 1913.

January 6, 1916.

*Present*:—Mr. Justice Holmwood and Mr. Justice Imam.

SARAT CHANDRA ROY—PLAINTIFF—APPELLANT

*versus*

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Chowkidari chakran *lands, resumption of—Bengal Village Chowkidari Act (VI of 1870 B.C.)—Chowkidari Commissioner's report, final and conclusive against whom—Notice of proceedings, persons entitled to.*

The question whether certain resumed *chakran* lands are the *chowkidari chakran* lands of one *mauza* or of another is a question of parcel or no parcel and as such is purely a question of fact. [p. 546, col. 1.]

A person who is not impleaded in the enquiry of the Commissioner under Act VI of 1870, B. C., is not entitled to any notice and under section 61 of the Act, the report of the Commissioner is final and conclusive against such person without notice: although the absence of such notice would render the proceedings of the Commissioner of no effect against a person entitled to such notice. [p. 546. col. 2; p. 547, col. 1.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 29th January 1913, affirming that of the Munsif, third Court, Burdwan, dated the 31st May 1911.

FACTS.—The plaintiff was the *patnidar* of *Mauza* Bonpass under the Burdwan Raj. Defendants Nos. 2 and 3 were the *patnidars* of a contiguous *mauza* called Haribati under the same Raj. In 1900 Mr. C. C. Mitra, who was appointed a Commissioner under section 58 of the Village Chowkidari Act (VI of 1870, B. C.), declared the lands in suit as *chowkidari chakran* lands of *Mauza* Haribati and the Collector thereupon transferred them to the Burdwan Raj as *zemindar* of *Mauza* Haribati and the Burdwan Raj then settled the lands with defendants Nos. 2 and 3 as the *patnidars* of *Mauza* Haribati. In 1908 a second Commissioner was appointed under the Act and he on enquiry found that the lands in suit appertained to *Mauza* Bonpass but were wrongly declared by the previous Commissioner as appertaining to *Mauza* Haribati. The plaintiff thereupon applied to this Commissioner to rectify the mistake of his predecessor, but this was not done and the plaintiff was directed to go to a Civil Court for redress. Accordingly the plaintiff instituted a suit, which was dismissed by the first Court and the decision was upheld in appeal. Hence the second appeal by the plaintiff.

Sir *Rash Behary Ghose*, with him Babu *Jotindra Nath Bose*, for the Appellant.—The first Commissioner's report is not at all binding upon the plaintiff because no notice of the proceedings of the enquiry held by that Commissioner was given to the plaintiff. No man could be prejudiced by the result of an enquiry held in his absence and without notice to him. The second Commissioner's enquiry was held in a lawful manner and had no legal defect and under the Chowkidari Chakran Act is conclusive against the defendants. The report of the first Commissioner, which was based upon an enquiry held behind the back of the plaintiff, must be taken to have been superseded as the Local Government would not have appointed a second Commissioner if the report of the first Commissioner were accepted by the Government. Referred to *Hiralal Mukerji* v. *Premamoyee Debi* (1).

Babu *Sajani Kanta Sinha*, for the Respondents.—The first Commissioner's report was never rejected by Government. There is no evidence to prove that that report was not accepted by Government. The second Commissioner might have been appointed for various reasons and in the absence of any evidence, it cannot be presumed that the appointment of the second Commissioner some seven or eight years after the report of the first Commissioner superseded that report. The omission to give notice of the inquiry under the Chowkidari Chakran Act is not fatal, as no notice is required to be given by the Act.

(1) 2 C. L. J. 306

SARAT CHANDRA ROY v. SECRETARY OF STATE.

[HOLMWOOD, J.—The Commissioner must follow the procedure laid down in Regulation VII of 1822 and under section 21 notice is necessary.]

That is in regard to rent suits for the determination of which the Collector was empowered. The Chowkidari Commissioner has no concern with settlement of rent or revenue. Section 21 of Regulation VII of 1822 requires notice to be given to the person impleaded in the suit. The plaintiff was not in possession of the lands in suit at the time of the enquiry and he was not entitled to any notice under any circumstances. Both the lower Courts have found that the lands in suit were held by the *chowkidars* of Haribati and the first Commissioner's report is conclusive on the point and cannot be given the go-by. This appeal is concluded by findings of fact.

Babu *Jotendra Nath Bose*, in reply.—The finding of the lower Courts as to possession is only incidental. If the report of the second Commissioner is conclusive under the Chowkidari Act the lower Courts had no jurisdiction to arrive at a finding contrary to the report.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff to have it declared that certain resumed *chakran* lands were *chowkidari chakran* lands of *Mauza* Bonpass of which he is the *patnidar*, and not the *chakran* lands of *Mauza* Haribati of which defendants Nos. 2 and 3 are the *patnidars*. The question stated in its simplest form would appear to be one of parcel or no parcel, and as such should be purely a question of fact; but the learned Doctor who appeared for the appellant raised points of law upon the construction of certain sections and upon the question of necessity for notice under section 21 of Regulation VII of 1822.

It appears that in the year 1899 there was an enquiry made by a Commissioner, Mr. C. C. Mitra, with regard to the *chowkidari chakran* lands of *Mauza* Haribati. He found that the Roll Book of 1836 shows that there were 24 *bighas* 9 *cottas* and 8 *chattaks* of *chakran* lands in that *mauza*. But at the time of his enquiry the *chowkidars* of Haribati were in enjoyment of 26 *bighas* 4 *cottas* of *chakran* land. He accounted for it by saying that it was due to variation of standard measurement. He declared under section 61 of the Chowkidari Act that this quantity of *chakran* lands appertained to Haribati; they were assessed at an annual rent of Rs. 58-5-3 and the *zemindar* who is also the *zemindar* of *Mouza* Bonpass had agreed by silent acquiescence to take settlement at half of that rent. The matter went before the Collector. He accepted the declaration of the Commissioner and handed over the lands to the Maharaja of Burdwan, who in due course settled them with the *patnidar* of Haribati. In 1907 a second Commission was issued by the Government of Bengal, and from the original papers before us it would appear, though the matter is not quite clear, that the scope of this Commission was for the purpose of determining the status of certain *chakran* lands which had been left out in the previous enquiry, that in the course of this enquiry the second Commissioner examined the *thak* survey and found that it was there clearly stated that some of the plots which had been given by the first Commissioner to Haribati were actually in the ambit of *Mauza* Bonpass, and not only were in the ambit of *Mauza* Bonpass but that they were in the *chowkidari chakran chaks* of that *mauza*. He, however, declined to make any statutory declaration with regard to these plots, because the Collector had already dealt with them upon the report of the first Commissioner and he appears to have thought and rightly thought that they were outside the scope of his Commission.

The questions raised on behalf of appellant seem to us to be negatived by the facts which we have just set out. The first ground of appeal was that the first declaration of Mr. C. C. Mitra could not be used as evidence against the plaintiff because he had no notice of those proceedings. Section 60 of the Chowkidari Chakran Act, VI of 1870, B. C., lays down that in these *chowkidari chakran* enquiries the procedure shall be in accordance with Regulation VII of 1822, and it has been held in more than one case in this Court, of which we need only refer to the case of *Hiralal Mookerji* v. *Premamoyee Debi* (1), where all the authorities are collected, that the absence of such notice would render

the proceedings of the Commissioner of no effect against a person who was entitled to such notice and that the Civil Court would interfere, although but for such defect the order of the Commissioner would be final and conclusive. Now turning to section 21 of the Regulation we find that the notice which is required is to secure the attendance of the defendant or the party otherwise impleaded and, as we have seen, in this enquiry before the first Commissioner the *patnidars* of Bonpass were in no way impleaded. It is quite possible that the lands in suit were at the time of the *thak* survey included in *Mauza* Bonpass and yet they may have been subsequently enjoyed by the *chowkidars* of Haribati. They were at the time of the first enquiry in the enjoyment of the *chowkidars* of Haribati and the Commissioner had no duty imposed upon him to give any notice to other *patnidars* who were in no way impleaded, so that we think that the report of the first Commissioner was really final and conclusive under section 61.

The *next* ground taken was that it must be assumed that the proceedings of the first Commissioner had been quashed inasmuch as the Local Government issued the second Commission in the year 1907. But as we have already seen, the proceedings seem to indicate that the second Commission was only issued to supply the omission in the first Commission and not to supersede anything which had been finally decided by that Commission and by the orders of the Collector based upon that Commission.

A *third* point which was raised was as to the effect of the words "final and conclusive", whether they mean incapable of revision by the executive authorities only or not open to question in a Court of Law. There is some conflict of judicial opinion upon this point, and we need only say that the remarks in the case we have cited are *obiter*, as has been pointed out by the learned Munsif. There have been more recent decisions in which the contrary has been held and in the view we have already taken of the proceedings the question does not really arise. No question of notice arises and as we have seen the second report in no way affected the first report, the question is purely an academical one.

The result is that the appeal must be dismissed with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1091 OF 1914.

November 17, 1915.

*Present:*—Mr. Justice Kumaraswami Sastri.

MANIKA NAIKER—DEFENDANT No. 2—PETITIONER

*versus*

SWARNATHAMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 38—"Maintenance", meaning of—Suit by guardian of person against guardian of property to recover money for minor's education—Jurisdiction.*

For the purpose of Article 38 of Schedule II of the Small Cause Courts Act, the word "maintenance" means any sum of money payable by a person under an obligation to support another, either by the general law to which he is subject or under a specific contract. [p. 548, col. 1.]

A suit by the guardian of the person of a minor against the guardian of his property to recover the amount payable under the order of the Court for the minor's education and maintenance is not a suit for maintenance within the meaning of Article 38 of Schedule II to the Provincial Small Cause Courts Act, and is cognizable by such Court. [p. 547, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Principal District Munsif of Trichinopoly, in Small Cause Suit No. 1145 of 1914.

Mr. *N. Rajagopalachariar*, for the Petitioner.

Mr. *V. Purushotham Aiyar* (for Mr. *T. R. Venkatarama Sastri*) and Mr. *K. S. Ramabhadra Aiyar*, for the Respondents.

JUDGMENT.—The amount claimed was payable under an order of the District Court by the guardian of the property of a minor to the guardian of his person for the education and maintenance of the minor. The suit is by the guardian of the person to recover the amount payable for two months against the present guardian of the property and the former guardian who alleged that the amount was paid. I do not think the suit is one for maintenance within the meaning of Article 38 of the Schedule to the Small Cause Courts Act.

BIBI SAHIBZADI v. MIR MOHAMAD.

The minor was solely entitled to the property and an order of Court applying a portion of the income for his support would not be maintenance paid to him by the guardian. For the purpose of Article 38 the word "maintenance" means a sum of money payable by a person under an obligation to support another, either by the general law to which he is subject or under a specific contract.

The question raised by the petitioner as to want of jurisdiction, therefore, fails.

On the merits, I see no ground to set aside the finding of the Judge as to the receipt, Exhibit I. There is, however, little to support the view of the Judge that the 2nd defendant was a party to the fabrication. The Judge finds that the *gumashta* of the 2nd defendant is a "worthless person" and possibly, the 2nd defendant was deceived by his *gumashta* and *bona fide* believed that the *gumashta* paid the guardian and got the receipt. Having regard to the respectable position of the 2nd defendant, who is an Executive Engineer, I do not think this passage in the judgment of the District Munsif ought to stand. I am not prepared to interfere with the order as to costs.

The petition fails and is dismissed with costs of plaintiff (1st respondent).

*Petition dismissed.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 36 OF 1913.

July 23, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

BIBI SAHIBZADI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Sayad* MIR MOHAMAD—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), s. 19—Acknowledgment of liability by implication, essentials of—Evidence Act (I of 1872), s. 35—Revenue Records, admissibility in evidence of.*

An acknowledgment of liability under section 19 of the Limitation Act may be by implication, but the implication must be a necessary implication, so that the acknowledgment is clear and unequivocal. [p. 549, col. 1.]

*Benode Bihary Mookerjee* v. *Raj Narain Mitter*, 30 C. 699; 7 C. W. N. 651; *Gopalrao Manohar Tambekar* v. *Harilal Subrai Sevak*, 9 Bom. L. R. 715, referred to.

An objection that a person should be joined as a party to a suit does not necessarily imply an admission of an existing liability to that person. [p. 549, col. 1.]

Though Revenue Records are not evidence of title for they are kept for fiscal purposes, yet when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those facts under section 35 of the Evidence Act. [p. 549, col. 2.]

*Lekraj Kuar* v. *Mahpal Singh*, 5 C. 744; 6 C. L. R. 593; 7 I. A. 63; 4 Sar P. C J. 93; 3 Suth. P. C. J. 704; Rafique & Jacksons P. C. No. 61; 4 Ind. Jur. 423, referred to.

Appeal against the decree of the Sub-Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Lalchand Hasemal*, for the Respondent.

JUDGMENT.

PRATT, J. C.—This is a suit for partition. The plaintiff's wife was Bibi Aisan, the sister of Abdullah Shah and of Shah Mahomed Shah. The plaintiff's case is that Bibi Aisan was a tenant-in-common and in joint possession with her two brothers until the death of Abdulla Shah in 1873, that from 1873 Bibi Aisan was in joint possession with Shah Mahomed Shah and Abdulla Shah's widow Bibi Kuran until Shah Mahomed Shah's death in 1893; from 1893 the possession is alleged to have been with Bibi Aisan, Bibi Kuran and two widows and a daughter of Shah Mahomed Shah, *i.e.*, Bibi Sahibzadi, Bibi Sajan and Bibi Fazul, and according to the plaint Bibi Aisan died in 1902 and the plaintiff was in joint possession as her heir until 1904 when he was custed by the defendants, the widows and daughter of his wife's brother.

The lower Court found that Bibi Aisan, the plaintiff's wife, died not in 1902 but some time prior to September 1898, that plaintiff was ousted from possession on his wife's death more than 12 years before the institution of the suit, but that the bar of the limitation was removed by an acknowledgment made by the defendants in 1905. This acknowledgment was made in a written statement filed in a suit instituted by Abdulla Shah's widow Bibi Kuran for partition against the present defendants and is in these words:—

"Proper parties have not been joined in this suit, such as Abdulla Shah and Shah

Mahomed Shah left a sister Bibi Aisan who died after them. It is necessary to join her heirs in this suit. The suit is not maintainable without joining them."

The lower Court considered that the statement that Bibi Aisan's heirs were necessary parties involved an admission that they had a share in theestate and was, therefore, an acknowledgment of liability under section 19 of the Limitation Act. Now an acknowledgment of liability need not be express. It may be by implication, but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal, *Benode Behary Mookerjee* v. *Raj Narain Mitter* (1) and *Gopalrao Manohar Tambekar* v. *Harilal Subrai Sevak* (2). Does the statement that Bibi Aisan's heirs should be made parties necessarily imply an admission that they have a share? We think not. The defendants may have meant "As you have filed a suit for partition you must make all the members of the family parties. Not that we admit that they have a share or that you have a share, but because it is desirable that all family claims such as yours should be set at rest in this suit." And this is apparently what they did mean, for in other paragraphs of the written statement they denied that plaintiff had any existing right and claimed that the estate was not partible. The written statement uses the phrase "necessary parties" and objects that without such parties the suit is not maintainable. But these words do not carry the inference any further. Necessary because defendants' interests require it, and not maintainable because plaintiff should not be allowed to continue the suit without joining these parties. Possible adverse claimants are very often joined as parties in order to avoid the risk of future litigation. An objection that a person should be joined as a party does not, therefore, necessarily imply an admission of an existing liability to that person.

The ground on which the Sub-Judge decided the suit in the plaintiff's favour, therefore, fails, but Mr. Lalchand, for the plaintiff-respondent, contends that his client was in possession after his wife's death and within 12 years of the suit. Plaintiff has no documentary evidence of such possession and the oral evidence that he has cited is very meagre and unconvincing. We have considered the whole of the evidence and our conclusion is that Bibi Aisan never was in possession, actual or constructive, from the date of her marriage to the plaintiff. Bibi Aisan was married in 1883 or 1888. It is not clear in which year but at any rate after the death of Abdulla Shah during the life-time of Shah Mahomed Shah. The plaintiff says that on his marriage he went to live in his wife's house with her. This is grossly improbable. He had his own *haveli* only 250 yards from the *haveli* of the defendants in Sajan Sawai. He must have brought her to his own house, instead of thrusting himself upon his brother-in-law. Shah Mahomed Shah admittedly had possession and management until his death in 1893. At his death the holding was transferred in the Revenue books to the name of his daughter, Bibi Fazul. The Mutation Register, Exhibit 278, shows the names of three widows and daughter as heirs, but the name of the sister Bibi Aisan is omitted. Now it is no doubt true that Revenue Records are not evidence of title, for they are kept for fiscal purposes and it is no part of the duty of the Revenue Officer to record title. But when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those facts under section 35, Indian Evidence Act. It was on this ground that the Privy Council in *Lekraj Kuar* v. *Mahpal Singh* (3) admitted village records as evidence of a custom of succession. Now it is clear from the form of the register that it was the duty of the Revenue Officer to record the names of the heirs of Shah Mahomed Shah and the omission in that record of the name of Bibi Aisan is evidence. We think that Bibi Aisan was not regarded as being an heir. This was no doubt because she had relinquished all rights of succession on her marriage. Subsequent events point to the same inference. Three years later in 1896 the three widows on their own behalf and on behalf of the minor daughter, Bibi Fazul, gave a lease of the estate for 10 years to one Sundal Shah. The plaintiff then tried to interfere. He

(1) 30 C. 699; 7 C. W. N. 651.
(2) 9 Bom. L. R. 715.
(3) 5 C. 744; 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 7C4; Rafique & Jacksons P. C. No. 61; 4 Ind. Jur, 423,

filed an application to the District Court to be appointed guardian of the minor Bibi Fazul, alleging that she was in need of protection as the lease was an act of mismanagement. Why did he not then say that the lease is not binding on the share which belongs to my wife? Why did he not then ask his wife to sue for partition? We have no doubt it is because she would not have supported any such claim as that. The guardianship application led to a quarrel for it was in 1897 that the widows left Sajan Sawai and went to live at their house at Dando so as to be far away from the plaintiff. Yet plaintiff pretends that his wife was living with the widows and that he was collecting the rents from the lessee Sundal Shah and giving it to his wife to share with them.

Bibi Asian died in 1898 and the evidence after that date also shows exclusive possession by the defendants. They alone gave a lease to Bhagu in 1903 and they alone claimed before the Land Acquisition Officer in 1904 and when Bibi Kuran sued for possession in 1905, she did not think of joining plaintiff as a party as she would certainly have done had he been in possession.

The plaintiff in the hope of avoiding limitation said that his wife died four years later than she really did. He would never have been guilty of the reckless untruth if there were any foundation in fact for his claim to joint possession.

Our conclusion is that Bibi Aisan went out of possession in 1883 or 1888, probably because she surrendered her share. If that is so, plaintiff who claims through her has no right. If she did not go out of possession of her own free will she was ousted at that time and plaintiff's suit is time-barred. The ouster being more than 12 years before the written statement in Bibi Kuran's suit that statement, if it be an acknowledgment, was made after the expiry of the period of limitation and cannot operate under section 19. We, therefore, reverse the decree of the lower Court and dismiss the suit with costs throughout.

Decree of the lower Court reversed and suit dismissed.

*Decree reversed.*

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 19 OF 1914-15 OF SITAPUR DISTRICT.

August 19, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

RAGHUBAR SINGH—DEFENDANT—APPELLANT

*versus*

*Thakur* BINDRA BUX SINGH—PLAINTIFF—RESPONDENT.

*U. P. Land Revenue Act (III of 1901), s. 103—Possession of reversioner, if transfer.*

A reversioner coming into proprietary possession of certain land on the death of a widow is not a transfer of proprietary possession as is contemplated by section 103 of the Revenue Act and upon such land, revenue cannot be assessed till the next Settlement.

Second appeal from the order of the Commissioner of Lucknow Division, dated the 9th November 1914, reversing that of the Deputy Commissioner, Sitapur District, in a case of fixation of revenue.

### JUDGMENT.

CAMPBELL, J. M. (*August* 18, 1915.)—I am unable to agree with the Commissioner in this case. There has not, in my opinion, been any transfer of proprietary possession during the currency of the Settlement such as is contemplated by section 103 of the Revenue Act. Appellants have recently come into possession of certain land as reversioners of Jawahar Singh, upon the death of *Musammat* Jaini: and the learned Judicial Commissioners have decided that Jawahir Singh was in proprietary possession of the land in dispute from the date of the Settlement decrees in his favour in 1866. The fact that Jawahir Singh and his successors have until now been recorded as rent free under proprietors does not alter the fact, as found by the Judicial Commissioners, that the transfer of proprietary possession took place in 1866, and not during the currency of the present Settlement.

I would, therefore, set aside the order of the Commissioner and restore the order of the Deputy Commissioner, giving appellants their costs in all Courts.

HOLMS, S. M.—I agree. Revenue cannot be assessed till next Settlement.

*Appeal allowed.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 391 OF 1914.

December 14, 1915.

*Present*:—Mr. Stuart, A. J. C.

TULSHI RAM SHUKUL AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MUHAMMAD HADI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage-deed giving mortgagee option to sue or not to sue on default in payment of interest—Period of limitation, starting point of.*

Where a mortgage-deed gave the mortgagee a right to enforce payment on default in payment of interest, and also gave him the option of not enforcing payment on such date:

*Held*, that the date from which the period of limitation began to run was the date of the first default, notwithstanding any stipulation in the deed giving the mortgagee the option of not enforcing payment on such date.

*Perumal Ayyan* v. *Alagirisami Bhagavathar*, 20 M. 245; 7 M. L. J. 222; *Durga* v. *Tota Ram*, 19 Ind. Cas. 738; 16 O. C. 45, referred to.

Appeal against an order of the District Judge, Fyzabad, dated the 19th May 1914, reversing that of the Officiating Munsif, Akbarpur, dated the 13th January 1914.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *Sami Ullah Beg*, for the Respondents.

JUDGMENT.—I have examined the terms of the deed and I consider that, according to those terms, the mortgagee would have been entitled to bring a suit for the recovery of the principal and interest on 24th June 1899, as the first instalment of interest was due on the 23rd June 1899 and had not been paid. Such a suit could not have been dismissed as premature. This being the case, the money charged upon the immoveable property became due on 23rd June 1899.

So the date from which the period began to run under the provisions of Article 132, Schedule I, Act IX of 1908, was 23rd June 1899. The mortgagee could not contract himself out of the provisions of that Article by saying: "If I do not choose to bring my suit within twelve years from the time from which the period begins to run under the provisions of the law I shall not be compelled to do so". But that is practically the argument which is set up. The facts of the case in *Perumal Ayyan* v. *Alagirisami Bhagavathar* (1) are similar to the facts in this case and the decision at which I arrive is the decision at which the Bench of the Madras High Court which decided that case arrived therein. I do not consider that there is anything in *Durga* v. *Tota Ram* (2) that conflicts with the view that I am taking. The learned Second Additional Judicial Commissioner had to decide in that case the period of limitation applicable to a suit on a simple money bond and one of the points for his decision was whether, when a day was specified for his payment, the period of limitation should run from the day so specified, even although it was open to the holder of the bond to sue at an earlier date than the date specified. But the learned Second Additional Judicial Commissioner was not concerned in that case with the interpretation of the words "When the money sued for becomes due" as used in Article 132. I consider that the learned District Judge was right. The suit is barred by limitation. This appeal is, therefore, dismissed. The appellants will pay their own costs and those of the contesting respondents.

*Appeal dismissed.*

(1) 20 M. 245; 7 M. L. J. 222.
(2) 19 Ind. Cas. 738; 16 O. C. 45.



## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 11 OF 1914.

September 24, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

FIRM OF DOULAT RAM—PLAINTIFFS—APPELLANTS

*versus*

THE SECRETARY OF STATE—DEFENDANT—RESPONDENT.

*Railways Act (IX of 1890), s. 76, applicability of—Railway, contract with, under risk note Form B—'Wilful neglect,' meaning of—Loss—Presumption—Suit for compensation—Facts to be proved—Burden of proof.*

A person is said to be guilty of wilful neglect when he intentionally, and of set purpose, does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done. [p. 552, col. 2.]

FIRM OF DAULAT RAM *v.* SECRETARY OF STATE.

A loss is said to be due to wilful neglect when such neglect is either the sole effective cause of the loss or is so connected with it as to be materially contributing to it. [p. 552, col. 2.]

When a plaintiff sues a Railway for compensation for loss of goods consigned under a risk note in Form B, he must allege and prove facts from which it can be fairly and reasonably inferred that the loss was due to *wilful neglect* on the part of the Railway. [p. 553, col. 2.]

Section 76 of the Railways Act does not apply to a case where goods have been carried under a special contract limiting the responsibility of the Railway, as in risk note, Form B. [p. 553, col. 1.]

*Semble.*—It cannot be presumed that a carrier has been guilty of wilful neglect from the bare fact that goods have been lost or damaged. [p. 453, col. 1.]

First appeal against the decree of the District Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *Himatsing Gajsing*, for the Respondent.

JUDGMENT.

CROUCH, A. J. C.—This is an appeal against the judgment and decree of the District Judge, Sukkur, dismissing with costs the claims of plaintiffs to recover the sum of Rs. 257, being the value of certain tins of *ghee* consigned to them through the North-Western Railway under a risk note in Form B, which were stolen *en route*.

The admitted or proved facts of the case are as follows. On the 27th May 1912 198 tins of *ghee* were despatched by the firm of Vishindas Mewaram of Tandianwala to Sukkur, plaintiffs being consignees. The train carrying the goods reached Sukkur on the night of the 29th May, and on the waggons being opened on the following morning, it was found that ten whole tins and the contents of another tin had been stolen. The roof of the waggon was of corrugated iron sheets. The thief had with some rough tool cut a hole, measuring 2 feet by 18 inches, in the roof, and had extracted the tins through it. The roof was a domed one and the top of the hole was near the ridge. The Carriage Foreman estimates that it must have taken $1\frac{1}{2}$ to 2 hours to cut such a hole, and that there must have been a good deal of noise in doing it. The owners' locks on the waggons were intact. After arrival at Sukkur the train remained, until opened, in the goods yard. The yard is fenced and has only one entrance, which is guarded all night by a watchman. Four or five watchmen look after the yard.

The form of the risk note, Form B, is given in the judgment of the lower Court. The portions which are relevant to the case are as follows:—

"I, the undersigned, do, in consequence of the lower charges, agree to hold the Railway Administration free from all responsibility for any loss or damage to the said consignment from any cause whatever, except for the loss of a complete consignment, or of one or more complete packages forming part of complete consignment, due either to the wilful neglect of the Railway Administration, or theft by, or to the wilful neglect of, its servants; provided that the term 'wilful neglect' be not held to include robbery from a running train."

It is evident that, before the Court can allow the plaintiffs' claim, it must be satisfied that there has been "wilful neglect" on the part of the Railway Administration or of its servants and that the goods had not been stolen from the train while in motion. A person is said to be guilty of wilful neglect when he intentionally, and of set purpose, does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done. Loss is said to be due to wilful neglect when such neglect is either the sole effective cause of the loss, or is so connected with it as to be materially contributing thereto.

It is not seriously disputed that the facts on record do not justify an inference that there had been such wilful neglect. Mr. Rupchand, for appellant, suggests the theory that the goods were stolen while the train was at rest in the Sukkur goods yard, and that the thief was a Railway employee. But this theory has nothing to support it but pure conjecture, and it is at least equally probable that it was a case of robbery from a running train.

But Mr. Rupchand contends that, under section 76 of the Indian Railways Act, 1890, it is necessary for the plaintiff to prove how the loss arose, and wilful neglect must be presumed unless the Railway show that the loss occurred from some cause for which they are not responsible. We must, therefore, discuss the scope of this section.

The responsibility of a Railway Administration for the loss or destruction of goods is, ordinarily, that of a bailee under the

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Indian Contract Act, and where goods have been lost, it is a fair presumption that there has been failure to exercise that amount of care which the law imposes on a bailee. Hence in a suit against a carrier for compensation for loss or damage to goods it is sufficient for the plaintiff to prove the loss or damage: a burden is then thrown on the defendant to prove that the goods were not lost or damaged by his default. The case forms no exception to the general rule that any plaintiff must prove all essential allegations; he has to prove negligence of a certain degree, but he can prove it by way of inference from the fact of loss or damage. Section 76 of the Railways Act merely reproduces a familiar rule of evidence having special application to a suit for compensation for loss or destruction of goods entrusted to a carrier under the ordinary contract of bailment. But where goods have been carried under a special contract, limiting the responsibility of the Railway embodied in risk note, Form B, the plaintiff has to allege and prove, not merely that the Railway have committed a breach of the ordinary contract of bailment, but that they have been guilty of wilful neglect, and that he has suffered loss as a consequence of such neglect. Hence, the rule of evidence embodied in section 76 is not a rule relevant to the case, for the presumption arising from the bare fact of loss or damage is not sufficient to establish the claim. There is no authority whatever for asserting that from the bare fact that goods have been lost or damaged, while in charge of a carrier, it can be presumed that the carrier has been guilty of wilful neglect. There could not be such presumption without transgressing the limits of reasonable inference. It is the recognised rule of the English Courts that where wilful misconduct is alleged against a carrier it must be proved by the person alleging it (Halsbury's Laws of England, Volume IV, page 34). This is a rule based on ordinary experience of what is probable, and is applicable to this country as much as to England. It would be impossible to place on the Railway the burden of proving the negative without completely nullifying the intention and effect of the special contract.

Mr. Rupchand has also argued that the burden of proof should rest on the Railway, inasmuch as the cause of loss is specially within their knowledge. But where goods are stolen at some time within 48 hours, at some place over a distance of several hundreds of miles, it would be altogether unreasonable to presume, without any evidence whatever, that the Railway Administration knows where and when the robbery actually occurred. There are no grounds for supposing that any available evidence has been suppressed.

We hold that, when a plaintiff sues a Railway for compensation for loss of goods consigned under a risk note in Form B, he must allege and prove facts from which it can be fairly and reasonably inferred that the loss was due to wilful neglect on the part of the Railway. In this case no such facts have been proved.

We affirm the decree of the lower Court and dismiss the appeal with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 259 AND 269 TO 284 OF 1914.

January 24, 1916.

*Present*:—Mr. Justice Sharf-ud-din and Mr. Justice Teunon.

THE HON'BLE MAHARAJA SIR RAMESHWAR PERSHAD SINGH BAHADUR, K. C. I. E., PLAINTIFF—APPELLANT

*versus*

NAUHKU MOD AND OTHERS—DEFENDANTS—RESPONDENTS.

*Rent, suit for--Title to receive rent set up in third person—Party, third person if necessary.*

When in suits for rent, the tenant defendants set up the title of a third person to the rent, such third person is no necessary party to the proceeding. [p. 554, col. 1.]

Appeal against the orders of the Subordinate Judge of Monghyr, dated the 14th April 1914, reversing that of the Munsif, Jamias, dated the 31st March, 1913.

Babus *Jogendra Chandra Ghose* and *Kulwant Sahay*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Soresh Chandra Sinha*, for the Respondents.

JUDGMENT.—These 17 appeals are appeals in suits for rent. In 16 of the appeals it appears that the amount claimed did not exceed Rs. 100 and it is, therefore, conceded that under the provisions of section 153 of the Bengal Tenancy Act, no second appeal lies.

It has been suggested to us that in these cases we should treat the appeals as applications under section 115, Civil Procedure Code. But we are not prepared to take this course in these cases, as it appears to us that the plaintiff-appellant has or had other remedies.

These sixteen appeals (Miscellaneous Appeals Nos. 259 and 270 to 284 of 1914) are, therefore, dismissed. We make no order as to costs.

In the remaining Appeal No. 269 of 1914 the amount claimed exceeds Rs. 100 and, therefore, a second appeal lies.

The appeal is against an order of the Subordinate Judge of Monghyr, by which he remands the suit for re trial with the direction that one Chandi Pershad, whose title to the rent had been set up by the tenant defendants, should be made a party to the suit.

As the law now stands, it is well settled that when in suits for rent the tenant defendants set up the title of a third person, such third person is no necessary party to the proceeding. The order of remand, in our opinion, is clearly wrong.

We set aside the Subordinate Judge's order and remand the case to him so that he may re-hear the appeal before him and dispose of it according to law.

Costs will abide the result.

*Order set aside; Case remanded.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 238 OF 1914.
(MISCELLANEOUS JURISDICTION NO. 3 OF 1904.)
June 30, 1915.

*Present*:—Mr Pratt, J. C.

HEMANDAS RAMRAKHIOMAL—APPLICANT

*versus*

CHELLARAM DHALLOOMAL AND OTHERS—OPPONENTS.

*Probate and Administration Act* (V *of* 1881), *s.* 98, *scope of—Executors and administrators, accounts required to be filed by—Court, power of, to inquire into—Legatee, right of, to inspection of accounts—Remedy, where inspection denied or result unsatisfactory—Executor, when becomes trustee.*

Section 98 of the Probate and Administration Act does not warrant an order requiring a series of yearly accounts. It contemplates only one initial inventory and one final account after the completion of the administration. [p. 555, col. 2.]

*Mohesh Chandra Bhuttacharjee* v. *Biswa Nath Bhuttacharjee*, 25 C. 250: 1 C. W. N. 646, approved.

Under the Probate and Administration Act a Court is not bound to inquire into the correctness of the accounts filed by executors and administrators under section 98, and its sole duty in respect to such accounts is to satisfy itself that the accounts filed *prima facie* satisfy the requirements of the section. [p. 556, col. 1.]

*Sarat Sundari Barmani* v. *Uma Porsad Roy Chowdhry*, 31 C. 628; 8 C. W. N 578, referred to.

A legatee or a person interested in administration has a right to inspect the accounts of the executors. [p. 555, col. 2.]

*Ottley* v. *Gilby* (1845) 68 R. R. 218; 8 Beav. 602; 14 L. J. Ch 177; 50 E. R. 237, referred to.

If a legatee is denied inspection or is not satisfied with the result of his inspection, he may file an administration suit and ask for administration by the Court. [p. 555, col. 2.]

*Obiter dictum.*—An executor dismisses the character of executor and becomes a trustee when, generally speaking, the funeral and testamentary expenses and the debts are discharged, the legacies are paid and sums are set apart for investment in the trust created by the Will. [p. 555, col. 2.]

*Trimbak Madhav Tilak* v. *Narayan Hari Lele*, 3 Ind. Cas. 164; 11 Bom. L. R. 495; 33 B. 429 at p. 433, referred to.

Mr. *Lalchand Hasomal*, for the Applicant.

Mr. *Hirdaram Mewaram*, for the Opponents.

JUDGMENT.—Probate was granted on the 22nd March 1900 to the opponents, who were executors of the Will of the late Seth Shewaram Ramrakhiomal.

On the 12th January 1904 an application was made by the present applicant Hemandas for revocation of the probate, on the ground that the executors had wilfully and without reasonable cause failed to file an inventory or account in accordance with the provisions of Chapter VII of the Probate and Administration Act V of 1881. That application was postponed pending litigation in which the validity of the Will was in suit. It was finally decided on the 18th October 1911.

The Judge dismissed the application, holding that the default was not without reasonable cause. He, however, ordered the three executors to file yearly accounts on dates specified in his order. He also noted that the executors had stated that they had no

objection to the applicant inspecting the original accounts whenever necessary and indicated that any further steps in pursuance of the Court's order should be treated as execution proceedings.

The further steps in pursuance of the Court's order would apparently be applications to enforce the filing of accounts on the dates specified under section 98, sub-sections 3 and 4.

Accounts have been filed in accordance with the order of the Court and this application arises out of these accounts.

It is made on 17th November 1914 after accounts for three years have been filed. It prays for inspection or exhibition of vouchers of the accounts of the trustees and also of the trustees' correspondence and trustees' proceedings and of all bonds, mortgages and other sale-deeds.

The order under section 98 only referred to accounts and, therefore, the application for inspection or exhibition of correspondence, proceedings and documents of title is beyond the scope of the order and must be rejected.

As to the accounts the applicant asks for vouchers, bill books, counterfoils, cheque, books, and the *sudhar* account and further demands an explanation of certain items in the accounts already filed.

The *sudhar* account is an account of one of the trusts created by the Will and the reference to this account shows that the executors have entered upon their duties as trustees. Indeed the application describes all the accounts not as accounts of the executors, but as accounts of the trustees.

Now with all respect to the Court that made the order for the filing of yearly accounts, I venture to think that the order was one which the Court was not competent to make under section 98 of the Probate and Administration Act. That section requires the executor to file an inventory of the property within six months and such further time as the Court may allow, and then to file an account after he has completed his administration. This account is to be filed within one year, for that is the time allowed to the executor to fully inform himself of the state of the testator's property. But if events occur, as they have in the present case, which protract the administration, the Court may, from time to time, extend the period for filing this account. But the section makes it quite clear that there should be one initial inventory and one final account after the completion of the administration. This construction was put upon the section in the case of *Mohesh Chandra Bhattacharjee* v. *Bisca Nath Bhattacharjee* (1) and I think that is the correct construction and that the section does not warrant an order requiring a series of yearly accounts.

I have referred to this defect in the order not because I wish to go behind the order, but because I think it has misled the parties into supposing that accounts were to be filed of the administration of the trusts created by the Will.

Now as said in *Trimbak Madhav Tilak* v. *Narayan Hari Lele* (2), it is not always easy to determine when an executor dismisses the character of executor and becomes a trustee. Generally speaking, it is when the funeral and testamentary expenses and the debts are discharged, the legacies paid and sums set apart for investment in the trust created by the Will. Whether this stage has been reached in the present case, I cannot say on the material before me; but this much is clear that the opponents have entered upon the duties of the trustees of some of the trusts created by the Will and the accounts they keep as trustees are not affected by the order made under section 98. The order expressly refers to the accounts of the executors and I shall construe it strictly and limit it to that. The application must, therefore, fail as it is made in respect of the trust accounts.

But even assuming that the applicant uses the word "trustee," loosely and that the application is intended to refer to the accounts of the executors, the result would be the same.

A legatee or a person interested in administration has the right to inspect the accounts of the executors. This is not expressly enacted in the Probate and Administration Act but it is the English Laws, *O'tley* v. *Gilby* (3): and it is recognised in section 49 of the Administrator-General's Act (III of 1913).

(1) 25 C. 250; 1 C. W. N. 616.

(2) 3 Ind. Cas. 164; 33 B. 429 at p. 433; 11 Bom. L. R. 495.

(3) (1845) 68 R. R. 218; 8 Beav. 602; 14 L. J. Ch. 177; 50 E. R. 237.

If he is denied inspection or is not satisfied with the result of his inspection, he may file an administration suit and ask for administration by the Court. The applicant has not taken this course but he wishes the Court to embark in a judicial inquiry into the correctness of the account and to require the production of the vouchers. There is no section of the Act that imposes this duty upon the Court. In the case of *Sarat Sundari Ba mani* v. *Uma Prosad Roy Chowdhry* (4) it was said that the sole duty of the Court was to satisfy itself that the accounts filed *prima facie* satisfied the requirements of the section. In this view I concur and I may add that it is clear from the correspondence, Exhibit I, that the applicant was allowed all reasonable inspection by the opponents and that the present belated application is altogether frivolous.

I dismiss the application with costs.

*Application dismissed.*

(4) 31 C. 628; 8 C. W. N. 578.

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1315 OF 1915.

January 19, 1916.

*Present*:—Mr. Justice Tudball.

RAM KISHUN DAS—DEFENDANT—APPELLANT

*versus*

MAHESHAR PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Canal Act (VIII of 1873), s. 47*—Lambardar, *payment of canal dues by—Collection of canal dues*—Muafidar, *status of*—'*Subordinate* zemindar,' *meaning of—Interest on canal dues, if allowable.*

A *lambardar* who first pays the canal dues to the Government out of his pocket, is entitled subsequently to collect the same from the subordinate *zemindars* under section 47 of the Canal Act. [p. 556, col. 2.]

A *muafidar* is a subordinate *zemindar* under section 47 of the Act. [p. 557, col. 1.]

A *lambardar* is entitled to recover interest on arrears of canal dues which he has paid to the Government. [p. 557, col. 2.]

Second appeal from the decision of the Additional District Judge of Farrukhabad, dated the 3rd May 1915.

Mr. *Harbans Sahai*, for the Appellant.

JUDGMENT.—This second appeal arises out of a suit brought by *lambardars* to recover from a co-sharer sums of money which had been paid by them to the Collector as canal dues. The suit is brought in virtue of the terms of section 47 of the Canal Act (VIII of 1873) and section 159 of the Tenancy Act. Five points have been raised before me. The *first* point is that under section 47 the plaintiffs are only entitled to first collect those arrears of canal dues from the other *zemindars* and then to pay them to the Government and that all that the Collector can do is to direct the *lambardar* to collect and pay the money; but in the present case the *lambardars* having paid the money first to the Government out of their own pockets cannot bring a suit under section 47 of the Canal Act and section 159 of the Tenancy Act in the Revenue Courts, and that all that they can now do is to go to the Civil Court and sue the defendant. In other words, the argument is that a *lambardar* by reason of the fact that he had paid the Government before he collected from the subordinate *zemindars* loses his power to collect from the latter under the terms of section 47 of the Canal Act. It is evident that there is no force whatsoever in this plea. The section might probably enable a *lambardar* to plead to Government that he, the *lambardar*, cannot be forced to pay Government before he has collected from the subordinate *zemindars*; but the bare fact that, in order to save himself from worry and trouble, he pays to Government first, before he collects from the subordinate *zemindars*, cannot affect his right under the above-mentioned section. The *next* point taken is that section 47 only enables a *lambardar* or a person under engagement to pay the land revenue to collect such sums from the subordinate *zemindars*, *raiyats* (tenants or sub-tenants), that the defendant is not a subordinate *zemindar* and that, therefore, no suit can be brought against him under this section. The facts are briefly as follows. The village consists of two classes of tenure. One class is *khalsa* land, that is, pure *zemindari*, and makes up $\frac{1}{3}$rd of the village. Two-thirds (the balance) is what is called *muafi*, that is to say, the Government does not take any revenue from these two-thirds, although under the law that land is liable to pay revenue and the Government could at any moment resume and assess it. The water rate which is being recovered is water rate assessed on the two-thirds *muafi* and

these plaintiffs are co-sharers in this *muafi* as well as the present defendant-appellant. The plea is that there being no engagement to pay revenue, the appellant is not a subordinate *zemindar* but only a *muafidar*. A *muafidar* is a person who is liable to pay revenue to Government if the Government were to assess revenue upon the land as it is empowered to do. The bare fact that the Government refrains from taking revenue from him makes no difference whatsoever in the appellant's position. He is a *zemindar* within the meaning of the word used in the section. There is no magic in the word *muafidar* and *muafidar* is not different from a *zemindar*, except in one respect. As a matter of fact cesses, etc., have to be paid by him and other demands are paid by him and he is in the strict sense of the word a land-holder or *zemindar*. In the present case in so far as the canal dues are concerned, the appellant is subordinate to the plaintiffs who have been called upon by the Collector to recover the amount from him. There is equally no force in this plea. The *next* plea taken is that the whole village has been irrigated, that the assessment should have been spread upon the whole village, *khalsa* and *muafi*, and should not have been placed on the *muafi* alone and that the plaintiffs themselves are personally responsible for part of the amount which they now seek from the defendant. It has been found by the Court below on the evidence on the record that the *muafi* land was assessed by the Government, that no assessment was apparently made upon the *khalsa* and that the amount which is now sought to be recovered is part of what has been assessed by the Government on the *muafi* and is not part of the sum which might have been assessed upon the *khalsa*. In other words, the Court has found clearly that the amount now claimed is part of the assessment on the *muafi* alone. The plaintiffs, I note, have pleaded that the *khalsa* pays no canal dues because the liability of the *khalsa* for canal dues has been combined with the revenue assessed upon the land. This may or may not be correct. The finding of the Court below is that the canal dues were duly assessed on *muafi* and the appellant must pay his share of that assessment. I agree on this point with the Court below. The *fourth* point raised is that the suit as to a portion of the claim is barred by limitation. This issue was decided by the Court of first instance in favour of the plaintiffs. The defendant, the present appellant, appealed to the Court below. There the question of limitation was not pressed or perhaps not even raised. If it were a pure question of law, there is no doubt that this Court in second appeal could and ought to go into it. A suit under section 159 of the Tenancy Act is serial No. 8 in group (*a*) of the Fourth Schedule. The period of limitation laid down on the fourth column is three years from the date when the arrears become due. The plea taken is that the date on which the time began to run is the date on which the canal dues became due to the Government. Assuming this to be so without agreeing, there remains the question of fact, when did the arrears of canal rate become due to the Government? The question is a question of fact. It was not raised in the Court below. The question of limitation, therefore, is not a pure question of law but a mixed question of law and fact and I decline to go into it at this stage of the case. There being no finding on the question of fact by the Court below and that point not having been raised there, there is no decision on which I can base my finding on limitation. The *last* point is on the question of interest. It is urged that the Court below has allowed interest at the rate of 12 per cent. per annum. Land revenue does not carry interest, therefore no interest should be allowed on arrears of canal dues, *secondly*, if interest should be allowed at all, it should be only at the rate of 6 per cent. per annum. In the first place, this is not a suit for arrears of land revenue. It is true that the arrears of canal dues are collected in the same manner in which land revenue is collected and that a *lambardar* who pays them can sue to recover them in the same way in which he sues to recover land revenue. Nevertheless the money due is not due as land revenue and there is nothing in law to forbid the Court below in granting interest on arrears of canal dues. The rate of interest allowed by the Court below is the rate allowed by law to be recovered by a *zemindar* from a tenant from whom arrears of rent are due. It is the common rate in the *mofussil* and I can see no reason to interfere with the exercise by the Court below of its discretion in the

matter of the rate of interest, that rate not being unusual or exorbitant. The result is that the appeal fails and I dismiss it.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 865 OF 1912.

January 21, 1916.

*Present*:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

FAZL ILAHI AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

ZAFAR ALI—PLAINTIFF—RESPONDENT.

*Muhammadan Law*—Waqf—Mutwalli, *whether can create permanent encumbrance—Right of successor to challenge such encumbrance—Erection of buildings on* waqf *property—Suit for ejectment—Defendant, whether entitled to compensation.*

A *mutwalli* has no right to create a permanent encumbrance on *waqf* property. [p. 560, col. 1.]

Anything in the nature of a permanent alienation of, or encumbrance upon, *waqf* property created by a *mutwalli* is not binding upon his successors, if it is challenged within 12 years from the date of the successor's appointment. [p. 559, col. 2; p. 560, col. 1.]

*Basheshar Lal* v. *Natha Singh*, 30 P. R. 1908; 35 P. W. R. 1905 (F. B.); 102 P. L. R. 1908; *Thakore Fatesingji* v. *Ramanji Ardeshir Dalal*, 5 Bom. L. R. 274; 27 B. 515 followed.

Where a document executed by the *mutwalli* of a mosque stated that the office of *charkhban* had been filled by a certain person and the word "*alalduam*" occurred in the closing passage of the document:

*Held* (1) that inasmuch as the words following the word "*alalduam*" related to the duties of the grantee and not to his privileges, this could not be taken as intended to create a permanent and for all time irrevocable alienation of rights in *waqf* property. [p. 560, col. 2.]

(2) that there was nothing to show that the post was to be held in the incumbent's family for ever and that the *charkhban* was liable to dismissal like any other servant of the mosque. [p. 560, col. 2.]

Where in a suit by the *mutwalli* for possession of certain shops belonging to the mosque by the ejectment of the defendants, it appeared that the defendants had erected certain shops on a site belonging to the mosque and the *mutwalli* had allowed them to stand unchallenged for a long time:

*Held* that under the circumstances the defendants were in equity entitled to claim the value of the buildings. [p. 563, col. 1.]

Ameer Ali's Muhammadan Law, 4th Edition, Volume I, pp. 481, 482, referred to.

First appeal from the decree of the District Judge, Lahore, dated the 9th March 1912, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Shah Nawaz*, for the Appellants.

Messrs. *Broadway* and *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.

CHEVIS, J.—This and the connected Appeal No. 902 of 1912 relate to a suit brought by Mirza Anwar Ali (now dead and represented by his son Mirza Zafar Ali) as *mutwalli* of Wazir Khan's Mosque for possession of certain property said to belong to the mosque. This judgment will cover both appeals. The plaint recites that Rahim Bakhsh was appointed *charkhban* of the mosque by the then *mutwalli* on 29th *Safr* 1246 A. H., and that after Rahim Bakhsh's death his son Karim Bakhsh continued in the appointment with the consent of the *mutwalli*. That Rahim Bakhsh and his son with the consent of the *mutwalli* realized the rent of the property in suit in lieu of salary, and always acknowledged the property to be *waqf*. That plaintiff as *mutwalli* has a right to dismiss servants. That plaintiff gave Karim Bakhsh a notice on 3rd September 1902 that in future he should take as wages rent of only 1/5th of the property in suit or if he did not agree to this should consider himself dismissed. That Karim Bakhsh died in January 1903 before anything had been settled. That his sons Fazl Din and Fazl Ilahi (defendants Nos. 1 and 2) did not do their duty as *charkhbans*, and on 17th August 1903 plaintiff dismissed them by registered notice.

Defendants Nos. 3 and 4 are not related to defendants Nos. 1 and 2, and are made defendants on account of certain mortgages executed in their favour by defendants Nos. 1 and 2. Defendant No. 5 was afterwards struck off, as it was found that he had no interest in the suit. Defendants Nos. 6—10 were added as it was found that they were in possession of one of the shops in suit, *viz.*, No. 8. These defendants are descendants of Kadir Bakhsh, brother of Karim Bakhsh.

The main plea of the principal defendants, *i. e.*, defendants Nos. 1 and 2, is that they are the permanent hereditary *charkhbans*

and not liable to dismissal so long as they perform their duties. Non-performance of duties is denied. And it is denied that all the property in suit belongs to the mosque. Defendants Nos. 6—10 deny that the shop in their possession (shop No. 8 in the plaint) belongs to the mosque.

The lower Court held that defendants Nos. 1 and 2 and their father and grandfather before them were ordinary servitors of the mosque receiving rent in lieu of wages, and were liable to dismissal, that all the property in suit belonged to the mosque and was recoverable, except shop No. 6 in which it was held that the mosque had only a limited interest, on which account plaintiff was allowed Rs. 61. Defendants Nos. 1 and 2 were allowed Rs. 101-6 on account of improvements. So plaintiff was given a decree for possession of all the shops Nos. 2—12, excepting shop No. 6, on payment of Rs. 40-6 (Rs. 101-6 *less* Rs. 61) with costs.

Defendants Nos. 1 and 2 have lodged this appeal as regards the decree against them. And plaintiff has lodged cross-objections as regards shop No. 6. The connected Appeal No. 902 of 1912 has been lodged by defendants Nos. 6—10, and relates to shop No. 8.

It may here be noted that the property as detailed in the plaint consists of a *hujra* No. 1, and 11 shops, Nos. 2 - 12. As regards the *hujra* and shops Nos. 1—5 they all admittedly belong to the mosque, and apparently it was by a mere slip that the *hujra* was not decreed along with the shops.

It is admitted by the defendants that plaintiff is the *mutwalli* and has power to dismiss ordinary servants, but it is pleaded that defendants Nos. 1 and 2 are hereditary and permanent servitors of the mosque, and are only liable to dismissal in case of non-performance of duty. The first question for decision is whether defendants Nos. 1 and 2 are liable to dismissal at the pleasure of the *mutwalli*.

The mosque was endowed by Wazir Khan as far back as 1051 A. H. The endowment deed is printed on pages 4 and 5 of paper-book A. The mosque was endowed with various shops and also certain plots of ground. The *mutwallishiip* was to descend in the founder's family.

On book A, page 45, is printed a translation of an old document (Exhibit P4*a*) dated 2nd *Muharram* 1179 A. H. (=1765 A. D. *circa*), which recites that Mir Sahib Adil Khan allowed his well to be used and Mian Sultan Muhammad undertook to put and keep the well in order and was given for himself and his family the permanent post of working the well. This document bears several seals, including those of Akhund Muhammad Shafi *mutwalli*.

Next we come to a document, Exhibit P 3*a*, (A page 44) in which Mirza Izad Baklish, father of Mirza Anwar Ali, states that the office of *charkhban* has been filled by Muhammad Sultan and Muhammad Yar, and now at the latter's request the post is made over to Hafiz Rahim Bakhsh. This document is dated 29th *Safar* 1246 A. H. (=19th August 1830).

Then comes Exhibit P2*a*, (A, pages 42 and 43) in which Buta Shah, as *mutwalli*, professes to put in Rahim Bakhsh as permanent *charkhban*. The date of this is 13th *Magh Sambat* 1887 (=January 1831). And in a document of the same date, Exhibit P1(*a*) (A, pages 40—42) Muhammad Yar son of Muhammad Sultan relates that he has adopted as daughter the wife of Rahim Bakhsh, and has made over the post of *charkhban* to Rahim Bakhsh.

So apparently the post of *charkhban* remained in the family of Sultan Muhammad (or Muhammad Sultan) till 1830, when it was transferred to Rahim Bakhsh, grandfather of defendants Nos. 1 and 2.

The genuineness of Exhibit P4*a* is questioned, and the learned District Judge did not consider it to be genuine. But we do not think the defendants, who had Exhibits P.1,2 and 3*a* to rely on, would have run the risk of forging a document which adds so little to their case. Granting that a permanent hereditary post was created in favour of Sultan Muhammad, it came to an end when the post went out of his family, and the real question is whether the appointment in favour of Rahim Bakhsh was a permanent and hereditary one. If it was, then it must stand, as though it is urged on plaintiff's behalf that anything in the nature of a permanent alienation of, or encumbrance upon, *waqf* property created by Izad Bakhsh is not

binding on his successors it is now too late for them to challenge such an act, more than 12 years having elapsed since Anwar Ali succeeded to the *mutwallishiр*. See *Basheshar Lal* v. *Natha Singh* (1), and *Thakore Fatesingji* v. *Ramanji Ardeshir Dalal* (2). It is clear that Anwar Ali was *mutwalli* at least as far back as 1880, see Book A, page 22, line 27.

As to Exhibit P2*a*, I do not think this helps the defendants, for it is by no means clear that Buta Shah had any right to make an appointment. According to the deed of endowment the *mutwallishiр* was to descend in the founder's family. Buta Shah clearly did not belong to that family, and how he came to be posing as *mutwalli* is not clear. Probably he was, as the District Judge says, merely a claimant, and Rahim Bakhsh, to be on the safe side, got documents both from him and from Izad Bakhsh. The really important document is Exhibit P3*a*. This is the document referred to in the plaint as the one by which Rahim Bakhsh was appointed *charkhban*, and what we have to decide is whether this document creates a permanent and hereditary post. As far as I can see there is nothing in the document to show that the post was to be held in the incumbent's family for ever, unless it be the word "*alalduam*" which occurs in the closing passage, and this word taken in connection with the words which immediately follow it, I regard as signifying nothing more than a condition attached to the post that the incumbent shall never cease to perform his duties zealously. If it were intended to lay down that the post was to remain in the grantee's family for ever, it would have been perfectly easy for the grantor to use words such as are used in Exhibit P4*a*, where we read that the rent is to be realized generation after generation, and that dismissal from the office should never take place. It is, I think, reasonable to suppose that Izad Bakhsh knew that he had no right to create a permanent encumbrance on *waqf* property, and unless it can be clearly and unmistakably shown that the document does create a permanent encumbrance, I think we should hold that the encumbrance, was not permanent. Flowery words are often used in Persian documents, and I think we should be careful before we interpret a single word such as "*alalduam*", especially when the words immediately following relate to the duties of the grantee, and not to his privileges, as having been intended to create a permanent and for all time irrevocable alienation of rights in *waqf* property. I would hold, therefore, that the appointment was not for all time and that the *charkhban* was liable to dismissal like any other servant of the mosque. The mere fact that Rahim Bakhsh's family has held the post ever since 1530 does not give them any sort of right to hold it for ever.

On the above finding it is unnecessary to consider whether there has been any default in the performance of the duties.

Next I proceed to consider the various pieces of property which are the subject of the suit.

As to *hujra* No. 1 and shops Nos. 2—5 there is no dispute, as the defendants admit that all of these belong to the mosque.

As to shop No. 6 the plaintiff, who has not been given a decree for possession, files objections. Before dealing with these objections I would make certain remarks with regard to the list drawn up in 1866. In a suit in 1899, brought by Karim Bakhsh against *Musammat* Bakhtawar, Karim Bakhsh stated that Izad Bakhsh got a list prepared, and that the houses shown in his name in the list came into his possession, see book A, page 26, line 13. He is also said to have stated that the sites of certain shops belonged to Wazir Khan, but the superstructures to himself, see the same page, lines 46 and 47; but reference to the original record shows that this passage has been erased and re-written, so that it is impossible to say what the original record was. However, there seems to me to be no manner of doubt that the list of 1866 was drawn up at a time when there was no dispute between the parties and I think may be taken as correct. The real question now is how far the shops in suit can be identified with shops on the 1866 list. It

( ) 30 P. R. 1908; 35 P. W. R. 1908 (F. B.); 102 P. L. R. 1908.

(2) 27 B. 515; 5 Bom. L. R. 274.

may here be noted that according to the lists attached to Exhibits P1*a* and P2*a* Rahim Bakhsh was put in possession of 23½ shops, but in 1866 the number had somehow or other dwindled down to 14.

Shop No. 6 is said by plaintiff to correspond to No. 179 in the list of 1866, and this has not been disputed before us. The 1866 list states that the building belongs to Karim Bakhsh. In 1880 part of this shop was acquired by Government (see A, page 22) and it was then agreed that the site belonged to the mosque and the building to Karim Bakhsh, so Anwar Ali as *mutwalli* got compensation for the site and Karim Bakhsh for the building. The part left unacquired measured 31 square feet approximately. (The figures given by the District Judge in his judgment are apparently square measure.) Karim Bakhsh subsequently bought 203 square feet, and the whole area is now about 253 square feet. The figures seem to be irreconcilable, but it appears clear that as regards the site of this shop only about $\frac{1}{8}$th belongs to the mosque and the rest to defendants, while the building also belongs to the defendants. I will leave for discussion later on what form the decree should take, *i, e.*, whether defendants should buy out plaintiff, or whether plaintiff should buy out defendants or whether defendants should remove the superstructure, and pass on to discuss the facts regarding the other shops.

Shop No. 7. Defendants admit that the site belongs to the mosque, and that this is the shop for which Karim Bakhsh sued *Musammat* Bakhtawar and Hassan Din in 1898 (see A, pages 23 to 27). Karim Bakhsh then got possession on payment of Rs. 51, cost of construction of a verandah. The District Judge decrees this shop on payment of Rs. 51. For judgment of the Chief Court in the above case, see A, pages 30 and 31.

In the list of 1866 it is recorded that *some* of the building belongs to Karim Bakhsh. This shop is No. 133 in the list.

Shop No. 8. This shop was acquired in 1876 from Government in exchange for another shop taken from Karim Bakhsh, see A, page 20. Karim Bakhsh objected to taking compensation in cash on the ground that he spent the rent of the acquired shop on the mosque. The shop acquired is said by plaintiff to correspond to No. 216 on the list of 1866. Here too it is said in the list that the building belongs to Karim Bakhsh. Defendants' Counsel points to the receipt given by Karim Bakhsh (see A, page 246) which speaks of a "newly-built shop," and says this cannot correspond to No. 216. But the shop may have been re-built. Counsel also urges that Karim Bakhsh may have spent the rent of other shops on the mosque. But I think there can be little doubt that what was really meant was that Karim Bakhsh took the rent in lieu of his services to the mosque, not that he really paid the rent to the mosque. I would here note that when Counsel is asked what became of shop No. 216 if it is not the shop which was exchanged for the shop now claimed he can only plead ignorance, saying that if Karim Bakhsh were alive he would be able to answer the question. A similar reply is made in the case of other shops too. Defendants will not admit that the shops now sued for correspond to certain shops pointed out by plaintiff in the list of 1866, but when asked what has become of the shops pointed out they plead ignorance.

The evidence of Sarb Dayal (B, page 73) is that he was tenant of the shop acquired by Government, and it is to be noted that Sarbu is the name of the tenant shown opposite No. 216 in the list of 1866. I would hold that shop No. 8 was taken in exchange for No. 216, the site of which belonged to the mosque while the superstructure belonged to Karim Bakhsh. Shop No. 8 must admittedly stand on the same footing as the shop for which it was exchanged.

Shop No. 9. Plaintiff's Counsel at first argued that this was the shop regarding which Karim Bakhsh had sued Budha Roda, but later on found that this was a mistake. He then pointed to the evidence of Nathu (B, page 99) and Arjan (B, page 100), and relied on it to show that shop No. 9 corresponds to No. 264 in the list of 1866. Nathu says nothing much about shop No. 9 except that it is occupied by Arjan. Arjan says Bhagwana once occupied the fourth shop from his. And Bhagwana is shown in the list of 1866 as tenant of No. 267.

Hence it is argued that shop No. 9 now occupied by Arjan must correspond to shop No. 264. This argument rests on the assumption that all the shops in the list of 1866 belonging to Izad Bakhsh were contiguous to one another. This may be so, but I can find no sufficient proof of it, and I would hold the claim unproved as regards shop No. 9.

Shop No. 10 is said by plaintiff to correspond to No. 266 in the list of 1866. Here reference may be made to the plan filed with the plaint in which shops Nos. 9, 10, 11 and 12 are shown. Counsel for plaintiff admits that shop No. 10 or No. 266 corresponds to the fourth shop from the right in this plan, and he owns that the plaint does not cover this shop. So no decree can be given as regards this shop, as Counsel admits.

Shops Nos. 11 and 12 may be taken together. These are said by plaintiff's Counsel to correspond to the last three shops on the right of the plan filed with the plaint. No. 11 is said to correspond with No. 267 in the list of 1866, and Nos. 268 and 269 are both said to be parts of No. 12.

In the list of 1866 the tenants are shown as follows.

| | | | |
|---|---|---|---|
| No. 267 | ... | Tenant | Bhagwana |
| No. 268 | ... | „ | Moba |
| No. 269 | ... | „ | Nihal |

Nihal died and his widow *Musammat* Sobha Devi sold the shop. Karim Bakhsh sued for pre-emption. See A, page 21. Ruldu Mal (B, page 97) gives evidence as to all three shops, and so does Nathu (B, page 99). These are defendants' witnesses. It appears that when Karim Bakhsh got No. 269 by pre-emption he put in Noba as tenant, and so Noba became tenant of two adjoining shops. Apparently there is one *baithak* over the two shops, and they are now claimed as one shop in the plaint. As to shop No. 11 the above witness Ruldu deposes that Karim Bakhsh got it from Roda Budha by suit in 1860, see judgment on A, pages 9–11. Karim Bakhsh brought a second suit against Jawahir regarding the same shop in 1861, see judgment on A, pages Nos. 11 and 12. Further litigation with Roda occurred in 1891, see A, pages 55 and 56, in which the former suit against him was referred to (see paragraph 4 of that plaint), and the plan filed in the suit of 1891 evidently corresponds with the three shops on the right of the plan filed with the plaint in the present suit. I would hold, therefore, that shops Nos. 10 and 11 are proved to correspond to Nos. 267, 268 and 269 in the list of 1866. I note that the list of 1866 shows the buildings on Nos. 267 and 268 as belonging to Karim Bakhsh.

As to shop No. 8 the District Judge holds that defendants Nos. 6—10 have been in possession since about 1880, but that they were not holding adversely to Karim Bakhsh, and that in any case section 10 of the Limitation Act is applicable as defendants Nos. 6—10 are not assignees for valuable consideration. It is unnecessary for us to stop to consider whether this finding is sound, as Mr. Shafi distinctly said that he did not plead limitation based on adverse possession as regards this shop, and as limitation is not pleaded and as it is not obvious on the face of the record that the claim as regards this shop is time-barred, I do not see why we should take up the question of limitation of our own accord.

Next comes the question whether the plaintiff has the right to take possession of the materials of those shops of which the sites only belong to the mosque, and if so, on what terms. For the defendants it is urged in the first place that all that plaintiff can claim is ground rent, as the site only belongs to the mosque. But in the absence of proof of any permanent tenancy I can see no reason whatever why plaintiff should not be entitled to recover possession, and he cannot recover possession even of the sites if the defendants are allowed to retain possession of the buildings erected on those sites.

Then it is urged on the defendants' behalf that if plaintiff is to take possession he should pay the defendants the value of the buildings. For the plaintiff it is contended that even though the buildings do not belong to the mosque all that can be allowed to the defendants is time to take away the materials.

Here Mr. Broadway cites *Ata-Ullah* v. *Azim-Ullah* (3); *Naunihal Bhagat* v. *Rameshar Bhagat* 4); *Ismai Kani Rowthan* v. *Nazar Ali Sahib* (5); *Shaik Husain* v. *Govardhandas Parmanandas* (6); *Jugmohandas Vundrawandas* v. *Pallonjee Eduljee Mobedina* (7) as authority for the proposition that a tenant who erects buildings on land leased to him cannot recover compensation when his lease expires. And we are referred to Ameer Ali's Muhammadan Law, 4th Edition, Volume I, pages 481 and 482, where we read that a person who erects a building for his own purposes on *waqf* property has the right to remove it. But having regard to the want of information as to the circumstances in which the shops first came to be erected, and to the length of time during which the *muturalli* has allowed them to stand unchallenged, I would hold that in this particular case the defendants are in equity entitled to claim the value of the buildings. The District Judge seems to recognize this to some extent when he allows the defendants compensation for some improvements. The *charkhban* has certainly spent some money on the shops; for instance, he got possession of one shop by pre-emption. I do not see that this makes him a permanent tenant any more than the person from whom he pre-empted, or the person who sold the shop. With the termination of the post of *charkhban* defendants' right to possession also comes to an end. But to evict the *charkhbans* without any compensation, or to call on them to remove the materials after they have held the shops for so many years' seems to me inequitable. It may well be that the *charkhban* or some other persons were to some extent encouraged by the *mutwalli* in the first place to improve the estate by building on it, and though there is no proof of any permanent tenancy having been created I still think that equity demands that the defendants should be allowed the price of the buildings on eviction.

(3) 12 A. 494; A. W. N. (1890) 179.
(4) 16 A. 328; A. W. N. (1894) 99.
(5) 27 M. 211; 14 M. L. J. 25.
(6) 20 B. 1.
(7) 22 B 1.

As to the value of the buildings we have the values fixed by the local Commissioner, see book B, pages 19 *et seq.*, and we understand that the parties are prepared not to dispute this valuation. The values given by the local Commissioner, excluding value of sites, is as follows :

| | | | Rs. |
|---|---|---|---|
| Shop 6 | ... | ... | 219 |
| „ 7 | ... | ... | 272 |
| „ 9 | ... | ... | 192 |
| „ 10 | ... | ... | 455 |
| „ 11 | ... | ... | 208 |
| „ 12 | ... | ... | 239 |
| Total for 6 shops | | ... | 1,585 |

which gives an average value of Rs. 264 per shop. The value of shop No. 8 is not given in the Commissioner's report, but I would give it an average value, *viz.*, Rs. 264, as I do not suppose this will be so very far wrong, and I understand that neither party wants a remand for further enquiry as to values.

Turning to the list prepared in 1866, we find in the last column opposite No. 179 (= shop No. 6) that the shop was constructed by the *charkhban*, opposite shop No. 133 (=shop No. 7), that *some* of the building belongs to the tenant, opposite shop No. 216 (the shop in exchange for which shop No. 8 was obtained) that the building belongs to the *charkhban*, opposite shop No. 267 (=shop No. 11) and shop No. 268 that the building belongs to the *charkhban*. The last column is blank in the case of No. 269, but as the rent here shown is only four annas, whereas the rent shown both for Nos. 267 and 268 is $5\frac{1}{2}$ annas the natural presumption seems to be that here too the building belonged to the tenant, for surely higher rent would be realized for a shop than merely for ground rent of a site. As to shop No. 7 the plaintiff has failed entirely to show what portion of the building belongs to the mosque, and so I think he ought to pay the whole value if he wants to take possession.

As to shop No. 6 about $\frac{1}{8}$th only of the site belongs to the mosque. Here the District Judge has allowed the defendants to buy out the plaintiff. But I do not think it correct to allow any property to be taken away from the mosque. I would, therefore, allow the plaintiff in this case to recover his

share of the site, *i.e.*, 31 square feet. That portion can be separated off, plaintiff being given a strip nearest to the road. I do not see how the defendants can be evicted from more than this against their will. To allow defendants the trifling value of $\frac{1}{8}$th of the price of the building and to make the plaintiff take over $\frac{7}{8}$th of the building would be to split ownership, which would, I should say, be unsatisfactory to both parties. Here I would give defendants the option of removing so much of the building as stands on the 31 square feet, or of calling on the plaintiff to acquire the whole shop including site as it stands, on payment of the price of the shop and $\frac{7}{8}$ths of the site.

To sum up I would decide the case as follows:—

I would decree the *hujra* and shops Nos. 2—5 free of payment. As to shop No. 6 I would decree 31 square feet, a strip nearest to the road, calling on defendants to remove so much of the building as stands on the 31 square feet, within three months, or in the alternative plaintiff to take possession of the whole shop on payment of the total value of the shop and site as fixed by the Commissioner (see B, page 18), Rs. 692, less 1/8th of the value of the site Rs. 59, *i. e.*, Rs. 633. The defendants to have the option here of saying which of the two alternatives should be followed. In case defendants choose the former alternative, but neglect to remove the materials within three months those materials to pass to the plaintiff free of payment.

Shop No. 7 I would decree on payment of Rs. 272.

Shop No. 8 I would decree on payment of Rs. 264.

As regards shops Nos. 9 and 10 I would accept defendants' appeal and dismiss the claim.

Shop No. 11 I would decree on payment of Rs. 208, and shop No. 12 on payment of Rs. 239.

I would allow plaintiff to take possession of the *hujra* and shops Nos. 2—5 at once, and of any other shop on payment of the sum fixed in respect of that shop, subject to the special conditions in the case of shop No. 6.

Defendants having been bought out I consider it unnecessary to allow them any further sums for improvements.

As to costs plaintiff succeeds in the main and I would allow him $\frac{2}{3}$rds costs in both Courts.

I would accept both appeals and also the cross-objections to the above extent.

LESLIE JONES, J.—I concur.

*Appeals partly accepted.*

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LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 143 OF 1913.
September 7, 1915.
*Present*:—Mr. Justice Twomey and
Mr. Justice Ormand.
MA SHWE YU AND ANOTHER—DEFENDANTS—APPELLANTS
*versus*
MAUNG SOK KYUN—PLAINTIFF—RESPONDENT.

*Specific Relief Act (I of 1877), s. 42—Plaintiff not in possession—Declaratory suit—Consequential relief—Failure to amend plaint, effect of.*

When a plaintiff does not sue for consequential relief on the ground that he is already in possession and he has an opportunity of amending his plaint and paying the additional Court-fees and adding a claim for the consequential relief when the issue is framed and he fails to do so, the suit should be dismissed if it is found that he was not in possession. [p. 565, col. 2.]

*Chokalingapeshana Naicker* v. *Achiyar*, 1 M. 40, followed.

Mr. *J. N. Lentaigne*, for the Appellants.

Mr. *Mg. Kin* with him Mr. *Harvey*, for the Respondent.

JUDGMENT.—The plaintiff sued for a declaration that he was the owner of certain paddy-land measuring 130·90 acres in the Hanthawaddy District and in a lengthy plaint he asked also for a declaration that a certain mortgage of these lands effected by him in favour of U Baw in May 1902 for Rs. 3,000 had been paid off and discharged in 1907. U Baw had two sons Po Cho and Po Sin. Po Cho died in 1907 leaving the 2nd defendant, his widow, and the defendants Nos. 3—5, his children him surviving. First defendant Po Sin admits the plaintiff's claim; except that he puts the plaintiff to prove that the mortgage had been paid off. He did not appear at the hearing. The District Judge has found that the plaintiff has not proved that he was in possession; but he has found that

the plaintiff was the owner and has paid off the mortgage; and he has ordered the defendant to execute a conveyance of the property in favour of the plaintiff. In the written statement, the defendant raises the defence that the plaintiff is not entitled to a declaration and that he was not in possession; and an issue was raised as to whether the plaintiff was in possession or not. The Judge has found that the plaintiff has not proved his possession. The plaintiff, therefore, was not entitled, under section 42 of the Specific Relief Act, to a declaration without asking for consequential relief. When the fact of his possession was put in issue and the plaintiff failed to ask for consequential relief and pay the necessary Court-fees, the plaintiff must be deemed to have relied upon the issue as framed and to have decided to stand or fall by the determination of the issue. In this case his suit should have been dismissed on the Judge's finding that he had not proved his possession; but on appeal he is entitled to support the decree (which we may regard as recognizing his ownership) upon the ground that the Judge should have found that he was in possession. We think the Judge was right in holding that the plaintiff had not proved his possession. He himself states that he received rents over a period of four years and gave the names of the tenants. He called Mutia, who states that he was the plaintiff's tenant and produces three cancelled tenancy bonds. These bonds do not identify the land which they purport to let and Mutia cannot describe the land. There are discrepancies between Mutia's statement and the Land Records Register of tenants. Another witness, Maung Gauk, states he worked the land for two years but no trace of his tenancy is found in the register. On the other hand, the land has remained all along in the names of U Baw's two sons, Po Cho and Po Sin; the Revenue Records, therefore, would show that the persons occupying those lands were occupying under Po Cho and Po Sin. In our opinion the District Judge was right in holding that the plaintiff had not proved his possession and, in consequence, the suit should have been dismissed. We may refer to the case of *Chokalingapeshana Naicker v. Achiyar* (1) as an authority to show that when a plaintiff does not sue for consequential relief on the ground that he is already in possession, and he has an opportunity of amending his plaint and paying the additional Court-fees and adding a claim for consequential relief when the issue is framed, and he fails to do so, the suit should be dismissed, if it is found that he was not in possession.

The appeal is, therefore, allowed and the suit dismissed. Respondent will pay the appellant's costs in both Courts.

(1) 1 M. 40.

*Appeal allowed.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY PETITION No. 36 OF 1914.

October 27, 1915.

*Present*:—Mr. Pratt, J. C.

MESSRS. FLEMING SHAW AND CO.—PETITIONING CREDITORS

*versus*

SADIRAM JAMNADAS AND OTHERS—INSOLVENTS.

*Provincial Insolvency Act (III of 1907), ss. 16, 27 (6 —Composition with creditors, if allowed, before adjudication—Discretion of Court, exercise of.*

Although sections 16 and 27 of the Provincial Insolvency Act provide for composition both before or after adjudication, yet composition before adjudication is rendered impossible as there is no provision for proof of debts until after adjudication. [p. 566, col. 1.]

*In re Assoomal Versimal*, 9 Ind. Cas. 724; 4 S. L. R. 222, referred to.

In sanctioning a composition a Court has a discretion under section 27 (6) of the Provincial Insolvency Act in exercise whereof it is its duty to see that the composition is reasonable and calculated to benefit the general body of creditors, and is not against commercial morality. [p. 566, col. 2.]

*Bischoffsheim, Ex parte, Aylmer, In re* (1887) 19 Q. B. D. 33, 56 L. J. Q. B. 460; 56 L. T. 801; 35 W. R. 532; 4 Morrell, 152, referred to.

Mr. *T. G. Elphinstone*, for the Petitioning Creditors.

Mr. *Khubchand T. Ojha*, for the Insolvents Nos. 2 and 3.

Mr. *Dharamdas Thawerdas*, for the Objecting Creditors.

JUDGMENT.—This is an application for the Court's sanction to a composition-deed under

section 27 of the Provincial Insolvency Act.

The insolvent firm suspended business on the 30th November 1914 and were adjudged insolvents on the 28th April 1915.

The Official Receiver has not yet taken proof of debts or framed a schedule. The insolvents submit a composition-deed whereby the whole of their property is to vest in trustees, who are to have the power to investigate the claims of creditors and of realizing the estate of the insolvents and dividing it among the creditors. A schedule of assets is attached to the deed which shows the amount of the assets to be about Rs. 34,000. The debts are said to amount to Rs. 1,07,000.

Now to begin with there is a legal difficulty about the application as the debts are not yet proved. It is true that section 27 follows the wording of the English Act and provides for composition before or after adjudication, but it has been pointed out in the case of *In re Assoomal Versimal* (1) that a composition cannot be entertained unless the creditors' debts are proved. In England the creditors' debts are proved by affidavits sent to the Official Receiver before the first meeting of the creditors and so there the difficulty does not arise, whether the composition be before or after adjudication. But under the Provincial Insolvency Act composition before adjudication is an impossibility inspite of the wording of sections 16 and 27, because there is no provision for proof of debts until after adjudication. So also in the present case the composition after adjudication is impossible if the debts are not proved, for section 27 (2) makes the assent of the majority in number and three-fourths in value of all the creditors whose debts are proved a *sine qua non*. This is not a mere formality as pointed out in *Ex parte Rogers, In re Rogers* (2), the Court must know who are the creditors entitled to the assets.

But apart from the legal difficulty the composition is one which is neither reasonable nor calculated to benefit the general body of creditors. The words of Lord Esher in *Bischoffsheim, Ex parte, Aylmer, In re* (3) apply exactly, for the creditors "get nothing more under the scheme than they would have had if the matter had proceeded in bankruptcy". In fact they get less, for the trustees will not have the power of the Court or the Official Receiver to take summary proof of claims. The result will be that the trustees' proceedings in this matter will probably involve the creditors in endless litigation.

It is true that the majority of the creditors support the composition. That is a circumstance to be considered, but it is not conclusive. In bankruptcy it is sometimes the duty of the Court to protect the creditors against themselves. I doubt if they understood the effect of this deed. Some of them had, I observed, qualms for they attached conditions to their signatures.

Again, the assets are admitted to be less than 8 annas in the rupee of the liabilities. That being so, the insolvents are not entitled to an absolute discharge. Section 27 (5) requires that in such a case the composition-deed should provide a reasonable security for 6 annas in the rupee of all unsecured debts, the deed makes no such provision.

Lastly, even if the deed were not open to these objections, the Court has a discretion which is recognised by section 27 (6). This discretion is exercised in the interests of commercial morality. The creditors in their petition complained that the insolvents had fraudulently concealed Rs. 8,000 worth of goods. The goods do not appear in the schedule of assets. What has become of them? The creditors have never withdrawn this allegation. The Court will not sanction a composition which seems to have the effect of compounding a fraud.

*Application rejected.*

(1) 9 Ind. Cas. 724; 4 S. L. R. 222.

(2) (1884) 13 Q. B. D. 438; 33 W. R 354; 1 Morrell, 159.

(3) (1887) 19 Q B. D. 33, 56 L. J. Q. B. 460; 56 L. T. 801; 35 W. R. 532; 4 Morrell, 152.

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 517 OF 1914.

January 5, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

RAMASWAMI NAICKER—PLAINTIFF—PETITIONER

*versus*

SUBBARAYULU NAICKER—DEFENDANT—RESPONDENT.

*Madras Estates Land Act (I of 1908), s. 205—Decision of Revenue Court—Revision to High Court, if competent—Jurisdiction, conflict of—Civil Procedure Code (Act V of 1908), s. 115—Charter Act, 24 & 25 Vic., c. 104, s. 15—Ex parte decree, setting aside of, without notice—Review—Revision.*

In a suit brought under the Madras Estates Land Act, a Sub-Collector passed an *ex parte* decree but later on he set aside the said decree without notice to the plaintiff. An application to review this order was made but after hearing both sides the Sub-Collector confirmed his previous order:

*Held* that the Sub-Collector acted at first irregularly in setting aside the *ex parte* decree without notice to the plaintiff but that as he confirmed his order on review after hearing both sides there was nothing in the circumstances of the case to warrant interference by the High Court in revision. [p. 568, col. 1.]

*Quære.*—Whether section 205 of the Madras Estates Land Act, 1908, bars the power of the High Court to entertain a revision petition against the order of a Sub-Collector exercising jurisdiction in a suit under that Act? [p. 567, col. 2.]

Petition, under section 115 of Act V of 1903, praying the High Court to revise the order of the Court of the Sub-Collector of the Dindigul Division, dated 8th April 1914, in Rent Suit No. 6 of 1914.

Messrs. *M. O. Parthasarathy Aiyangar* and *S. Gopalaswami Aiyangar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.—This is a revision petition against the order of a Sub-Collector exercising jurisdiction in a suit brought under the Estates Land Act. The preliminary objection is taken that this Court has no jurisdiction to entertain such a revision petition. The preliminary objection is based on the contention that as section 205 of the Madras Estates Land Act gives jurisdiction to the District Collector and to the Board of Revenue to revise non-appealable orders of Revenue Courts passed in proceedings taken under the Act, the Legislature intended that the High Court should not have any such revisional powers, especially as the exercise of revisional powers by two independent authorities would lead to inconvenient conflict of jurisdictions.

Reliance is further placed on the decisions in *Velli Periya Mira Ravuthan* v. *Moidin Padsha Ravuthan* (1) and *Venkatanarasimha Naidu* v. *Suranna* (2) passed in cases arising under the repealed Rent Recovery Act, VIII of 1865.

The above two cases, however, have little application. Those decisions turned on the language of section 76 of the Rent Recovery Act, VIII of 1865, the words of that section being that "*No judgment of a Collector.....shall be open to revision* otherwise than by appeal to the Zillah Court," except where it is an *ex parte* judgment when it may be revised by the Collector himself. Section 205 of the Estates Land Act gives powers of revision to the Collector and the Board of Revenue, but does not expressly take away from any other Tribunal the revisional powers which it might possess under other Statutes [see *Nilmoni Singh Deo* v. *Taranath Mukerjee* (3); see also *Chaitan Patjosi Mahapatra* v. *Kunja Behari Patnaik* (4) and *Kartik Chandra Ojha* v. *Gora Chand Mahto* (5), the result of those cases being that when the Court has appellate jurisdiction in certain matters over another Court, it has also revisional powers under section 15 of the Charter Act, though some other Tribunals might have also been given such revisional powers under other Acts]. The question is, however, not at all free from doubt. It would be difficult to hold that the Board of Revenue is a Court subordinate to the High Court or subject to the appellate jurisdiction of the High Court (section 115 of the Civil Procedure Code and the Charter Act) The difficulty, therefore, of a conflict between the revisional power of the High Court if it is deemed to continue to exist notwithstanding section 205 of the Estates Land Act and the

(1) 9 M. 332.
(2) 17 M. 298.
(3) 9 C. 295; 12 C. L. R. 361; 9 I. A. 174; 5 Shome L. R. 130; 4 Sar. P. C. J. 392; 6 Ind. Jur. 547.
(4) 11 Ind. Cas. 207; 38 C. 832; 14 C. L. J. 284; 15 C. W. N. 863.
(5) 20 Ind. Cas. 420; 40 C. 518; 17 C. L. J. 593.

revisional power of the Revenue Board under that section cannot be got over [see also *Ram Dayal* v. *Ramadhin* (6)].

As it is, however, unnecessary to express a final opinion on the question of the powers of this Court for deciding this petition, we do not proceed further with the consideration of this point.

On the merits the Sub-Collector no doubt acted at first irregularly in setting aside the *ex parte* decree without notice to the plaintiff. But he confirmed his order on review after hearing both sides and we must take it that he was satisfied with the truth of the affidavit of the defendant's Vakil. Though the second order does not expressly state that the review petition was dismissed on the merits and that a fresh order on the same terms as the first order was passed, we think that that was what was in substance intended by the Sub-Collector. We, therefore, reject this petition. Under the circumstances, there will be no order as to costs.

*Petition dismissed.*

(6) 12 A. 198; A. W. N. (1890) 59.

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## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 67 OF 1915.

December 17, 1915.

*Present*:—Mr. Justice Twomey.

MA NYEIN ME—DEFENDANT—APPELLANT

*versus*

MA MAY AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Buddhist Law, Burmese—Joint undivided ancestral property—Adverse possession—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art. 144.*

In a suit to which Article 144 of the First Schedule of the Limitation Act applies it is for the plaintiff in the first place to prove title and if the plaintiff succeeds in proving title, the onus of proving adverse possession for 12 years lies upon the defendant. [p. 568, col. 2.]

There can be no adverse possession between co-heirs in joint possession. [p. 569, col. 1.]

*Ma Ye* v. *Maung Hlaw*, 2 L. B. R. 184, distinguished.

Mr. *Hamlyn*, for the Appellant.

Mr. *Ba Dun*, for the Respondents.

JUDGMENT.—The defendant-appellant, Me Nyein Me, is widow of Mg. Tun, the eldest son of Ma Shwe La, and the plaintiffs-respondents are other children and grand-children of Ma Shwe La. The property in dispute is a house and house site which were attached in execution of a decree against Ma Nyein Me and sold as her property. The plaintiffs-respondents having failed to obtain removal of the attachment sued for a declaration of their right to the property. Their suit was dismissed by the Township Court, but the District Court on appeal held that the property was the joint family property of all Ma Shwe La's children and accordingly gave the plaintiffs a declaratory decree in respect of 8/9ths of the property, the remaining 1/9th being deceased Maung Tun's share.

The plaintiffs' case was that the property belonged to their mother Ma Shwe La who died about 20 years ago, that on her death about 15 years ago it became the property of all her children although it was assessed to revenue in the name only of the eldest son Maung Tun and his wife.

The defendant-appellant Ma Nyein Me at first contended that the land was given to Maung Tun by his mother Ma Shwe La, but afterwards receded from this position and said she did not know how Maung Tun had got it. She relied, however, on adverse possession for upwards of 12 years.

In suits to which Article 144 of the first Schedule of the Limitation Act applies, it is for the plaintiff in the first place to prove title, and if the plaintiff succeeds in proving title the onus of proving adverse possession for 12 years lies upon the defendant.

In this case it is clearly proved by the plaintiffs' witnesses that the house and site were left by Ma Shwe La on her death and according to the ordinary law of inheritance all her children inherited the property as co-heirs. It is shown that the house was occupied after the mother's death not by Maung Tun alone but by other children as well. It was only after some years as the family grew that Maung Tun was left in sole occupation of the house, and even then two other children (Ma Me and Ma Tu) of Ma Shwe La built houses on the same piece of land

and they and their families have continued to live in these two houses ever since. It is true that after Ma Shwe La's death the land was transferred to Maung Tun's name alone, but that circumstance is explainable by the fact that the co-heirs were numerous and it was convenient to constitute the eldest son as representative of all in dealing with the Revenue Authorities. There is evidence which seems trustworthy that Maung Tun was asked by the other children of Ma Shwe La to partition the site and that he procrastinated. He never seems to have set up a claim to own the property to the exclusion of his brothers and sisters. I think the evidence produced by the plaintiffs strongly supports their contention that the property is joint undivided ancestral property, that Maung Tun was not in sole possession of the site but was in possession jointly with the two other co-heirs who had built houses on the site and that these co-heirs together with Maung Tun were in possession on behalf of the general body of co-heirs.

Mr. Hamlyn relies strongly on the case of *Ma Ye* v. *Maung Hlaw* (1), in which the defendant was allowed by his co-heirs to remain in possession of certain land for 13 years without any agreement on the part of the defendant that he held on behalf of the co-heirs or any acknowledgment of the co-heirs' rights. The plaintiffs' suit was held to be barred by limitation. That case, however, is sharply distinguished from the present case by the fact that Maung Tun's sisters and co-heirs Ma Tu and Ma Me were in possession of the site in dispute jointly with Maung Tun and that Maung Tun promised to partition the land with his brothers and sisters. It was clearly treated all along as joint family land.

The plaintiffs proved their title and the defendants failed to prove adverse or even separate possession.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 2 L. B. R. 184.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 185 OF 1913.

October 28, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

THIRUGNANAPAL *alias* VAIKUNTA NADAN—PLAINTIFF—APPELLANT

*versus*

PONNAMMAI NODATHI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Will, construction of—Intention, if gathered from habits of life and circumstances—Intention to confer estate as adopted son, effect of, when not adopted—Gift.*

Per *Coutts Trotter, J.*—A testamentary disposition should be construed according to its terms, and a particular intention should not be ascribed to the testator, unless there are words in the document which give that effect; habits of life and the circumstances surrounding the transaction only cannot determine what that intention was. [p. 570, col. 1.]

A joint enjoyment of a property with the testator during his life-time cannot be construed as a gift in favour of one after his death. [p. 570, col. 1.]

*Srinivasa Aiyangar, J.*—Where the tenor of a testamentary disposition clearly indicates that the testator intended that a particular person should succeed to his property as his adopted son, and in that character only, the disposition cannot take effect as a gift *in præsenti* when unregistered or as a legacy in his favour when he was not in fact the adopted son, nor can he take as a *persona designata* under the Will when there is nothing in the instrument referring to him *individually* except as an adopted son. [p. 571, col. 2; p. 572, col. 1.]

*Brij Lal* v. *Suraj Bikram Singh*, 16 Ind. Cas. 92; 39 I. A. 150; 16 C. W. N. 745; 9 A. L. J. 802; 23 M. L. J. 38; 12 M. L. T. 1; 16 C. L. J. 47; 14 Bom. L. R. 827; 15 O. C. 270; (1912) M. W. N. 646; 34 A. 405; *Fanindra Deb Raikat* v. *Rajeswar Das*, 11 C. 463 at p. 485; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; *Lali* v. *Murlidhar*, 33 I. A. 97; 28 A. 488; 10 C. W. N 730; 1 M. L. T. 171; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; *Karamsi Madhowji* v. *Karsandas Natha*, 23 B. 271; *Nilhomoni Debya* v. *Saroda Pershad Mookerjee*, 3 I. A. 253; 26 W. R. 91; *Bireswar Mukerji* v. *Ardha Chunder Roy*, 19 I. A. 101; 19 C. 452 (P. C.); *Venkatachariar* v. *Sadagopachariar*, 8 Ind. Cas. 517; 9 M. L. T. 139; (1910) M. W. N. 785; followed.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorn, in Original Suit No. 48 of 1911.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. R. Rangaswami Aiyangar*, for the Appellant.

Dr. *Swaminadhan* and Messrs. *T. Rangachariar*, *S. Srinivasa Aiyangar* and *V. Venkatachariar*, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—What has to be determined in this case is the true construction

of a document, dated 8th March 1892, purporting on the face of it to be the Will of one Vaikunta Nadan. Many cases have been cited to us as embodying the principles which should guide the Court in construing such documents as the present, and I think the result of these may shortly be summarized as follows: We are to give effect to the intention of the testator as expressed in his words. We are to acquaint ourselves with the circumstances in which he was placed; we are to have regard to the habits of life and thought of the people to which he belonged and to the system of law under which he lived. But when all that is done, our task still remains to construe his language; and we cannot give effect to a supposed intention, however cogently suggested by extrinsic evidence, unless there are words to be found in the document which, on a natural construction, convey it either expressly or by necessary implication. Looking at this document, it is clear that there are no express words of testamentary gift to be found; words of gift, indeed, there are: but they refer only to a gift of a joint estate with the testator, to be enjoyed during his life-time. Then it is said that the whole tenor of the document obviously contemplates that the plaintiff should deal with the properties as owner, after the decease of the testator. That is quite true; but is it solely referable to an estate created by a testamentary disposition? It obviously is not, because the testator shows, by the recitals in the document, that he believed himself to have adopted the plaintiff, though in fact he had not. The plaintiff could deal with the properties as effectively in his supposed capacity of adopted son, as in that of legatee; and it would only be possible to infer an unexpressed disposition from language which was solely referable to such a disposition. The last desperate suggestion of the appellant's Counsel, that the opening words of the document "Will in favour of Vaikunta Nadan" are to be taken as operative words of disposition of the testator's whole estate, to my mind puts a burden on the words that they are wholly incapable of bearing. It is said that the result of our construction is to defeat the testator's intention that the plaintiff should own his property after his death. If by that is meant the testator's intention as contained in this document, I do not agree; in my opinion he never intended the plaintiff to take his property as legatee under this document, or as a legatee at all. No doubt he had a general intention that the plaintiff should own his property, but he endeavoured to carry that out not by this document, but by what has proved to be an abortive adoption. The defeat of his general intention is due not to any construction laid down by this Court, but to his own failure to satisfy the legal requirements of a valid adoption.

As, in my view, this document contains no testamentary disposition at all, it is unnecessary to discuss the further question raised by the respondents, whether such disposition, if it existed, was subject to a condition precedent that a valid adoption should, in fact, have taken place. The appeal fails and is dismissed with costs.

SRINIVASA AIYANGAR, J.—This appeal arises out of a suit for the recovery of possession of certain properties, which belonged to one Vaikunta Nadan, from his heirs and their alienees. The plaintiff claims title as devisee under an instrument called a Will alleged to have been executed by Vaikunta Nadan on the 8th of March 1892, shortly before his death. The suit has been dismissed on the ground that the document of the 8th of March 1892 contained no dispositions of property, that if it did, they were not testamentary in character but took effect immediately on the execution of the instrument as a gift, and finally if there was a devise to the plaintiff the same was to him in his character as adopted son of Vaikunta Nadan. It is admitted that the plaintiff was not adopted by Vaikunta Nadan. No evidence has been taken in the case and except the matter of the construction of the document called the Will, no other question has been tried. The document is called a Will in several places and is addressed to "the boy adopted by me whose name I have this day changed into Vaikunta Nadan from Tirugnanapal." There is, however, no question of identity and plaintiff is the Tirugananapal mentioned here. Vaikunta next refers to the position of his family (that they were *nattamais* and were held in veneration by his caste people) and states that he makes the Will according to the request of his castemen after consultation

with his mother and wife for the purpose of perpetuating his family, for obtaining spiritual benefit by having a male child according to the Hindu *Sastras* and the enjoyment of his property. The next clause is important as that, if any, contains the devise of his properties to the plaintiff.

It begins by saying "from this day forward you are to live with me as my child" and concludes with "all the properties in schedule 4 and included in my *patta* you are yourself to enjoy living with me." There are no other words of gift or devise in any other portion of the document but in the later portions of the Will, the executant assumes that he would be in possession and enjoyment of the properties after his death. In the clause immediately following that above set out, he directs his son to live with his mother and to conduct himself according to her wishes. There are also directions as to the performance of the marriage of his daughter and other ceremonies in the family including the funerals of his wives, and as to the payment of his debts.

The first thing to be noticed is the absence of any reference to the plaintiff by name in any portion of the Will, except the very first sentence wherein he calls him his adopted son whose name he has changed from Tirugnanapal to Vaikunta Nadan. The purpose is stated to be the affiliation of a son to represent the family; this is also suggested by the change of the name of the plaintiff to Vaikunta Nadan which, as pointed out by Mr. Rangachariar, seems to be, the name assumed by the head of the family apparently to indicate his position as a *guru* or spiritual head. The words that "you are yourself to enjoy living with me" seem to imply a pre-existing right in the plaintiff which, obviously the executant thought, the plaintiff possessed by virtue of the affiliation mentioned in the previous portion of the document. I think Vaikunta by that clause merely declared the legal consequences of the adoption, and did not give the properties to a person who would otherwise have no title to them. The subsequent portion of the Will is not only consistent with this implication, but the absence of any disposition therein goes also to show that the executant was not making a Will for the purpose of disposing of his property but executed the document to evidence an adoption which he thought he had made and to give directions to his adopted son, who, by virtue of the adoption, had become the owner of the property along with him during his life-time, and would become the sole owner after his death.

I do not think it useful to discuss the cases cited on one side or the other, but the language of this instrument seems to be similar to the language used in *Brij Lal* v. *Suraj Bikram Singh* (1).

Mr. Ananthakrishna Aiyar, the learned Pleader for the appellant, contended that he did nct rely on the above words as words of devise, but that we have to imply a gift from the fact that the document is addressed to the plaintiff and from the assumption throughout the document that the plaintiff was to be the owner of Vaikunta's properties. I quite agree that the testator throughout the document assumes that the plaintiff, I should say, his adopted son, would be the owner of the properties; but that to my mind leads to the conclusion that the testator did not intend to give these properties to the plaintiff by the Will, but that he assumed that the plaintiff, as his adopted son, would be entitled to his properties without any gift from him. I do not attach much importance to the fact that the document is executed in favour of the plaintiff. If the plaintiff had been a stranger and if he had not been assumed to be an adopted son, I should have come to the conclusion without hesitation that the words "shall enjoy" are quite sufficient to give the property to the plaintiff.

Assuming, however, that there was a gift or devise in favour of the plaintiff, the next question is, whether that gift was testamentary or whether the gift took effect immediately on the execution of the document. In the latter case, the document being unregistered, the gift must fail. It is quite clear that Vaikunta Nadan intended that the plaintiff should be in enjoyment of his properties during his life-time. He expressly says so. If by the words "shall enjoy" he meant to give the properties to the plaintiff and if those words operated

(1) 16 Ind. Cas. 92; 39 I. A. 150; 16 C. W. N. 745; 9 A. L. J. 802; 23 M. L J. 38; 12 M. L. T. 1; 16 C. L. J. 47; 14 Bom. L. R. 827; 15 O. C. 270; (1912) M. W. N. 646; 34 A. 405.

to convey title to the plaintiff, the instrument is obviously a deed of gift, and there being no further devise in favour of the plaintiff of any interest in the properties after the death of Vaikunta Nadan (in fact, there could not be any such devise if Vaikunta Nadan had given his properties during his life-time to the plaintiff), the plaintiff's suit fails. That is why his learned Pleader, who, when he opened his case, relied upon those words as words of gift, when confronted with this difficulty, strenuously contended that those were not words of gift. But he cannot escape the position that the plaintiff was to have the enjoyment of the properties during the life-time of Vaikunta Nadan. If there was any implication of gift apart from these words, there was an implication of only one gift by virtue of which the plaintiff was entitled to enjoy the properties during the life of Vaikunta Nadan, and continue to enjoy them after his death; that implied gift would be equally fatal to the plaintiff's case. It is impossible without making a new Will for the testator to find two separate gifts, one a gift *pur autre vie* during the life-time of Vaikunta and an independent gift of the same properties by way of testamentary disposition after his life-time.

Another point which was decided against the plaintiff by the learned Sub-Judge was that the devise, if any, in this case was to the plaintiff in his character of adopted son and not as *persona designata*. Mr. Rangachariar, the learned Pleader for the respondent, contended that Vaikunta Nadan was under the mistaken impression that a mere declaration by him that he had adopted the plaintiff and a change of name would be enough to constitute the plaintiff an adopted son and it was under this mistaken impression that he drafted and executed the instrument in question and except for that misapprehension, he would not have given the properties to the plaintiff. He points out that the document shows the anxiety of the deceased to be represented by a son more especially as the family was held in reverence by the members of the community; that, for the purpose of getting the boy recognized by the community as his son and head of the family, he consulted his castemen; that, in fact, affiliation of a son was the dominant idea in their mind of Vaikunta Nadan and not a disposition of his property. He relied on *Fanindra Deb Raikat* v. *Rajeswar Das* (2), *Lali* v. *Murlidhar* (3) and *Karamsi Madhowji* v. *Karsandas Natha* (4). Mr. Ananthakrishna Aiyar, the learned Pleader for the appellant, contended on the contrary that there is nothing to show that Vaikunta Nadan was under any misapprehension as to the essentials necessary for a valid adoption, that his intention was to give his property to the plaintiff who was his foster-son; and if he was not under any misapprehension as to the status of the plaintiff (which, however, was a matter for proof by evidence in the case), there could be no question of devise to the plaintiff in his capacity as adopted son, as that would involve the testator making an elaborate Will knowing all the time that that Will was perfectly useless. He also relied on *Nidhoomoni Debya* v. *Soroda Pershad Mookerjee* (5), *Bireswar Mukerji* v. *Ardha Chunder Roy* (6) and *Venkatachariar* v. *Sadagopachariar* (7). In view of the conclusion which I have already arrived at on the construction of this document, it is unnecessary to express any opinion on the question, a determination of which would require evidence of the surrounding circumstances including any misapprehension on the part of the testator as to the position of the plaintiff.

The appeal, therefore, fails and must be dismissed with costs.

*Appeal dismissed; Disposition negatived.*

(2) 11 C. 463 at p. 485 (P. C.); 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277.

(3) 33 I. A. 97; 28 A. 488; 10 C. W. N. 730; 1 M. L. T. 171; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415

(4) 23 B. 271.

(5) 3 I. A. 253; 26 W. R. 91.

(6) 19 C. 452 (P. C.); 19 I. A. 101.

(7) 8 Ind. Cas. 517; (1910) M. W. N. 785; 9 M. L. T. 139.

## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 364 OF 1914.

December 23, 1915.

*Present*:—Mr. Justice Maung Kin.

MAUNG NE DUN—PLAINTIFF—APPELLANT

*versus*

MA LE AND OTHERS—DEFENDANTS—RESPONDENTS.

*Vendor and purchaser - Contract to sell - Specific performance, suit for—Registered transfer, necessity of—Transfer of Property Act (IV of 1882), s. 54—Limitation Act (IX of 1908), Sch. I, Art. 113.*

A vendor is bound to do all things necessary to complete the title of his vendee and where section 54 of the Transfer of Property Act applies, the sale must be by a registered document

Article 113 of the First Schedule of the Limitation Act applies to suits to compel the execution of registered documents by way of specific performance of the contract of sale, and time runs from the date of the plaintiff's knowledge of refusal to execute such documents where no specific date is fixed.

Mr. *Agabeg*, for the Appellant.

Mr. *Baon*, for the Respondents.

JUDGMENT.—In 1907 defendants-respondents sold the land in suit to plaintiff-appellant for Rs. 750. They transferred it into the name of the plaintiff and gave him possession. The plaintiff has been in possession ever since. These facts are not disputed. The parties are at variance as to whether defendants promised to execute a registered conveyance. The plaintiff's case is that they did so promise and instead of fulfilling it, they claimed to be entitled to get back the land on the ground that no title had been acquired by the plaintiff for want of a registered deed and they threatened to sue him for the recovery of possession of the land. The plaintiff, therefore, sues the defendants for specific performance of their agreement to sell, praying that they may be compelled to execute a registered conveyance.

The defence is that there was no agreement to execute a registered conveyance and that the suit is barred by limitation.

In my judgment it is clear law that it is immaterial whether there was an agreement to give a registered document, the vendor is bound to do all things necessary to complete the title of his vendee and according to section 54 of the Transfer of Property Act, which applies to this case, the transaction must be by a registered deed in order to pass a valid title from the vendor to the vendee. The suit must, therefore, be decreed, if it is within time.



The question then is, is the suit barred by limitation? Article 113 of the Limitation Act applies. The period of limitation provided for thereby is three years and it is made to run from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. The way to interpret this provision of law is as pointed out by the present Chief Judge who in *Ma Shwe On* v. *Maung Kywet* (1) said: "The Limitation Act being one in which rights are rendered ineffective, if not abrogated, must be read strictly."

No date was fixed for performance in this case. Therefore limitation will run from the date the plaintiff had notice that performance was refused. That must in this case be the date on which the defendants claimed the land back from the plaintiff. That was admittedly shortly before plaintiff's suit, said to be a few months. The suit was, therefore, clearly within time.

The appeal is allowed with costs in all the Courts and there will be a decree ordering that the defendants do execute a registered deed by which their title in the property in suit is conveyed to the plaintiff for the consideration of Rs. 750 which they have already received.

*Appeal allowed.*

(1) 32 Ind. Cas. 536.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 17 OF 1912-13 OF BASTI DISTRICT.

January 26, 1914.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

SATAROHAN PANDE—PLAINTIFF—APPELLANT

*versus*

RAM UGRAH PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

*U. P. Land Revenue Act (III of 1901), s. 34—Mutation*

SATAROHAN PANDE *v.* RAM UGRAH PANDE.

*—Contested case—Jurisdiction of Tahsildar to enquire—Tahsildar, power of, to refer to arbitration—Award, effect of—Rent Act (XII of* 1881*), s.* 203.

In a mutation case, a Tahsildar should at once refer the matter to the Sub-Divisional Officer, when the suit becomes contested, as the law does not contemplate his continuing to investigate the case thereafter.

Under section 203 of the Rent Act, no one but an Assistant Collector of the First Class or some higher Court can make a reference to arbitration. Therefore if a Tahsildar makes such a reference the award made is void *ab initio.*

Third appeal from the order of the Commissioner, Gorakhpur Division, dated the 1st July, 1913, confirming that of the Collector, in a case of mutation of names under section 34 of Act III of 1901.

JUDGMENT.

TWEEDY, J. M.—(*January* 16, 1914.)—I think the appeal must succeed because the whole procedure appears to have been illegal. The law says that when a dispute arises in a mutation case the Tahsildar shall at once refer the matter to the Sub-Divisional Officer. When the application is made the Tahsildar is to make an enquiry and when a dispute arises he is to refer the matter. After the dispute has arisen the law does not contemplate his continuing to investigate the case. I am aware that a contrary practice has sprung up in some districts, but it is not according to law. In the present case not only did the Tahsildar continue to enquire but he proceeded to pass orders about the arbitration. It appears that in December the parties filed an application for arbitration before the Sub-Divisional Officer. The latter sent it to the Tahsildar, for what purpose does not clearly appear. He was not seized of the case and could not legally accept the application. He should have refused it and at the same time called upon the Tahsildar to send him the mutation case in which the dispute was going on. The Tahsildar proceeded to issue all sorts of illegal orders, calling upon the parties to produce the decision of the arbitrators before him or else to appear with their evidence on 30th December. No one appeared on that date and he then issued orders asking the arbitrators to file their award by January 4th. No one appeared on January 4th and the case was adjourned until January 6th, when the arbitrators asked for more time which the Tahsildar refused and then did nothing for six weeks, when he at last sent the case to the Sub-Divisional Officer on 26th February the award having been in the meantime filed in the Tahsil on 5th February. When the case came before the Sub-Divisional Officer the party who got the worst of it in the arbitration naturally objected to the award. I do not see how the least weight can be attached to such an arbitration which was a long course of illegalities and irregularities from beginning to end. Section 203 of the Rent Act says clearly that no one but an Assistant Collector of the First Class or some higher Court can refer to arbitration. The Sub-Divisional Officer certainly did not refer it because he passed no orders on the subject and was not seized of the case and the Tahsildar had no jurisdiction to refer it so that the award is waste paper. Whatever we may think of the morality or sense of fair play in the appellant who strained every nerve to set aside the award which he had asked for directly he heard that it was against him, there is no doubt that he is legally entitled to get it adjudged ineffective.

I do not agree with the view of the Collector as to the High Court ruling which he quotes. There has been no change in the law in respect of arbitration. The present law gives three grounds for setting aside an "award", but the word "award" in that connection means a *legal* award, one that has been delivered after the due formalities prescribed by law have been observed. An award like the present, which was delivered by arbitrators who to begin with were not legally appointed and who did not follow the rules laid down by the Civil Procedure Code, is null and void *ab initio.*

I would decree the appeal and direct that the case be returned to the Sub-Divisional Officer for re-trial without any reference to the arbitration. Costs should be on parties throughout.

BAILLIE, S. M.—I concur.

*Appeal allowed.*

*In re* HENRY ROBERT SMITH.

## SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY No. 4 OF 1912.

June 30, 1915.

*Present*:—Mr. Pratt, J. C.

*In re* APPLICATION BY HENRY ROBERT SMITH FOR INSOLVENCY.

*Provincial Insolvency Act (III of 1907), s. 44—Power of Court to set aside or vary its own orders.*

No Court has an inherent power to set aside an order which has been properly made by it unless such power is expressly given by Statute.

*Drew* v. *Willis, Ex parte Martin*, (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373, referred to.

There is no provision in the Provincial Insolvency Act enabling the Court to set aside or vary any order made by it under its insolvency jurisdiction.

*Thuckar Bhagvandas Harjivan, In re*, 4 B. 489; *Dayabhai Sarupchand, In re*, 23 B. 474, referred to.

Mr. *Tahilram Maniram*, for the Insolvent.

Mr. *Nadirshah Naoroji*, for Creditor No. 1.

Mr. *F. B. Limki*, for Creditor No. 2.

Mr. *Isardas Oodharam*, for Creditor No. 3.

JUDGMENT.—The applicant who has been adjudged insolvent applies for an order absolute of discharge under section 44 of the Provincial Insolvency Act.

A similar application was made to Crouch, A. J. C., and the order of discharge was refused on the 27th February 1914. It is urged that an Insolvency Court has power to set aside or vary any order made by it under its insolvency jurisdiction.

This inherent power was asserted in the case of *Thuckar Bhagvandas Harjivan, In re* (1) but was ruled out in the later case of *Dayabhai Sarupchand, In re* (2). Both cases were under the former Indian Insolvency Statutes, 11 and 12 Vic., Chap'er 21. In the later case it was held that the Court had no power to review an order of discharge made under section 47 except under section 56.

In the English Bankruptcy Act the power to review, rescind, or vary an crder already made is expressly confirmed by section 104 (1).

In the Presidency Towns Insolvency Act there is a similar general provision in section 8 and a special provision as to orders of discharge in section 42 (1). The provisions in these Acts would be superfluous if the Court had the inherent jurisdiction that is now asserted.

There is no similar provision in the Provincial Insolvency Act and the inference is that the Legislature did not intend the Court to have this jurisdiction. The general principle seems to me to be that laid down in *Drew* v. *Willis, Ex parte Martin* (3) that "No Court has such power of setting aside an order which has been properly made, unless it is given by Statute".

I cannot, therefore, set aside or vary the order made by Crouch, A. J. C., refusing a discharge. It may be noted that the applicant had remedies of which he did not avail himself of. He could have appealed under section 46 or he could have applied for review under section 47 and section 114 of the Civil Procedure Code.

Application dismissed with costs.

*Application dismissed.*

(1) 4 B. 489.
(2) 23 B. 474.



(3) (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373.

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## PUNJAB CHIEF COURT,

SECOND CIVIL APPEAL No. 3270 OF 1915.

January 17, 1916.

*Present*:—Mr. Justice Shah Din.

KIRPA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

CHURU—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts.* 66, 67, 80 *—Unregistered bonds, how governed—Bond providing for re-payment on happening of certain contingency, suit on—Starting point of limitation.*

Article 67 of the Limitation Act has to be read with Article 66 and both these Articles apply to unregistered bonds. Neither of these can properly be applied to a bond which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is payable on a future date upon a certain contingency happening. [p. 576, col. 1.]

Where, therefore, a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously:

*Held*, that since according to the true construction of the bond the money due on it could not be demanded by the plaintiff before the money due on the mortgage-deeds was paid to him, the starting point for limitation was the date of such payment and that Article 80 of Schedule I of the Limitation Act governed the case. [p. 576, col. 1.]

BABBAN MISIR v. RAM LOCHAN.

*Bahadur Lal* v. *Gaman*, 139 P. R. 1889, distinguished.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 27th August 1915, reversing that of the Munsif, First Class, Una, dated the 25th January 1915, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—The sole question for decision in this case is whether the rule of limitation applicable to the suit brought by the plaintiffs is that laid down in Article 67 or that provided for by Article 80 of the Limitation Act. I have read the registered bond, dated the 9th January 1897, on which the plaintiffs' suit is based; and I am of opinion that it is Article 80 of the Limitation Act that applies to the case, and not Article 67. Article 67 has to be read with Article 66, and both these Articles seem to me to apply to unregistered bonds: Article 66 applies to a bond where a particular day is specified for payment and the limitation begins from the day so specified, whereas Article 67 applies to a bond where no particular day is specified and the period of limitation starts from the date on which the bond was executed. Neither of these Articles can properly be applied to a bond like the one on which the present suit is based, which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is not payable on demand but is payable on a future date upon a certain contingency happening. The bond before us says that the money due upon it will be paid at the time of the payment of Rs. 2,600 due on two mortgage-deeds, dated the 10th June 1884 and the 28th May 1888, respectively. It is admitted that the sum of Rs. 2,600 due on the said mortgage-deeds was paid on the 5th June 1914; and I agree with the Munsif that since, according to the true construction of the bond, the money due on it could not be demanded by the plaintiffs before the sum of Rs. 2,600 was paid to them, the starting point for limitation for the present suit was 5th June 1914. In my opinion Article 80 of the Limitation Act applies to this case and the suit was within limitation.

*Bahadur Lal* v. *Gaman* (1), which is relied on by the respondent's Counsel, is distinguishable from the present case, inasmuch as there the bond sued upon was an unregistered one to which, as pointed out by the learned Judges, the limitation of three years applied, and upon the true construction of the bond the obligor was not bound to pay at the time when the suit was brought by the obligee.

I accept this appeal and setting aside the decree of the District Judge restore that of the Munsif with costs throughout.

*Appeal accepted.*

(1) 139 P. R. 1889.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 12 OF 1913-14 OF GORAKHPUR DISTRICT.

January 26, 1914.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

BABBAN MISIR AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAM LOCHAN—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 58—Land let for agricultural purposes converted into other uses—Ejectment, suit for—Remedy.*

A sub-tenant of an occupancy holding erected a "*chardiwari*" and an enclosure for feeding cattle on the holding:

*Held*, that the fact that the land was not *now* held for agricultural purposes was no bar to ejectment under section 58 of the Tenancy Act. [p. 577, col. 1.]

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 12th September 1913, reversing that of the Assistant Collector, Gorakhpur District, in a case of ejectment under section 58 of Act II of 1901.

JUDGMENT.

TWEEDY, J. M.—(*January* 19, 1914).—The Commissioner's view seems to me incorrect. The evidence clearly shows that the appellant, an occupancy tenant, let these two plots as agricultural land for agricultural purposes to the respondent in 1314. He cultivated for three years but during the last three years the fields have been uncultivated and the defendant-respondent has

constructed an enclosure called a "*chardiwari* and another for feeding cattle. He is only a sub-tenant and has no right to resist ejectment because of his illegal and unauthorised action. The opinion of the Commissioner that in a case like this the landlord's only remedy is under section 57 (*b*) and that as he has not availed himself of it within a year, ejectment is barred, seems to me erroneous. The land was *let* for agricultural purposes and, therefore, the fact that it is not now *held* for such purposes does not affect the issue. I would decree the appeal with costs and restore the finding of the Assistant Collector.

BAILLIE, S. M.—I concur.

*Appeal allowed.*

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## CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3495 AND 3748 OF 1913.

January 14, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

MOHAMED ALI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

JNANADA SUNDARI CHOWDHARANI—PLAINTIFF—RESPONDENT.

*Occupancy holding, non-transferable, transfer of—Co-sharer landlord recognising transfer of his share of non-transferable occupancy holding, effect of—Co-sharers, other, right of.*

One co-sharer landlord can recognise a transfer of a non-transferable occupancy holding in respect of his own share, although such a recognition is not in any way binding upon the other co-sharers and may not as such prevent the other co-sharers from effecting a sub-division of the holding. [p. 579, col. 1.]

Appeals against the decrees of the Officiating Sub-Judge, Mymensingh, dated the 30th June 1913, reversing those of the Munsif, First Court, Mymensingh, dated the 15th April 1912.

FACTS.—The *raiyat* of a non-transferable occupancy holding sold his holding to several persons without the consent of the landlords. Some of these transferees, who were in possession of separate plots of the holding, paid rent and the rent was accepted by the *tahsildar* of some of the co-sharer landlords. One of the questions that arose for decision in the second appeal, was what was the legal effect of the acceptance of the rent as regards the transferees who paid the rent.

Babu *Rajendra Chandra Guha*, for the Appellants.—The landlord's *tahsildar* accepted the rent paid by the transferees. This was entered in the landlord's papers, *dakhilas* were granted for them and the landlord apparently used the money realised from the transferees as rent. The landlord cannot now say that he is not bound by the act of the *tahsildar* in accepting the rent. It is admitted that this *tahsildar* was making settlement of lands with many other tenants with the *naib's* assent; the landlord did not put a stop to this. He by his conduct held out the *tahsildar* as having authority to make settlement, and if the defendants, *bona fide* believing that the *tahsildar* had power to make settlement, paid rent to him and thereby obtained his recognition of the transfer of the holding in their favour, the landlord would be estopped under section 237 of the Contract Act from getting rid of the recognition or settlement by the *tahsildar*. It cannot be disputed that recognition of a transfer which is absolutely void, made by the landlord or his man, is a fresh settlement with the transferee. The landlord also ratified the act of the *tahsildar*, inasmuch as the rent accepted by the *tahsildar* was credited to the landlord and the landlord did not refuse to accept it. The papers of the landlord showed that rents were realised from these transferees and the landlord could not be heard to say that he did not know of the facts relating to the realisation of the rent. If he ratified the act of the *tahsildar*, supposing it to have been unauthorised, he must be held to have ratified the whole transaction, *i. e.*, the acceptance of the rent and the recognition of the transfer. The lower Appellate Court has held that even assuming that the *tahsildar* had power to make settlement or recognition of transfer, he could not make a sub-division of the tenancy. But I submit what was done was not sub-division of the tenancy. The old tenant abandoned the holding and thereupon persons who were in possession of the holding as transferees were recognised by the *tahsildar*, so each one of them became a separate tenant of the parcel of the holding he was in possession of. Sub-division of a tenancy means that the tenancy subsists and it is sub-divided, but here the old tenancy was at an end and new tenancies, separate from each other, were

created in respect of the lands of the old tenancy. It is said that the settlement, if any, was made by the agent of a co-sharer landlord and, therefore, it was invalid and the case reported as *Kader Bakhsh* v. *Ram Manikya Das* (1) has been relied upon. With all respect to the learned Judges who decided that case, I submit the decision is not sound law. Referred to *Hossein Mahomed* v. *Fakir Mahomed* (2).

Babu *Chandra Kanta Ghosh*, for the Respondent.—The receipt which was granted was not in the prescribed form, hence no counterfoils of the receipts were kept, so it cannot be said that the landlord had actual or constructive knowledge of the realisation of rent.

[D. CHATTERJEE, J.—Do you rely upon the decision reported as *Kader Bakhsh* v. *Ram Manikya Das* (1)?]

I need not rely upon that but I rely upon the findings of the lower Appellate Court. It has been found that the *tahsildar* had no authority to make settlement. The very name "*tahsildar*" signifies that his duty was to make *tahsil* or collection of rents.

[D. CHATTERJEE, J.—In one of the cases the settlement was made under the orders of the *naib*, and *nazar* was accepted and credited to the landlord.]

Then the question might arise, whether the *naib* had authority to make settlement. His business is to manage the property as it is and not to settle or unsettle lands. But this is not a case of mere settlement but of sub-division of a tenancy. No sub-division could be made without the consent of the landlord in writing. This is a case from Eastern Bengal and there is a difference in the provisions of section 88 Bengal Tenancy Act, as regards Eastern Bengal. In Eastern Bengal sub division of a tenancy cannot be made with the consent of the agent.

[D. CHATTERJEE, J.—Suppose a portion of a holding is sold and the landlord recognises the purchaser of the portion, would not this be a good settlement with the purchaser?]

This would be so if the old tenant gives his consent.

(1) 19 Ind. Cas. 395.
(2) 4 Ind. Cas. 740; 10 C. L. J. 618 at p. 622.

[D. CHATTERJEE, J.—The recognition of the purchaser would be to the benefit of the old tenant as otherwise he would remain liable for the whole rent, notwithstanding the transfer of a portion of the holding].

The landlord might do it, but his *naib* or manager could not do it without the written consent of the landlord. In Eastern Bengal officers of the landlord used to make such settlements in an underhand manner and, therefore, there is now the provision in section 88, Bengal Tenancy Act, under which agents of the landlord would not have any such power.

Babu *Rajendra Chandra Guha* was heard in reply.

JUDGMENT.—The learned Subordinate Judge has evidently made a confusion of the two cases. They were tried together. In Appeal No. 3748 a question was raised as to a settlement by a co-sharer *malik* in respect of his share. In Appeal No. 3495 a question was raised as to a settlement by the plaintiff's own agent. The learned Subordinate Judge, however, says: "The defendants' case is that they were recognised as tenants by the co-sharer landlords' *tahsildar*. This is not so in both cases." The settlement in Appeal No. 3745 is said to have been made by the co-sharer landlords' *tahsildar* in the presence of his *naib* and under his direction and the premium paid is said to have been entered in the *zemindar's* papers. That would not be a settlement by *tahsildar*. The learned Subordinate Judge then says:—"As no *tahsildar* had any authority to recognise any sub-division of the holding, the receipt of rent by any *tahsildar*, if true, cannot give validity to the transfer." That may be so. A *tahsildar* or even a *naib* may not have a right of sub division without the landlord's consent, but the simple fact of the agent not being entitled to effect a sub-division would not invalidate the recognition by the co-sharers. The learned Judge is also under the erroneous impression that the recognition of the transfer by a co-sharer landlord is not valid even to the extent of his share. There is nothing in law to prevent one co-sharer landlord from recognising a transfer in respect of his own share, although such a recognition is not in any way binding upon other co-sharers and may not as such prevent

other co-sharers from effecting a sub-division of the holding. Both these cases raised a question of separate settlement in favour of the transferees and the Court must consider the question of settlement raised by the defendant in each case. In determining the question the Court will have to see who made the settlement or the recognition, whether he had any authority to do so and whether the *zemindar* directly or indirectly acted upon such recognition. Unless these questions are considered it is not possible to make a proper decree in this case.

The judgments and decrees of the lower Appellate Court are, therefore, set aside and the cases sent back to that Court for decision in accordance with law.

Costs to abide the result.

*Decrees set aside; Cases remanded.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1708 OF 19'4.

December 8, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Abdur Rahim.

DEVIBHASHYAM VENKANNA, MINOR, BY PATERNAL GRANDMOTHER AND GUARDIAN LACHAMMA—DEFENDANT No. 2 —APPELLANT

*versus*

PEDDINTI VENKATARAMANAYYA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1 —RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 22, cl. (4)—Appeal dismissed as time-barred—Respondent, whether entitled to be heard on cross-objections.*

*Per Abdur Rahim, J, (Ayling, J*, dubitante.)—A respondent filing a memorandum of objections within time is entitled to be heard on it even if the appeal in which it was filed is dismissed as being presented out of time. [p. 580, col 1.]

An appeal thus dismissed should be treated as one dismissed upon hearing for the purpose of hearing the memorandum of objections, though it does not come exactly within the scope of clause (4) of rule 22 of Order XLI. [p 580, col. 1.]

*Biridugadda Venkadu* v. *Receiver of Nidadavole and Medur Estates*, 30 Ind. Cas. 832; (1915) M. W. N. 792, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry, in Appeal Suit No. 210 of 1913 (Referred Appeal Suit No. 89 of 1913, on the file of the District Court of Godaveri), preferred against that of the District Munsif of Rajahmundry, in Original Suit No. 67 of 1911.

Mr. *S. N. Rao* for Mr. *T. Prakasam*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—There has been a delay of 34 days in the presentation of this appeal, and the affidavit filed on behalf of the appellant does not account for the greater portion of that delay. The appeal is dismissed with costs.

The next question is whether we can hear the memorandum of objections, which was filed within one month from the filing of the appeal as required by law. The question depends upon the construction of Order XLI, rule 22, of the new Code corresponding to section 561 of the old Code. The new Code has made certain alterations in the law with respect to the hearing of the memorandum of objections. It provides by clause 4 that even if the original appeal is withdrawn or dismissed for default, the objections filed may nevertheless be heard and determined. But it does not say in so many words, at least so far as that clause is concerned, what will happen if the appeal is dismissed on the ground that it was filed after the expiry of the time allowed by law.

The question came up recently for consideration before Coutts Trotter and Kumaraswami Sastri, JJ., in *Biridugadda Venkadu* v *Receiver of Nidadavole and Medur Estates* (1). They have held that the memorandum of objections filed in circumstances similar to this case should be heard, though they have refrained from expressing any definite opinion on the general question involved. I am inclined to take the view that the memorandum of objections can be heard. I treat a case like this, where the appeal has failed or rather has been dismissed because it was filed out of time, as being dismissed upon hearing, distinguishing it from the case where it is not heard at all, being withdrawn or dismissed for default. Cases

(1) 30 Ind. Cas. 832; (1915) M. W. N. 792.

of withdrawal or dismissal for default are expressly provided for in clause 4, because it has been the relief under the old Code that in such cases the memorandum of objections fails *ipso facto*. I think the case of dismissal of an appeal filed out of time stands on a different footing and is very similar to the dismissal of a suit on the ground of limitation, and must be taken to be covered by clause 1 of rule 22, Order XLI. That is to say, the respondent in spite of the dismissal of the appeal because of limitation is entitled to have his cross-objections heard, if it was filed within one month of the filing of the appeal. That has been done in this case. Unless the Code lays down otherwise, I should say the respondent is entitled to have his objections heard. Having heard the objections on the merits, I think, however, that the memorandum of objections must be dismissed. It relates only to the question of costs and the Subordinate Judge appears to me to have exercised sound discretion in allowing part of the costs against the 1st defendant. At any rate, I am not prepared to say that there was no justification for the exercise of his discretion. He had a discretion and there were circumstances calling for the exercise of that discretion. The memorandum of objections is dismissed with costs.

AYLING, J.—As regards the preliminary question whether the respondent is entitled to have his memorandum of objections heard and determined, I am bound to say that my mind is not altogether free from doubt. The case to which we have been referred, *Biridugadda Venkadu* v. *Receiver of Nidadavole and Medur Estate* (1), is certainly indistinguishable from the present one. But I feel somewhat pressed by the wording of clause 4 of Order XLI, rule 22, which so far as their judgment shows, was not considered by the learned Judges in that case. I find it unnecessary to say more as in the present case, I entirely agree with my learned brother that the memorandum of objections is one which should be dismissed on its merits.

I concur in the order proposed by my learned brother.

*Appeal and memorandum of objections dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 163 OF 1913.

August 12, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Newbould.

PUNIT NARAYAN SINGH AND OTHERS—DECREE-HOLDER—APPELLANTS

*versus*

RAJKUMARI GODABARI KOERI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Estate—Decree against widow, when binds estate—Test.*

Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property. [p. 581, col. 1.]

But in order that a decree may operate against the estate, the suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her [p 581, cols. 1 & 2.]

The test is not merely whether the female heir could have been sued, but whether she was in fact sued, in a representative capacity. If the reversioners be joined as parties, the fact would afford clear indication that the creditor intends to make the inheritance liable and not to restrict his remedy to the qualified interest of the female heir. But it is not essential that the reversioners should be joined; the frame of the suit, the judgment and decree may show that the proceeding is not against the female heir personally but against her as the representative of the estate of the last full owner. [p. 581, col. 2.]

Appeal against the order of the Subordinate Judge, Gya, dated the 15th March 1913.

Babus *Mahendra Nath Ray*, *Gonesdut Singh* and *Sheonandan Roy*, for the Appellants.

Babus *Dwarka Nath Chakrabarti* and *Chandra Sekhar Prosad Singh*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the decree-holders against an order which decides that they are not entitled, in execution of a decree for money obtained by them against Rani Sundar Koer on the 10th May, 1911, to proceed against the estate of her husband, now in the hands of his two daughters. The facts material for the determination of this question are not in controversy. On the 20th February, 1903, Rani Sundar Koer executed a usufructuary mortgage in favour of Punit Narain Singh for a loan of Rs. 25,000. The mortgagee paid Rs. 1,500 in cash and retained

the balance for payment of a decree obtained by one Baldeo Lal against the mortgagor on the 18th February, 1903. The usufructuary mortgagee was subsequently deprived of possession of the hypothecated properties as the result of a dispute between the mortgagor and her brother-in-law, which culminated in the Court of Wards taking charge of the entire estate. The usufructuary mortgagee was consequently driven to institute a suit on the 2nd January, 1911, against the mortgagor Rani Sundar Koer for recovery of the money advanced by him. He claimed only Rs. 17,5'.0 as the principal amount, namely, Rs. 1,500 paid in cash to the lady and Rs. 16,000 paid to the decree-holder, Baldeo Lal, in satisfaction of his claim. On the 10th May, 1911, the mortgagor confessed judgment and a decree was made against her for the amount claimed together with interest and costs. Before this decree could be executed Rani Sundar Koer died on the 27th March, 1912. Execution was then taken out against such portion of the estate of the husband as had come into the hands of his two daughters by virtue of his testamentary disposition. The terms of this disposition are not known to the Court as the Will mentioned is not on the record. The daughters contended that the decree obtained against their mother could not be executed against the estate of their father, which, upon her death, had passed into their hands. The Subordinate Judge has given effect to this objection and has dismissed the application for execution as against the daughters. We have been invited by the decree holders to hold that this view is erroneous.

The principle applicable to cases of this description is well settled. Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property: *Jugal Kishore* v. *Jotindra Mohun Tagore* (1). The position is different when the foundation of the decree is a liability which might bind the estate in the hands of the reversioners. But in order that the decree may operate against the estate, the suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her. The reason is obvious. Although in a suit brought to recover or charge an estate of which a Hindu female is the proprietress she will as defendant represent and protect the estate, as well in respect of her own as of the reversionary interest, still, and on this very account, the plaintiff is bound to give notice that he is seeking so large a remedy, in order to put those who may be ultimately affected upon their guard and to enable them to protect themselves. If the suit is so framed as only to claim a personal decree against the heiress, the decree can only be executed against the female holder personally and against her limited interest in the land, notwithstanding that the debt was one which might have been enforced against the estate in a suit properly framed for that purpose: *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (2); *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (3). The test consequently is not merely whether the female heir could have been sued, but whether she was in fact sued, in a representative capacity. If the reversioners have been joined as parties, that fact would afford clear indication that the creditor in ended to make the inheritance liable and not to restrict his remedy to the qualified interest of the female heir: *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (2); *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (4); *Srinath Dass* v. *Hari Pada Mitter* (5); *Bhagirathi Dass* v. *Balesvar Bagarti* (6); *Rameswar Mandal* v. *Provabati Debi* (7). But it is not essential that the reversioners should be joined; the frame of the suit, the judgment and the decree may show that the proceeding was not against the female heir personally but against her as the representative of the estate of the last full owner: *Jugal Kishore* v. *Jotindra Mohun Tagore* (1); *Court of Wards* v. *Maharaja Coomar Ramaput Singh* (8); *Ram Lal Shookool* v.

(1) 11 I. A. 66; 10 C. 985.

(2) 11 M. I. A. 241; 8 W. R. (P. C.) 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275.

(3) 2 I. A. 275; 1 C. 133; 24 W. R. 306.

(4) 15 B. L. R. 142; 23 W. R. 174.

(5) 3 C. W. N. 637.

(6) 19 Ind. Cas. 686; 17 C. W. N. 877; 41 C. 69; 19 C. L. J. 155.

(7) 25 Ind. Cas. 84; 19 C. W. N. 313; 20 C. L. J. 23.

(8) 14 M. I. A. 605; 10 B. L. R. (P. C.) 294; 17 W. R. 459; 2 Suth. P. C. J. 575; 3 Sar P. C. J. 117.

RAMSING v. PARUMAL.

Akhoy Charan Mitter (9); Roy Radha Kissen v. Nawatan Lall (10); Brojo Nath Pal v. Jaggeswar Bagchi (11); Kisto Moyee Dossee v. Prosunno Narain Chowdhry (12); Bisto Behari Sahoy v. Lala Baijnath Prasad (13); Bireswar Das Dey v. Kamal Kumar Dutt (14); Mohamed Sadut Ali v. Hura Sundari Debya (15); Trilochan Hazra v. Bakkheshwar (16); Rameswar Mandal v. Provabati Debi (7); Veerabadra Aiyar v. Marugandas Nachiar (17). Tested in the light of these principles, what is the position of the decree-holders in the case before us? There is no indication whatever that in the suit for recovery of the money, they intended to obtain a decree which would operate against the inheritance. The claim was in form personally against the widow. The decree on the face of it was personally against her. That decree cannot after her death be executed against the estate of her husband in the hands of his daughters who have taken it under his testamentary disposition. In this view, it is needless to determine whether the loan was in whole or in part for purposes which made it binding upon the reversionary heirs to the estate of her husband.

The result is that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at five gold *mohurs*.

*Appeal dismissed.*

(9) 7 C. W. N. 619.
(10) 6 C. L. J. 490
(11) 1 Ind. Cas. 62; 9 C. L. J. 346.
(12) 6 W. R. 304.
(13) 16 W. R. 49; 7 B. L. R. 213.
(14) 16 Ind. Cas. 437; 17 C. W. N. 337.
(15) 15 Ind. Cas. 351; 16 C. W. N. 1071.
(16) 14 Ind. Cas. 839; 15 C. L. J. 423.
(17) 8 Ind. Cas. 1072; (1910) M. W. N. 799; 34 M. 188; 9 M. L. T. 235; 21 M. L. J. 320.

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## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 45 OF 19 3.

July 30, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

RAMSING *alias* RAMLAL—PLAINTIFF—APPELLANT

*versus*

PARUMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Stamp Act (II of 1899), ss. 3, 19, 35—Promissory note executed outside British India, necessity of stamping—Promissory note, admissibility of, in evidence—Negotiable Instruments Act (XXVI of 1881), ss. 13, 64—Negotiability, how far essential to make an instrument promissory note—Promissory note, maker of, liability of, when not purporting to sign in a representative character—Presentment, when necessary—Holder, right of, to fall back on original consideration—Construction of document—Intention of parties.*

A promissory note not executed in British India is not compulsorily stampable under the Stamp Act but is chargeable only when presented, paid or negotiated in British India. [p. 584, col. 2; p. 586, col. 1.]

*Mahomed Rowthan* v. *Mahomed Husin Rowthan*, 22 M. 337; 9 M. L. J. 135, referred to.

A promissory note executed outside British India is admissible in evidence, even if unstamped. [p. 585, col. 1.]

*Semble.*—Judgments in English cases bearing on the definition of pro-note contained in the English Stamp Acts of 1870 and 1891 must be applied with discrimination in India, for that definition is wide enough to include almost every document that contains a promise to pay. [p. 583, cols. & 2.]

*Mortgage Insurance Corporation* v. *Inland Revenue Commissioners*, (1888) 21 Q. B. D. 352; 57 L. J. Q. B. 630; 36 W. R. 833; *British India Steam Navigation Co.* v. *Inland Revenue Commissioners*, (1881) 7 Q B. D. 165; 50 L. J. Q. B. 517; 44 L. T. 378; 29 W. R. 6 0; *Speyer Brothers* v. *Commissioners of Inland Revenue*, (1907) 1 K B. 246; 76 L. J. K. B. 186; 96 L. T. 70; 23 T. L. R. 145, referred to

Neither in England nor in India is the definition of a pro-note limited to an instrument that is negotiable according to mercantile usage. An instrument may be a pro-note without being negotiable. The test is not mercantile usage, but the terms of the statutory definition. [p. 583, col. 2; p. 584, col. 1.]

*Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, (1888) 20 Q. B. D. 645, referred to.

Section 64 of the Negotiable Instruments Act makes presentment of a pro-note a necessary condition only when it is sought to make liable parties other than the maker. [p. 584, col. 2.]

*Ardeshir Sorabsha Moos* v. *Khushaldas Gokuldas*, 10 Bom. L. R. 268; 32 B. 247; referred to.

When a pro-note is not given independently of the transaction of loan the plaintiff cannot fall back and sue on the original consideration. His suit must be based on the pro-note. [p 584, col. 2.]

*Krishna Narayan Parkhi* v. *Rajmal Manikchand Marwadi*, 2 Bom. L. R. 5; 24 B. 360, referred to.

A maker of a pro-note who does not purport to have signed it in a representative capacity renders himself personally liable on the same. [p. 585, col. 1.]

*Issur Singh* v. *Bergamann*, 30 C. 627, referred to.

Per *Boyd, A. J. C.*—Intention of parties is an element to be taken into account in considering what is the nature of a document. [p 585, col. 2]

*Yeo* v. *Dawe*, 34 W. R. 739; 53 L. T. R. (N. S.) 125; *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue*, (188 ) 21 Q B. D. 352; 57 L. J. Q. B. 630; 36 W. R. 833, referred to.

RAMSING *v.* PARUMAL.

Appeal against the decree of the District Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Dipchand T. Ojha*, for Respondent No. 1.

Mr. *Kalumal Pahlumal*, for Respondent No. 2.

JUDGMENT.

PRATT, J. C.—The plaintiff sued to recover a sum of money lent to the first defendant out of British India and re-payable at Shikarpur. In the plaint he said that the agreement of loan had been reduced to writing. Paragraph 5 of the plaint is as follows:—

"The plaintiff demanded from the defendant No 1 four thousand Sumbs deposited by him. But the defendant No. 1 could not pay the money at that time and said: 'I shall pay you, *i. e.*, the plaintiff, the aforesaid four thousand Sumbs with interest at Shikarpur.' As regards that the defendant No. 1 has also executed such agreement in his handwriting in favour of plaintiff in a *bandi* which is herewith filed. The defendant No. 1 executed such agreement at Kashgar on 12th July 1907."

The second defendant was joined, as he is the son of the first defendant, in order to make him liable to the extent of the joint family property in his possession.

The main defence was that the money was lent not to the first defendant, but to a partnership of which plaintiff and defendant No. 1 were partners and that that partnership having terminated plaintiff only was entitled to an account.

The lower Court found that the agreement recorded in plaintiff's *bandi* was a promissory note and that being unstamped it was not admissible in evidence. The Judge also gave a finding on the evidence that the personal loan was not proved.

The first issue that arises is whether the entry in plaintiff's book is a promissory note.

The entry is as follows:

"*Lekha vahi* (account book)

May Sri Ganesh (elephant faced deity) help;

An account opened by Paman Khialdasani Makhijo with Bhai Ramlal Begsingani Makhija at Kashgar, Khatan Khatai territory in *Sambat* 1964.

| Credit | Debit |
|---|---|
| 4000 *Miti Akhar Sud* 2 *Sambat* 1964 Russian gold Sumbs four thousand agreed to be paid with interest at the eight annas per cent. at Shikarpur—Handwriting of Paman Makhijo" | |

Mr. Rupchand contends that this is not a promissory note and cites the case of *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (1) for the proposition that the Court must consider what the document is in the common acceptation of men of business. Judgments in English cases bearing on the definition of pro-note contained in the English Stamp Acts of 1870 and 1891 must be applied with discrimination in India for that definition is wide to include almost every document that contains a promise to pay. It was, therefore, necessary for the Courts to place limitations on the definition and here is a line of cases, including the one cited, in which this has been done. The Courts had to consider whether the documents were promissory notes or something more than promissory notes, *e. g.*, a pro-note or a debenture in *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (2); a pro-note or a policy of insurance in *Mortgage Insurance Corporation* v. *Inland Revenue Commissioners* (3) and a pro-note or a marketable security in *Speyer Brothers* v. *Commissioners of Inland Revenue* (4). In all these cases the Courts had to consider whether the document was a pro-note or something more than a pro-note and in making this distinction the Courts considered in what light a merchant would regard the instrument. But neither in England nor in India is the definition of a pro-note limited to an instrument that is negotiable according to mercantile usage.

There was no definition of a promissory note in the Stamp Act of 1879 but when the present Stamp Act was enacted, the Legisla-

(1) (1898) 20 Q. B. D. 615.
(2) (1881) 7 Q. B. D 165; 50 L. J. Q. B. 517; 44 L. T. 378; 29 W. R. 610
(3) (1888) 21 Q. B. D. 352; 57 L. J. Q. B. 630; 36 W. R. 833.
(4) (1907) 1 K. B. 246; 76 L. J. K. B. 186; 96 L. T. 70; 23 T. L. R. 152.

ture was careful to avoid the English definition and adopted that given in section 4 of the Negotiable Instruments Act merely adding thereto undertakings to pay on certain specified conditions.

Now the definition of pro-note in section 4 includes instruments that are not negotiable, for a pro-note does not become negotiable unless it is expressed in the form prescribed by section 13; and of course conditional undertakings under the extension to the definition enacted by the Stamp Act would not be negotiable.

It follows, therefore, that an instrument may be a pro-note although it would not pass current as such among merchants and the test is not mercantile usage as has been suggested, but the terms of the statutory definition.

Now to turn to the document that is the basis of this suit. There are no conditions in it and it is signed by the maker. The only question, therefore, is whether the words used amount to an undertaking to pay. The words are "agreed to be paid." This seems to me as "it is agreed by me to pay" or "it is promised by me to pay" or "I promise to pay." There is no distinction between "I agree to pay" and "I promise to pay". In *Smith* v. *Dean* (5) the words "on the day of the transfer of the license I agree to pay you the sum of twenty pounds" were held to constitute a pro-note. In my opinion the writing in this case is a pro-note.

It is contended that it is an agreement. It is true that every promissory note is an agreement; for a promise is an agreement—Section 2 (*e*), Indian Contract Act; and a promissory note like a bond is a special form of agreement. The question then is whether it is chargeable under the general class of agreements not otherwise provided for under Article 5 (*c*) or as a particular form of agreement, *i.e.*, a promissory note under Article 49. The answer depends upon the matter in the writing in excess of that included in the definition. If this excess matter is mere surplusage, it does not alter the character of the document and it is a pro-note. An instance of this is the case of *Karupthappa Ronth·n* v. *Baoa Moideen Sahib* (6). But if the excess matters are terms and conditions which alter the substantial character of the document it is then an agreement or something else, but no longer a pro-note. This was expressed by Lindley, L. J., in the *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (3) in the following words: "I also think that 'containing a promise to pay' must mean that that is the substance of the document, the whole contents; it cannot mean containing a promise to pay forming one of a number of stipulations." But in the writing before us there is no matter—no conditions or stipulations—in excess of the bare agreement of undertaking to pay. I feel no doubt, therefore, that it is chargeable as a pro-note and not as an agreement.

It is next argued that the writing is an acknowledgment which may be disregarded and the suit based on the original transaction of loan. But it is not an acknowledgment of an existing liability but a promise to pay. Moreover, the provision as to future interest takes it out of the definition of acknowledgment contained in the Stamp Act. *Luxumibai* v. *Ganesh Raghunath* (7) and *Mulchand Lala* v. *Kashibulla Biswas* (8).

It is next contended that even admitting the writing is a pro-note the plaintiff may disregard it and sue on the original consideration. This would be so if the note were given independently of the transaction of loan. *Krishnaji Narayan Parkhi* v. *Rajmal Manikchand Marwadi* (9). But here the pro-note itself is the agreement of loan as is shown by the paragraph quoted from the plaint, the suit must be based on the pro-note and the pro-note must be proved. Section 91, Indian Evidence Act, and particularly illustration (*b*).

But although I have come to the conclusion that the entry in plaintiff's book is a pro-note and that the suit is and must be based on it. I do not think the lower Court was right in thinking that it was chargeable with duty and excluding it from evidence for want of stamp. The pro-note was made out of India and duty is chargeable under sections 3 and 19 only when the note is presented,

(5) (1900) 69 L. J. Q. B. 331; 81 L. T. 755.

(6) 12 Ind, Cas. 542; 36 M. 370; (1911) 2 M. W. N. 380; 10 M. L. T. 531, 24 M. L. J. 513.

(7) 25 B 373; 2 Bom. L. R. 1132.

(8) 35 C. 111; 11 C W. N. 1120.

(9) 24 B. 360; 2 Bom. L. R. 25.

(10) 22 M 337; 9 M. L. J. 135.

paid or negotiated in British India. As none of these events have happened no duty is chargeable on the note, and it is, therefore, not excluded by section 35. This was so decided in the similar case of *Mahomed Rowthan* v. *Mahomed Husin Rowthan* (10). Mr. Dipchand appears to argue that it was the duty of the plaintiff to present the note for payment. But section 64 of the Negotiable Instruments Act makes presentment a necessary condition only when it is sought to make liable parties other than the maker. There are no such parties here for the note has not been endorsed and is not negotiable. The maker is the principal debtor and he is liable to the holder irrespective of presentment. *Ardeshir Sorabsha Moos* v. *Khushaldas Gokuldas* (11).

The pro-note is, therefore, admissible in evidence and the only question that remains is whether it was for money lent to the first defendant or for money lent, to the partnership. But if it was for money lent to the partnership, it was quite easy for defendant to have protected himself by signing as manager or agent of the partnership. There is no satisfactory explanation as to why he did not do so. Moreover as said by Sale, J., in *Issur Singh* v. *Bergmann* (12), "the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction should be separately pursued." And on the facts I agree with my learned colleague that the advance was an advance to the defendant No. 1 personally. Defendant No. 2 is his son and as no partition has been proved he is liable to the extent of the joint family property, if any, in his possession.

I would, therefore, reverse the decree of the lower Court and decree plaintiff's suit as proposed by my learned colleague.

BOYD, A. J. C.—This is a suit to recover money said to have been lent by plaintiff to defendant No. 1 in Russian territory. Defendant No. 1 resides at Shikarpur in Sind. It was urged for defendants that the document exhibited below produced by plaintiff is a promissory note and inadmissible in evidence in view of sections 19 and 35 of the Indian Stamp Act, 1899, as plaintiff took no steps to get it stamped. The learned District Judge found that this document is a promissory note, refused to admit it and dismissed the suit. The document is as follows:—

"*Lekha vai* (account book)

May Sri Ganesh (elephant-faced deity) help;

An account opened by Paman (defendant) Khialdasani Makhijo with Bhai Ramlal (plaintiff) Begsingani Makhija at Kashgar Khatan Khatai territory in *Sambat* 1954.

| Credit | Debit |
|---|---|
| 4000 *Miti Akhar Sud* 2 *Sambat* 1964. Russian gold Sumbs four thousand agreed to be paid with interest at the rate of eight annas per cent. at Shikarpur—Handwriting of Paman defendant) Makhijo." | |

The definition of a promissory note is contained in section 4 of the Negotiable Instruments Act:—

"A 'promissory note' is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

This definition was adopted with an addition by the framers of the Indian Stamp Act of 1899 in section 2 (22) of that Act.

I was at first inclined to think that this document is not a promissory note, as it seemed possible that the words "agreed to be paid" might refer to a former promise and not to a promise made on the date of the document. I entirely concur with the learned Judicial Commissioner in his view that the word "agree" in this context means "promise." But it seemed difficult to say for certain whether defendant meant to make the promise then, or was merely alluding to a previous promise made perhaps a few days before. As they stand the words seem to be capable of either interpretation. This being so, it is allowable to try to find out from the record what the parties intended the words to mean. In

(11) 10 Bom. L. R. 268; 32 B. 247.
(12) 30 C. 627.

*Yeo* v. *Dawe* (13) and *Mortgage Insurance Corporation* v. *Commissioners of Inland Revenue* (3) Lord Esher laid down that the intention of the parties is an element to be taken into account in considering what is the nature of a document. Now in this case neither party ever suggested that the words refer to a previous promise. On the contrary both say that the terms of the agreement were reduced to writing. Plaintiff says this in his plaint (paragraph 5) and defendant in his deposition. This clearly means that the writing contains the promise or, in other words, that the promise and the writing were contemporaneous. So the theory of a former completed transaction may be discarded. The written words amount to a promise. It follows that the document is a promissory note unless it is something more; and the learned Judicial Commissioner has shown that it is nothing more.

I entirely agree with the Judicial Commissioner that this document requires no stamp. Sections 3 and 19, Indian Stamp Act, do not apply. And no other section makes it compulsory to stamp a pro-note which has not been executed in British India.

*Decree reversed.*

(13) 33 W. R. 739; 53 L. T. R. (N. s.) 125.

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1912-13 OF ALLAHABAD DISTRICT.

December 9, 1913.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

RAJA SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

*Thakur* PARGAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 87—Death of tenant—Heirs not traceable—Ejectment suit against sub-tenant, if maintainable.*

A landlord, before he can eject a sub tenant, must prove that the tenant-in-chief has died without leaving any heirs. The mere fact that no trace is to be found of his heirs does not entitle him to a decree, as there is no abandonment when the holding is cultivated by the sub-tenant. Section 87 applies only when a tenant has ceased to cultivate his holding either by himself or by some other person. [p. 586, col 2.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 3rd May 1913, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

FACTS of the case appear from the following quotation from the Commissioner's judgment.

"The appellants as land-holders have sued to eject the defendants-respondents treating them as their tenants. There is no one else who can be so treated [*Siria* v. *Mukhram*. File No. 1659 of 1896]. It is urged that Khunni left a son called Mahadeo. He does not appear. Some people say he is dead and some say he is not..... The plea of mortgage must fail. They have no legal status as mortgagees. They are liable to pay rent on the fields to the plaintiff and no one else, for Mahadeo is a person of doubtful existence."

JUDGMENT.

BAILLIE, S. M. (*December 3, 1913.*)—The land in question was the occupancy holding of one Khunni and it is proved that Khunni mortgaged the two fields now in question, which were a part of his holding, to the appellant. Khunni died a year ago. It is alleged for the appellant that Mahadeo, the son of Khunni, left the village eight or nine months ago, the remainder of the holding besides the land, now in question, being in the hands of sub-tenants. For respondent, it is alleged that Mahadeo left ten years ago and that he is dead. The Commissioner decided the case with reference to a ruling passed under the former Act which, in my opinion, is not in any way applicable under the Tenancy Act. A right of occupancy existed in this land and that right can be extinguished only under the circumstances mentioned in section 18, that is, so far as this case is concerned the right of occupancy may have been extinguished owing to the tenant having died leaving no heir under this Act to inherit. This was the plain question which was before the Commissioner to decide. There is no other question, inasmuch as there was clearly no abandonment as the holding is admittedly cultivated by the sub-tenants and the appellant, and section 87 applies only when a tenant has ceased to cultivate his holding either by himself or by some other person,

I would allow this appeal and direct that the case be restored to the file of the Commissioner's Court for decision with reference to his finding on the issue whether the death of Mahadeo has been proved or can legally be presumed. It is necessary to send the case back inasmuch as before the Commissioner an affidavit was filed stating that the Court of first instance had refused to record the evidence of witnesses on behalf of respondent who were present in Court.

Costs will follow the final issue.

TWEEDY, J. M.—I concur.

*Appeal allowed; Case remanded.*

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## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 249 OF 1915.

December 21, 1915.

*Present*:—Mr. Justice Holmwood and Mr. Justice Mullick.

KIRANBALA DEBI—PLAINTIFF—APPELLANT

*versus*

KALI CHARAN SINGHA—DEFENDANT—RESPONDENT.

*Hindu Law—Widow, decree against, interpretation of—Test—Sale in execution of decree against Hindu widow's interest, effect of.*

Where a decree against a Hindu widow directs her right, title and interest in the husband's property to be sold, the test to be applied in order to determine the exact interest that will pass by the sale depends upon the question, whether the suit in which the sale is directed is one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in suit. [p. 589, col. 2.]

*Jotendro Mohun Tagore* v. *Jogul Kishore*, 7 C. 357, 9 C. L. R. 57, *Jugul Kishore* v. *Jotendro Mohun*, 10 C. 985; 11 I. A. 66, followed.

In making a decree against a Hindu widow, a Court ought to state specifically whether the decree is a personal decree or one against her as representing her deceased husband. [p. 590, col. 1.]

*Ram Kishore Chuckerbutty* v. *Kellykanto Chuckerbutty*, 6 C. 479; 8 C. L. R. 1, applied.

In the absence of such specification it is open to any Court dealing with the decree to interpret it in accordance with sound principles of law and it is not open to the Judge who made the decree to interpret it in a sense which would render it contrary to law [p. 590, col. 1.]

In interpreting a decree against a Hindu widow for mesne profits of a property, the frame of the original suit for recovery of possession of that property can and should be gone into. [p. 590, col. 1.]

*Roy Radha Kissen* v. *Nouratan Lall*, 6 C. L. J. 490 at pp. 519-20, referred to.

Appeal against the decree of the Subordinate Judge, Berhampore, dated the 19th April 1915.

FACTS of the case appear from the judgment reported as *Bhagabati Barmaniya* v. *Kali Charan Singh*, 32 C. 992, they are briefly as follows:—

One Ram Lal died in March 1868 leaving a widow and sisters' sons, Jagat Mohun, Nilkanta and Shyamacharan, having executed a Will before his death. Madhusudan was another son of a sister who was born after Ram Lal's death. The widow executed an *ekrar* in favour of Shyamacharan, the only surviving sister's son, on 11th October 1901. Kalicharan, son, of Nilkanta, instituted a suit in 1902 against the widow, Shyamacharan and others for declaration of his title to a certain share of the property of Ram Lal, which was claimed and was in the possession of Shyamacharan by virtue of the *ekrar*. This suit was contested by Shyamacharan but it was decreed by the District Judge on the 24th April 1903. There was an appeal to High Court which was dismissed on the st June 1905. From the decision of the High Court Shyamacharan preferred an appeal to the Privy Council and pending this appeal he died on the st April 1906. The estate left by Shyamacharan then went into the possession of certain persons who claimed to be the executors under an alleged Will of Shyamacharan.

In a probate proceeding this Will was found to be a forgery and thereupon Shyamacharan's widow got possession of the estate, and continued in possession of the lands in suit up to *Chait* 1317 B. S., corresponding to April 1911, when she on being informed of the dismissal of the appeal by the Privy Council gave up possession of the lands in suit. In the meantime on the 29th July 1907, Kalicharan had sued Shyamacharan's widow and his daughter for recovery of possession and mesne profits of the lands in suit. In this suit the defendants did not object to the delivery of possession and the suit was decreed with mesne profits on the 27th April and an enquiry into the amount of mesne profits was ordered. The subsequent enquiry that was held resulted in an order, the meaning of some terms of which

was in controversy in this appeal. The words were to this effect: "The plaintiff do get from Kiranbala (the widow) on account of mesne profits Rs. 2,388, etc. etc...."

The Judge who had made the decree interpreted these words to mean that the life-interest of Kiranbala in her husband's property was liable to be sold in execution of the decree and he accordingly ordered her life-interest in certain Government promissory notes inherited by her from her husband to be sold. Against this order this appeal was preferred to the High Court.

Babu *Brij Lal Chakraverty* with him Babu *Guru Das Sinha*, for the Appellant.—The Judge of the Court below had no jurisdiction to sell the life-interest of the widow in execution of the decree for mesne profits; for that decree did not say that her life-interest should be sold. The Judge must interpret the decree in accordance with law and the nature of the case clearly shows that the decree against the widow was not a personal decree. The cause of action for the title suit arose during the life-time of her husband; after the death of the husband, she was in duty bound to defend the suit by which her husband's estate was sought to be diminished. It would have been dereliction of duty on her part if she had not prosecuted the appeal in the Privy Council which had been preferred by her husband. All that could be sold under the decree is her right, title and interest in the property, but her life-interest could not be sold under the decree.

[HOLMWOOD, J.—Right, title and interest means life-interest.]

That may or may not be. A Hindu widow's right, title and interest in her husband's property may be more than her life-interest under certain circumstances. When the decree does not say that her life-interest would be sold, the Judge of the executing Court has no jurisdiction to order the sale of the life-interest. The sale of her life-interest in the Government promissory notes will fetch a very small price and the result will be that after the sale the decree will remain unsatisfied and her other properties might be sold. The widow gave up possession as soon as she learnt that the appeal in the Privy Council had been dismissed. Thus she acted very honestly.

Referred to *Jugul Kishore* v. *Jotendro Mohun Tagore* (1), *Jotendro Mohun Tagore* v. *Jugal Kishore* (2), *Baroda Kanta Chattapadhya* v. *Jatindra Narain Roy* (3), *Ramkishore Chuckerbutty* v. *Kallykanto Chuckerbutty* (4), *Harinath Chatterjee* v. *Mothur Mohun Goswami* (5), *Hari Saran Moitra* v. *Bhubaneswari Debi* (6), *Mahabir Pershad* v. *Moheswar Nath Sahai* (7), *Sri Raja Rau Lakshmi Kantaiyammi* v. *Sri Raja Inuganti Rajagopal Rau* (8), *Punit Narain Singh* v. *Raj Kumari Godabari Koeri* (9).

Babu *Lal Mohan Ganguly*, for the Respondent.—The mesne profits went into the pocket of the widow and the estate of her husband was not benefited; therefore, the widow herself should disgorge what she has taken. The decree against her was intended to be and was in fact a personal decree. No question as to the interpretation of the decree could arise in this case, because the very Judge who made the decree held in the execution proceedings that the decree was a personal one and the life-interest of the widow in the estate of her husband was liable to be sold.

[HOLMWOOD, J.—Has the Judge any right to interpret his decree in a manner contrary to law? Are we bound by his interpretation?

His personal opinion as to what he meant by the decree when making it is wholly irrelevant. The question is whether the decree was against the widow in her personal capacity, apart from what the Judge meant or thought.]

I would submit the decree was against the widow personally, because she herself enjoyed the mesne profits and the Judge, in view of this fact, passed a decree against her personally.

JUDGMENT.—This is an appeal from an order of the learned Subordinate Judge of Berhampore directing that the life-interest of a Hindu widow in certain Government promissory notes should be sold in the first

(1) 10 C. 985; 11 I. A. 66.
(2) 7 C. 357; 9 C. L. R. 57.
(3) 22 C. 974.
(4) 6 C. 479; 8 C. L. R. 1.
(5) 21 C. 8; 20 I. A. 183.
(6) 16 C. 40; 15 I A. 195.
(7) 17 C. 584; 17 I A. 11.
(8) 2 C. W. N. 337; 21 M. 344; 25 I. A. 102.
(9) 32 Ind. Cas. 580; 22 C. L. J. 400.

instance and if this is not sufficient, the promissory notes themselves should be sold.

The decree against the widow was for mesne profits of a property recovered by the decree-holder in litigation with her husband. Part of the mesne profits accrued due during the husband's life-time and part after his death.

The learned Judge divided the claim into three periods:—1. The period of the husband's life-time for a few months in 1312. 2. The period of the executors of the estate under a forged Will during the remainder of 1312 and up to *Assin* 1316. 3. The widow's period from *Kartick* 1316 to *Chaitra* 1317 when she gave up possession. Shyamacharan Singh, the husband, died on the 1st April 1906. Litigation was then still going on. Plaintiff's title to recover possession of $\frac{1}{3}$rd had already been declared but there was an appeal pending.

Plaintiff sued to recover possession with mesne profits on the 29th July 1907. The suit was kept pending for the Privy Council decision in appeal as to the title. The Privy Council delivered judgment on the 14th February 1911=2nd *Falgun* 1317 and the widow made over possession directly. She had notice of the decision in March 1911= *Chait* 1317. On the authorities it is clear that the widow could not be made personally liable for the mesne profits on her husband's estate. Only the estate itself could be made liable.

The widow was bound to defend the litigation by which it was sought to diminish her husband's estate by one-third. She did no wrongful act. She had no possession herself after the final decree of the Judicial Committee. She must, therefore, have been sued in her representative capacity for mesne profits and if her right, title and interest were put up for sale as it ought to have been, what would pass would be the estate of the husband. But in an enquiry as to the amount of mesne profits due to the decree-holder the learned Subordinate Judge passed a judgment on the 29th August 1914, which matured into the decree now sought to be executed, declaring that Kiranbala Dassi, the widow appellant, was liable for mesne profits from 1st *Bysack* 1313, Rs. 2,205 odd with interest and future interest till realization, *secondly* from 1st *Bysack* 1316, Rs. 2,306 odd with interest as before and *thirdly*, Rs. 5,936 from 1st *Bysack* 1317. Now the dates given in the decretal order and the decree appear not to tally with the periods set out by the Judge or with the findings of the Commissioner.

The first item appears to be for the first period, that is, the period during Shyamacharan's life-time.

This alone shows that the decree against Kiranbala for this sum, whatever the learned Judge who made it may say, was a decree in her representative capacity and the respondent has admitted before us that he does not press for the personal liability of the widow as far as that amount is concerned. That being so, as all the items are governed by the words "Kiranbala is liable" the whole decretal order must be interpreted as meaning liable in her representative capacity. To hold otherwise would be to hold that the decree passed was contrary to all principle and authority and that a gross injustice was intended to be inflicted on the unfortunate lady by the Court. We observe that the learned Judge himself finds that it is quite true that the object of the decree-holder is to make Kiranbala Debi a beggar, because the promissory notes will pass out of her hands for a sum insufficient to cover the decree and they will have to be sold again at their face value as part of the husband's estate, yet he finds it impossible to interpret his own decree in the only way it can be interpreted so as to make it a legal and valid decree. In any case there was no decree against the life-interest of Kiranbala specificaly. All that could be sold was her right, title and interest and if that had been done, the test to be applied in order to determine the exact interest which passed at the sale would depend upon the question whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself, or one which affects the whole inheritance of the property in suit: *Jotindro Mohun Tagore* v. *Jugal Kishore* (2) upheld by *Jugal Kishore* v. *Jotindro Mohun Tagore* (1). An examination of the Sub-Judge's judgment on which the decree is based clearly shows that for the first period during her husband's life-time the widow could not be personally liable, for the second period, she

has been held not liable as the executors who got possession under a forged Will could alone be liable; how then could she be liable for the third period in any other capacity than that in which she has been found liable in the decree for the mesne profits accrued due during her husband's life time? The learned Subordinate Judge has neglected to carry out the sound rule that was laid down by this Court in the case of *Ramkishore Chuckerbutty* v. *Kallykanto Chuckerbutty* (4) in neglecting to state specifically whether the decree against the Hindu widow is a personal decree or one against her as representing her deceased husband and it was, therefore, open to any Court dealing with the decree to interpret it in accordance with sound principles of law and it was certainly not open to the Subordinate Judge to interpret it in a sense which would render it contrary to law. Even if the widow had been personally responsible for retaining possession after her husband's death, which in this case she certainly was not, there is authority for holding that inasmuch as the origin of the debt was in her husband, and the proceeds of the sale could not be applied exclusively to a liability incurred after the husband's death, what would pass in a sale of the right, title and interest of the widow would be the estate of inheritance: *Rajah Debendro Narain Roy* v. *Coomar Chundernath Roy* (10). In a suit in which the estate of her husband is in any way involved, the widow represents the whole estate of her husband and she alone is entitled to be a party as representing the estate and the decree fairly and properly obtained against her will bind the whole estate. See *Katama Natchier* v. *Srimut Rajah Moottoo Vijaya Ragunadha Bodha Gooroo Sawmy Periya Odaya Tever* (11).

There can be no doubt on the facts, pleadings and judgment in this case that the widow was sued for mesne profits in her representative capacity and even after sale under the decree the frame of the original suit can and should be gone into, as was pointed out by Mookerjee, J., in *Roy Radha Kissen* v. *Nauratan Lall* (12), where all the authorities on this point are collected.

*A fortiori* this can and should be done in interpreting the decree before sale when the decree does not specifically show on the face of it whether it was a decree against the widow in her personal or her representative capacity. We, therefore, think that the order of the Subordinate Judge is erroneous and that all that can be sold in execution is the right, title and interest of the widow in the estate of her deceased husband. The petition for execution against her personal, life interest is infructuous and must be dismissed with costs as an appeal from order valued above Rs. 10,000.

*Order set aside.*

(10) 20 W. R 30.

(11) 9 M. I. A. 539; 2 W. R. C. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25.

(12) 6 C. L. J. 490 at pp. 519-20.

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ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 65 OF 1915.

January 21, 1916.

*Present*:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

CHHATTAR SINGH—DECREE-HOLDER—APPELLANT

*versus*

AMIR SINGH—JUDGMENT-DEBTOR—RESPONDENT

*Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Decree—Payment out of Court, not certified—Court, power of, to take evidence as to such payments—Execution application, statement as to payment in, if can be relied on—Practice.*

No payment on foot of a decree having been "certified and recorded" within the meaning of Order XXI, rule 2, a Court is bound to assume that no such payments have been made and it is not entitled to go into evidence as to payments on an application for execution of the decree. [p. 592, col. 2.]

In case of payments made on foot of a decree the practice in Allahabad is that when payments are made in Court or out of Court there is a record on the execution file showing that the payments have been certified and recorded. [p. 592, col 1.]

Letters Patent appeal from the decision of the Hon'ble Mr. Justice Chamier in Second Appeal No. 1739, dated 23rd April 1915 and reported as 29 Ind. Cas. 274.

Mr. *Sital Prasad Ghose*, for the Appellant.

Mr. *Mohanlal Sandal*, for the Respondent.

CHHATTAR SINGH *v.* AMIR SINGH.

JUDGMENT.—This appeal arises out of an application made by a decree-holder to execute a decree. In the application for execution the decree-holder stated that the decree was payable by instalments and the first four instalments had been paid but default had been made in the fifth instalment. He accordingly asked for execution of the decree in respect of the balance still remaining due. The decree was an instalment decree but provided that if default was made in the payment of the instalments, the full amount should become due. The judgment-debtor opposed the application on the ground that the application for execution was barred by time. He denied that payments had been made of any instalments. The Court of first instance after setting forth the facts states as follows: "The judgment-debtor contests that the application is time-barred inasmuch as under the present Act the Court cannot recognise any uncertified payments. The decree-holder on the other hand says that the terms of the decree are not imperative and that the decree would be within time assuming the payments referred to were not recognised." The Court accepted the contention of the decree-holder and disallowed the objection. On first appeal to the District Judge the decision of the Court of first instance was upheld. On second appeal to this Court a learned Judge reversed the decision of the lower Courts and dismissed the application as barred by time.

The *first* question for consideration is whether on the assumption that no payments were ever made, the decree-holder is entitled to have execution for the remaining instalments. If the first four instalments had been made, it is quite clear that the application for execution in respect of the remaining instalments would be well within time. The contention, however, of the judgment debtor is that assuming default was made in respect of the first instalment, the full amount of the decree became payable and that under the provisions of Article 182 (clause 7) the application is barred. The decree-holder on the other hand contends that he was entitled, if he so pleased, to waive his claim to the earlier instalments and that he was entitled to get execution in respect of the remaining instalments This was his contention in the Court of first instance, which was accepted by the Munsif. It seems to us that this contention is not sound. Undoubtedly (on the face of the decree) it was directed that payment of the full amount should be made when default was made in the payment of any instalment. Therefore, under clause 7 of Article 182 time began to run from the date when the first instalment became due (we are dealing now with the case upon the assumption that default was made on that date).

It is *next* contended that the decree-holder ought to have been allowed to go into evidence to show that the first four instalments had been paid out of Court. He says that he had his witnesses ready which could and would have been produced if the Munsif had not expressed an opinion that this was unnecessary and that the judgment-debtor's objection was bad for other reasons. It is quite possible that the witnesses were present and that the decree-holder might have given evidence as to the payments of the first four instalments. There is, however, nothing on the record to show that the witnesses were present in Court. However this may be, the judgment-debtor's objection has still to be considered. He relies on the provisions of Order XXI, rule 2, which is as follows: "Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly" Clause (3) is as follows: "A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree." The judgment-debtor contends that even if the witnesses were present in Court ready to give evidence, the Court could not hear them inasmuch as the only way in which a payment towards the decree could have been proved was by its being "certified and recorded" according to the rule. As against this contention the decree-holder says that there is no period prescribed by law within which he could certify the payment made on foot of the

decree out of Court, and that his application for execution in which he says that payments had been made should have been treated as "certifying." The appellant relies upon the case of *Lakhi Narain Ganguli* v. *Felamani Dasi* (1) and upon the case of *Rajam Aiyar* v. *Anantharatnam Aiyar* (2). In the first of these cases the learned Judges say. "The decree was obtained as long ago as the 5th April 1909 and the application for execution was made on the 17th December 1913. Between these two dates, on three occasions, as found by the learned Judge of the Court below, the judgment-debtor made part payments to the decree-holders, namely, on the 6th March 1911, 18th March 1912, and the 21st February 1913. Receipt of each of these payments was endorsed on the back of an office copy of the decree and thereupon the decree-holders applied on the 17th December 1913 for execution for the balance remaining due under the decree."

Later on the learned Judges say: "There is no definition of what certifying or recording is; but it is quite clear that the practice in this country is that the decree-holder certifies the part payments in the application for execution and thereupon the Court having recorded the whole of the petition directs execution to issue for the balance."

We are not prepared to accept this as the practice in these Provinces. In our opinion the practice is that when payments are made in Court or out of Court, there is a record on the execution file showing that the payments have been certified and recorded. It would obviously not be within the spirit of Order XXI, rule 2, that the "certifying" of the payments on foot of a decree should rest entirely with the decree-holder. He might often be tempted to record on his private copy of the decree a part payment which had in fact never been made. We may assume for the purposes of argument that a decree-holder may at any time come in with an application to the Court that he should be at liberty to certify a payment and have it recorded, but in the present case there was no such application made by the decree-holder. He merely came in with an application for execution alleging that certain payments had been made. As to what has been the practice of "certifying" payments, we may refer to the case of *Gokul Chand* v. *Bhika* (3) and also to the case of *Bhajan Lal* v. *Chede Lall* (4). In our opinion no payment on foot of the decree having been "certified and recorded" within the meaning of Order XXI, rule 2, the Court was bound to assume that no such payments had been made and it was not entitled to go into evidence as to payment on an application for execution of the decree. In this view the decree of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

*Appeal dismissed.*

(1) 27 Ind. Cas. 11; 20 C. L. J. 131.
(2) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) M. W. N. 127.
(3) 23 Ind. Cas. 753; 12 A. L. J. 387.
(4) 24 Ind. Cas. 215; 12 A. L. J. 825.

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1003 OF 1914.

December 3, 1915.

*Present*:—Mr. Justice Coutts Trotter.

V. SUBRAYA DAVAY—PLAINTIFF—PETITIONER

*versus*

V. S. VENKATARAMA AIYAR—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 95, scope of —"Expense or injury caused to the defendant," meaning of—Court, power of to award general damages.*

Section 95 of the Code of Civil Procedure does not prescribe any particular procedure by which a defendant wrongfully arrested should claim compensation; it is enough if the Court becomes seized of the matter in some form or other. [p. 593, col. 1.]

The words "expense or injury caused to the defendant" in section 95 of the Code of Civil Procedure are not confined only to some tangible injury that can be measured directly in money but include also general damages for injury to reputation or the humiliation caused of necessity by the arrest. [p. 593, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Principal District Munsif of Trichinopoly, in Civil Miscellaneous Petition No. 173 of 1914 in Small Cause Suit No. 645 of 1914.

Mr. *K Bashyam Aiyangar*, for the Petitioner.

Mr. *K. R. Narayanaswami Aiyar* for Mr. *T. Natesa Aiyar*, for the Respondent.

NAJAF KHAN *v.* GIRDHARIA.

JUDGMENT.—This is a petition to set aside an order of the District Munsif of Trichinopoly in which he awarded a sum of Rs. 50 as compensation to the respondent, who had been arrested before judgment on the suit of the petitioner. It is sought to set aside this order on two grounds. The *first* is that the matter was not brought before the Court in the manner provided by section 95 of the Civil Procedure Code. The fact was that, in the proceedings on the petition for arrest, the defendant filed a counter-petition in which besides traversing the statements of the petitioner relating to the necessity for the arrest he asked for damages for the arrest, which by then had been carried out. The Court was, therefore, fully seized of the matter, and this objection is entirely without merits.

The *next* point taken is that the words of section 95 which speak of "the expense or injury caused to the defendant" for which compensation is to be awarded, only extend to cases where what in English Law would be called "special damage" can be shown; that is to say, where the plaintiff has suffered some tangible injury that can be measured directly in money. I see no ground for confining the words in that sense, and I think it is perfectly competent to the Court to award general damages for injury to reputation or the humiliation caused, of necessity, by the arrest. I think it was, therefore, quite within the competence of the District Munsif to award general damages of this nature; and the amount he has awarded is a very modest one. The petition is dismissed with costs.

*Petition dismissed.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 742 OF 1914.

January 10, 1916.

*Present:* - Mr. Justice Walsh.

NAJAF KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

GIRDHARIA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 21—Mortgage of occupancy holding before operation of Act—Possession and dispossession after operation of Act—Suit for possession by mortgagee, if maintainable—Party in possession, position of.*

A usufructuary mortgage of an occupancy holding was executed before the coming into force of the Agra Tenancy Act, 1907, but the mortgagee obtained possession after the Act came into force. He was subsequently dispossessed and sued for possession:

*Held*, that the mortgagee could not recover possession, inasmuch as the mortgage was governed by the provisions of the Agra Tenancy Act, 1901. [p. 594, col. 1.]

*Bahoran Upadhya* v. *Uttamgir*, 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779, referred to.

Where both litigants are parties to an invalid transaction, the position of one in possession is stronger and must prevail. [p. 593, col. 2.]

Second appeal from the decision of the Subordinate Judge of Banda, dated the 27th of February 1914.

Mr. *S. P. Sinha*, for the Appellants.

Mr. *Ramakant Malaviya*, for the Respondents.

JUDGMENT.—This is an appeal by a plaintiff mortgagee in respect of a usufructuary mortgage of an occupancy holding granted on the 1st of October 1901. On some date in 1904 the mortgagee obtained possession. It is agreed that from that date this transaction is governed by the provisions of the Tenancy Act of 1901. In April 1910 the mortgagee was dispossessed by the mortgagor and he now brings this suit for possession. Both Courts have decided against him, upon the ground that the mortgage transaction under which he claims to take possession is, by the Act which now governs it, invalid. The point argued on behalf of the appellant is that the mortgagee having once recovered possession, if he is dispossessed by the mortgagor without being paid off, can notwithstanding the invalidity of the transaction again recover possession. The fallacy in that argument appears to me to be that in a suit for possession he is still asserting a transaction which is invalid. My attention was drawn to a decision in *Bahoran Upadhya* v. *Uttamgir* (1), where it was held that a mortgagor under similar circumstances who was out of possession could not recover it without paying the mortgage money. On the other hand it has been held in the case cited in the judgment of the Court below that a mortgagee cannot recover possession. The principle seems to be an illustration of the maxim that where both litigants are parties to an invalid transaction, the position of one in possession is stronger and must prevail

(1) 12 Ind. Cas. 112; 8 A. L. J. 931; 33 A. 779.

In this case it is to be observed that the mortgage money has been deposited in Court by the mortgagor and so far as appears from anything before me, he has done equity.

I see no ground for interfering with the decision of the lower Appellate Court and dismiss the appeal with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1549 OF 1913.

October 29, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, and Justice Sir William Ayling, KT.

K. RAMASWAMI NAICKER—DEFENDANT —APPELLANT

*versus*

A. SEENIMAKAYYA VELUCHAMI NAICKER—PLAINTIFF—RESPONDENT.

*Madras Estates Land Act (I of* 1908), *ss.* 55, 3 (16)—*Land not classed as* ryoti—*Suit for* pattah, *who can bring.*

A suit for a *pattah* under section 55 of the Act will lie only at the instance of a *ryot* in respect of that land alone which is classed as "*ryoti*", and not in respect of any land which is excluded from the definition of that term by section 3 (16) (*b*).

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 218 of 1912, preferred against that of the Court of the Sub-Collector of Dindigul Division, in Summary Suit No. 13 of 1911.

Messrs. *M. O. Parthasarathy Aiyangar* and *S. Gopalaswamy Aiyangar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*, for the Respondent.

This second appeal coming on for hearing on the 22nd December 1914, the Court delivered the following

JUDGMENT.—Under section 3 (16) (*b*) *ryoti* land does not include threshing floors, cattle stands, village sites and other lands situated in any estate which are set apart for the common use of the villagers. This definition was not apparently considered in the lower Courts. If the suit land at the time of the coming into force of Act I, 1908, came within the description of land so excluded from the category of *ryoti* land, then under the Act the tenant was not entitled to bring this suit. The last sentence of paragraph 2 of the District Judge's judgment qualifies the previous finding so that we cannot accept it as a finding that this was *ryoti* land. We must call for a fresh finding on the issue

Was the suit land *ryoti* land at the time when Madras Act I of 1908 came into force ?

This will involve another question, whether it ever was land of the description comprised in section 3 (16) (*b*) and, if so, whether it had ceased to be so before the Act came into force.

Fresh evidence may be taken. The finding should be submitted in two months, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Madura submitted the following

FINDINGS.— * * * * *

I would, therefore, answer the question raised by the 1*st* issue in the negative, the *first* clause of the *second* issue in the affirmative, and the *second* clause in the negative.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—This suit purports to be under section 55 of Act I of 1908. That section only gives a right to bring the suit to *ryots*, and the plaintiff according to the finding is not a *ryot* within the definition of the Act.

We accept the finding and dismiss the suit with costs throughout.

*Suit dismissed.*

BIDHU CHAND *v.* DURGA PRASAD.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 1 OF 1914-15 OF ETAWAH DISTRICT.

February 15, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

BIDHU CHAND—DEFENDANT—APPELLANT

*versus*

DURGA PRASAD—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 13—Occupancy holding, acquisition of—Ejectment—Tenant's son let into possession—Entry of* zemindar's *servant as tenant-in-chief, effect of—Tenancy, break in.*

A *zemindar* ejected a tenant in 1306 *Fasli*, and in 1307 *Fasli* the land remained in possession of the ejected tenant's son at the same rent though the name of the *zemindar's* servant was shown as the tenant-in-chief in the *patwari's* papers:

*Held*, that there was no break in the tenancy.

Board's Selected Decision in file No. 1229 of 1883, *Ishri Singh* v. *Ganga Prasad*, followed.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 7th July 1914, reversing that of the Assistant Collector of Etawah, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February* 10, 1915.)—I cannot accept the view of the Commissioner that the break of the tenancy of Bidhu Chand in 1307 *Fasli* was complete. The Board's Selected Decision in file No. 1229 of 1883, *Ishri Singh* v. *Ganga Prasad*, is applicable. In it it was held that a notice of relinquishment which is not followed by an act of relinquishment, does not cause a break in a cultivating tenure. In 1307, although Pahalwan, a servant of the *zemindar*, is shown as tenant-in-chief, yet he has not been produced as a witness by the *zemindar*, and the appellant's son, who was shown as a sub-tenant, is recorded as paying the same rent for this and other plots as paid by the tenant-in-chief. On these facts there seems little doubt that there was no actual break in the cultivation and, that despite the surrender, Bidhu Chand has held for a period more than twelve years from 1297 *Fasli* onwards, and has, therefore, acquired occupancy rights.

I would, therefore, set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

*Appeal allowed.*

MA BON LON *v.* MAUNG PO LU.

## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 170 OF 1915.

January 10, 1916.

*Present*:—Mr. Justice Maung Kin.

MA BON LON AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MAUNG PO LU—PLAINTIFF—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 100, applicability of—Charge—Mortgage—Security, when amounts to charge.*

Section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law, such as that of registration prescribed by section 59 of the Transfer of Property Act; the case being otherwise, if the relation of mortgagor and mortgagee does not exist between the parties. [p. 596, col. 2; p. 597, col. 1.]

Case-law on the point reviewed.

Mr. *N. N. Sen*, for the Appellants.

JUDGMENT.—The point for decision is whether the transaction in question operates as a charge or not under section 100 of the Transfer of Property Act.

The nature of the transaction is explained in the first paragraph of the plaint in these words:—

"The 1st defendant, being unable to repay the sum of Rs. 125 which she had borrowed from Maung Shwe So on the mortgage of the paddy land, was about to lose the same; so she asked the plaintiff to redeem the land with his own money and take possession of it and work it without paying any rent or charging any interest. The plaintiff accordingly paid Maung Shwe So the principal and interest amounting to Rs. 154 about the month of *Taboung* 1272 B. E. (1911) and redeemed the land in question and took possession of it and has since been working and enjoying it."

It is clear from this description that the transaction is a usufructuary mortgage.

The Township Court dismissed the suit, holding that the mortgage was invalid on the ground that it was not made by a registered deed, as it should have been under section 59 of the Transfer of Property Act, and that consequently the plaintiff was not entitled to a mortgage decree.

The District Judge on appeal to him also held that the plaintiff was not entitled

to a mortgage decree, but he said that he was entitled to a charge on the land and made a declaration to that effect. He cited as his authority a ruling of Ormond, J., in *Ma Lon* v. *Mg. Po Oh* (1).

In my opinion that case is different from the present. There the plaintiff at the request of the defendants redeemed a mortgage which they had made. He did not get possession of the property. Nor was it agreed that he should be given possession, as security for the money he had paid on behalf of the defendants. This seems quite clear, for two years later, he sued the defendants for specific performance of a contract to sell. As he did not prove the contract he alleged, the Court of 1st instance dismissed his suit. On appeal, however, the Divisional Court gave him a decree for possession as mortgagee, it is difficult to understand for what reason. Ormond, J., on second appeal, held that the plaintiff was entitled to a charge on the land to the extent of Rs. 1,200 (that being the amount for which he had redeemed the land) and to a declaration to that effect. It is clear that there was no mortgage within the meaning of section 58 of the Transfer of Property Act to the plaintiff as a result of his payment of Rs. 1,200.

In this case there is clearly an usufructuary mortgage for the sum for which the plaintiff redeemed the mortgage which had been made by the defendant.

Section 100 of the Transfer of Property Act provides that when immoveable property of one person is, by act of parties, * * * * * * * made security for the payment of money to another, the latter person is said to have a charge on the property, *if the transaction does not amount to a mortgage*. The qualifying words, "the transaction does not amount to a mortgage" are all-important and effect must be given to them. In *Pran Nath Sarkar* v. *Jadu Nath Saha* (2) Maclean, Chief Justice, says, "what we have to consider is whether the present transaction amounted to a mortgage. The expression 'amount to a mortgage' in section 100 means such a mortgage as is defined by section 58 of the Act." Therefore, having regard to the terms of the latter section, the question to ask is, is the transaction in question a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced by way of loan? If the answer is in the affirmative, the transaction is a mortgage and if by reason of any of the formalities of the law not having been complied with, it cannot be enforced as such, no charge can arise under section 100. In reality that section means that there is no charge in such a case. The Court is not at liberty to go against this statutory provision and apply general equitable principles and say that there is a charge in such a case, because in England under English Law where a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. "It is an established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it." Per Mookerjee, J., in *Royzuldi Sheik* v. *Kali Nath Mookerjee* (3). But where the transaction does not amount to a mortgage, the matter is different. The above view has been uniformly maintained in the Calcutta High Court both before and after the case above cited. See *Sreemutty Rani Kumari Bibi* v. *Rajah Srinath Roy* (4); *Tofaluddi Peada* v. *Mahar Ali Shaha* (5); *Girandra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (6); *Royzuddi Sheik* v. *Kali Nath Mookerjee* (3) and *Debendra Chandra Roy* v. *Behari Lal Mukerjee* (7). The Bombay High Court has adopted the same view, following the Calcutta cases. See *Narayan Babaji* v. *Lakshmandas Harachand* (8). In Madras, however, there are two cases which point to the contrary view. See *Rangasami* v. *Mutukumarappa* (9) and *Mithiram Bhat*

(1) Special Civil Second Appeal No. 140 of 1913.
(2) 32 C. 729; 9 C. W. N. 697.
(3) 23 C. 985 at p. 995; 4 C. L. J. 219.
(4) 1 C. W. N. 81.
(5) 26 C. 78.
(6) 26 C. 246; 3 C. W. N. 84.
(7) 15 Ind. Cas. 666; 16 C. W. N. 1075.
(8) 7 Bom. L. R. 934.
(9) 10 M. 509.

v. *Somanatha Naickar*(10). But in a later case the Madras High Court adopted the same view as Calcutta. See *Konchadi Shanbhogue* v. *Shiva Rao* (11). It must, therefore, be held that section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge, if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law.

In the present case the transaction set up is clearly mortgage, but it cannot operate as such because it was not made in accordance with the requirements of section 59 of the Transfer of Property Act. In the case decided by Ormond, J., there was something short of a mortgage the relation of mortgagor and mortgagee not existing between the parties, and it was right, and not contrary to the provisions of section 100 of the Transfer of Property Act, to hold that the transaction created a charge.

For the above reasons I hold that the transaction before me does not operate as a charge.

The appeal is allowed with costs throughout.

*Appeal allowed.*

(10) 24 M. 397.
(11) 28 M. 54.

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MADRAS HIGH COURT.
**FULL BENCH.**

APPEAL AGAINST APPELLATE ORDER NO. 120 OF 1912.

November 24, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

RAMA AIYAR AND ANOTHER—PETITIONERS—APPELLANTS

*versus*

KRISHNA PATTER—COUNTER-PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), ss. 13 (a), 44—Application for execution of a foreign decree, when allowed—Competency of foreign Court's jurisdiction, how determined—Voluntary submission, effect of.*

An application under section 44 of the Civil Procedure Code for the execution of a decree of a foreign Court may be resisted on any of the grounds mentioned in section 13 of the Code. [p. 599, col. 1.]

*Veeraraghava Iyer* v. *Muga Sait*, 26 Ind. Cas. 287; 27 M. L. J. 535; 1 L. W. 887; 16 M. L. T. 479; (1915) M. W. N. 162, followed.

Whether a foreign Court is or is not a Court of competent jurisdiction within the meaning of section 13 *(a)* has to be determined in accordance with the principles of international law, and not in accordance with the law of the country in which the foreign Court is situated. [p. 599, col. 1.]

*Pemberton* v. *Hughes*, (1899) 1 Ch. 781; 80 L. T. 369; 68 L. J. Ch. 281; 47 W. R. 354; *E. Christian* v. *P. J. Delanney*, 26 C. 931; 3 C. W. N. 614; *Shaik Atham Sahib* v. *Daoud Sahib*, 3 Ind. Cas. 199; 19 M. L. J. 457; 32 M. 469, referred to.

Where a defendant submits himself to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour, there is a duty cast on him to obey that judgment if it goes against him; but where his appearance is not voluntary but brought about under duress, the case is treated as though he had not appeared. [p. 600, col. 1.]

*Voinet* v. *Barrett*, 55 L. J. Q. B. 39 at p. 40; 39 W. R. 161, followed.

Where, therefore, a defendant appeared in a foreign Court under protest because "he did not want to be arrested when he went there on business" and a decree having been passed against him, the decree-holder applied in British India under section 44 of the Civil Procedure Code for execution thereof:

*Held*, that the mere intention of avoiding an inconvenience that might happen in the future did not make the defendant's appearance involuntary and the decree was binding upon him. [p. 605, col. 1.]

*Parry and Co.* v. *Appasami Pillai*, 2 M. 407, overruled.

Appeal against the decree of the District Court of South Malabar, dated the 19th August 1912, in Appeal Suit No. 169 of 1912, preferred against the order of the Subordinate Judge of Palghat, in Execution Petition No. 1471 of 1911, in Original Suit No. 134 of 1084, on the file of the District Court of Anjikaimal (Appeal Suit No. 50 of 1085 on the file of the Chief Court, Cochin).

This appeal coming on for hearing on the 14th and 21st October 1914, the Court (Oldfield, J., and Tyabji, J.) delivered the following

JUDGMENT.—Since the hearing in the lower Appellate Court some of the questions between the parties have been set at rest by the Full Bench decision in *Veeraraghava Iyer* v. *Muga Sait* (1).

In consequence of it there is now no suggestion that the Court cannot enquire into the binding nature of a foreign decree, of which execution is sought.

The question is next whether the decree is binding and, therefore, executable in consequence of the respondent's submission to the foreign Court's jurisdiction. The decision referred

(1) 26 Ind. Cas. 287; 1 L. W. 887; 27 M. L. J. 535; 16 M. L. T. 479; (1915) M. W. N. 162.

to decided at least that a party, who pleads in a foreign Court (although after protest), does not submit to its jurisdiction, if he does so in order to protect his property in that jurisdiction from attachment and perhaps sale. The respondent contends that it further left open the question whether the presence of an intention to avoid any other or lesser inconvenience, such for instance as the possible attachment of property, which the party might bring within the jurisdiction in future, would deprive his appearance or pleading of its character as a submission. *Vide Parry and Co.* v. *Appasami Pillai* (2). Before dealing with this, we think it advisable to have the facts clearly before us. We, therefore, call on the lower Appellate Court to find on the issue:

"What were the facts or reasons, which led the respondent to appear and plead in the foreign Court?"

Fresh evidence may be taken. The finding is due in six weeks. Seven days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of South Malabar submitted the following

FINDING.—A finding is called for on the issue:—"What were the facts or reasons, which led the respondent to appear and plead in the foreign Court?" Krishna Pattar, the respondent, states in evidence that the money, which Rama Aiyar, the plaintiff in Original Suit No. 134 of 1084 in the District Court of Anjikaimal in the Cochin State, sued to recover, was borrowed by him from Kailasa Aiyar, son of Rama Aiyar. He says that he had borrowed the money from Kailasa Aiyar for his trade in gold and re-paid it at the request of the latter in Madras, obtaining a receipt (Exhibit I) in acknowledgment of the amount paid and the letter (Exhibit II). When Rama Aiyar brought the suit against him, he was asked by Kailasa Aiyar to contest the suit and contend that the money had been paid back at his request. He states that Kailasa Aiyar said to him that unless he so contested the suit he would not refund the money to him in the event of his father obtaining a decree against the respondent. The respondent further explains that if a decree were obtained against him, he might have been arrested when he went to the Cochin State as he used to do to carry on his trade and to see his relations. The conversation about the suit between Rama Aiyar and the respondent is also mentioned by his 2nd witness, Samu Pattar, a trader of Palghat who also says that respondent paid back the money borrowed from Rama Aiyar in Madras as requested by Kailasa Aiyar. His brother-in-law, the 3rd witness, Anantarama Patter speaks of the trade of the respondent in Cochin (*vide* Exhibits III to VIII) and states that the respondent contested the suit because he did not want to be arrested when he went there on business. The appellant, who is the legal representative of the plaintiff in the suit, did not examine any witness. He relied mainly on the proceedings in the Anjikaimal Court in that suit (Exhibits H, J, B, C, D, E, F and G) to show that the plea of the respondent is not true and that he merely contested the suit because he expected to win it. But it is clear that the plea of want of jurisdiction was expressly raised by the defendant and the fact that he contested the suit on its merits, does not show that it was not with the object of avoiding the inconvenience of having a decree against him in the Cochin State. I see no reason on the whole to reject the evidence of the respondent and his witnesses as to the reasons which led him to contest the suit, and I find on the issue that the respondent appeared and pleaded in the District Court of Anjikaimal under the circumstances now stated by him.

This appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial on the 19th August 1915, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyer* and *N. A. Krishna Aiyar*, Vakils for the 2nd appellant, and of Messrs. *C. V. Anantakrishna Aiyar* and *T. K. Govinda Aiyar*, Vakils for the respondent, and the case having stood over for consideration till the 6th September 1915, the Court (Tyabji and Phillips, JJ.) made the following

(2) 2 M. 407.

RAMA AIYAR *v.* KRISHNA PATTER.

## ORDER OF REFERENCE.

TYABJI, J.—This appeal arises out of an application under section 44 of the Civil Procedure Code for execution of a decree passed in the Courts of the State of Cochin. It is admitted that there is such a notification with reference to the Courts in Cochin as is mentioned in that section.

It has been recently held, and was not questioned before us, that such an application may be resisted on the grounds mentioned in section 13 of the Civil Procedure Code [*Veeraraghava Iyer* v. *Muga Sait* (1)].

The present application is resisted on the ground that the foreign Court was not of competent jurisdiction: section 13 (*a*) of the Civil Procedure Code.

It is admitted that the Courts in Cochin had jurisdiction in accordance with the laws of Cochin. But whether a foreign Court is or is not a Court of competent jurisdiction within the meaning of section 13 (*a*) has to be determined in accordance with the principles of international law, and not in accordance with the law of the country in which the foreign Court is situated. See *Pemberton* v. *Hughes* (3) where it is said: "The jurisdiction which alone is important in these matters is the competence of the Court in an international sense, *i. e.*, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country." See also *E. Christian* v. *P. J. Delanney* (4) and *Shaik Atham Sahib* v. *Daoud Sahib* (5). In *Pemberton* v. *Hughes* (3) the question was (as it always is in England) whether a suit would lie in England on a foreign judgment. Section 44, however, permits execution to be obtained on the foreign judgment itself.

Whether section 44 does not proceed on the principle of "comity" as that expression is understood in *Schibsby* v. *Westenholz* (6), has not been argued before us, and I will assume that the principle of "comity" has no bearing on judgments falling within section 44. The difference between the two aspects is thus explained in *Schibsby* v. *Westenholz* (6): "and we think that if the principle on which foreign judgments were enforced was that which is loosely called 'comity', we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down;" the latter principle being thus explained: "we think that, for the reasons there given, the true principle on which the judgments of foreign Tribunals are enforced in England is that stated by Parke, B., in *Russell* v. *Smyth* (7) and again repeated by him in *Williams* v. *Jones* (8) that the judgement of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

The cases in which foreign Courts are in England recognised to be internationally of competent jurisdiction in regard to suits of a personal nature have been stated by Fry, J., in *Rousillon* v. *Rousillon* (9) to include the following five.

"1. Where he is the subject of the foreign country in which the judgment has been obtained;

2. Where he was resident in the foreign country when the action began;

(3) (1899) 1 Ch. 781; 80 L. T. 369; 68 L. J. Ch. 281; 47 W. R. 354.
(4) 26 C. 931; 3 C. W. N. 614.
(5) 3 Ind. Cas. 190; 32 M. 469; 19 M. L. J. 457.
(6) 6 Q. B. 155; 40 L. J. Q. B. 73; 24 L. T. 93; 19 W. R. 587.
(7) 9 M. & W. 810 at p. 819; 1 D. (N. S.) 929; 11 L. J. Ex. 308; 152 E. R. 343.
(8) 13 M. & W. 628 at p. 633; 2 D. & L. 680; 14 L. J. Ex. 145; 153 E. R. 262.
(9) (1880) 14 Ch. D. 351 at p. 371; 49 L. J. Ch. 338; 42 L. T. 679; 28 W. R. 623; 44 J. P. 663.

3. Where the defendant, in the character of plaintiff, has selected the *forum* in which he is afterwards sued;

4. Where he has voluntarily appeared;

5. Where he has contracted to submit himself to the *forum* in which the judgment was obtained".

In the present case only the 4th head need be considered. It is impliedly recognised as a source of international competence in *Gurdyal Singh* v. *Raja of Faridkot* (10), as a decree of a foreign Court to the jurisdiction of which the defendant has in any way submitted himself is in their Lordships' judgment excepted from those decrees which are described as being by international law a nullity.

What we have to decide, therefore, is whether or not the respondent had voluntarily appeared in the Cochin Court, or to use Lord Selborne's words in the *Faridkot* case (10), whether or not he had in any way submitted himself to the jurisdiction of the Cochin Courts.

Both the lower Courts have answered this question in the negative, and the question before us narrows itself down into whether there is any evidence on which they could have held that the defendant's appearance was caused by duress so as to prevent his appearance having the effect of clothing the Courts of Cochin with jurisdiction under the 4th head.

The facts are as follows:—

A sum of Rs. 2,300 was due from the respondent (Krishna Pattar) to the appellant (Rama Aiyar). The respondent paid this sum to Kailasa Aiyar, the son of Rama Aiyar. Rama Aiyar repudiated the payment to his son as a proper payment to himself, and brought the suit in the Cochin Courts. The respondent appeared in the Cochin Courts under protest, but pleaded on the merits. His defence on the merits was upheld in the Court of first instance in Cochin, but that decision was reversed by the Appellate Court. Both Courts decided against the respondent on the question of jurisdiction. The respondent says that his appearance was not voluntary having been actuated by the following circumstances:

(1) "He states" (in the words of the District Judge) "that Kailasa Aiyar said to him that unless he so contested the suit, he would not refund the money to him in the event of his father obtaining a decree against the respondent." In other words, a third party, Kailasa Aiyar, required the respondent to contest the suit and said to him that unless the suit was contested he (Kailasa Aiyar) would not refund the money which had been paid to him by the respondent on behalf of his father.

(2) "The respondent further explains that if a decree were obtained against him, he might have been arrested when he went to Cochin State as he used to do to carry on his trade and to see his relations."

Do these two circumstances furnish any evidence that the appearance of the respondent in the Cochin Courts was under duress?

Great reliance was placed by the respondent upon *Parry and Co.* v. *Appasami Pillai* (2), the principle of which decision appears in the following sentences: "The grounds on which those decisions proceeded were that the defendant, by appearing in the foreign Court and taking no objection to its jurisdiction, had for the time put himself under the jurisdiction of the Court and had led the plaintiff to believe that the proceedings were allowed by him to be effectual, and encouraged the plaintiff to proceed on them instead of withdrawing from them and instituting proceedings elsewhere." Mr. Justice Muthuswami Aiyar, whose decision was upheld, said in *Parry & Co.* v. *Appasami Pillai* (2): "The true test seems to be something in the conduct of the defendants which amounts to a voluntary submission to jurisdiction and which might amount to a breach of faith if the defendants were allowed to question the jurisdiction of the foreign Court."

The true principle, however, seems to be not that good faith estops the defendant from questioning the jurisdiction of a Court which in fact has no jurisdiction; but that the fact of the defendant appearing and pleading on the merits, and thus taking a chance of a decision being given in his favour (and inviting the Court to pronounce on the merits), makes that Court internationally competent to adjudicate on the merits, in the same manner as is done by

(10) 22 C. 222 at p. 238; 21 I. A. 171; 4 M. L. J. 267; (1894) A. C. 670.

residence (even temporary) of the defendant in the foreign country, or by a contract made prior to the suit by the defendant with the plaintiff to submit himself to the jurisdiction of the Court. Applying the test approved of in *Schibsby* v. *Westenholz* (6), it may be said that when a person appears before a foreign Court and takes the chance of a judgment in his favour, there is a duty cast upon him to obey that judgment even if it goes against him.

On the other hand, of course, where the defendant's appearance is not voluntary, but brought about under duress, the Courts cannot give to such an act any legal consequence: and "the case will be treated as though he had not appeared" [*Voinet* v. *Barrett* (11) per Lord Esher]. It has been assumed that one example of such duress is where property having been "seized by the foreign Tribunal in order to compel appearance" (*Ibid.*, per Cotton, L. J.), the defendant appears under protest in order to protect such property. On the other hand it has been said by Lord Esher, M. R., in the same case that the mere fear that things which may be afterwards carried into the foreign country will be seized is not such pressure as will prevent appearance from being voluntary under head 4 above: and Lord Justice Bowen said, "A man cannot be said to be compelled to appear because, if he does not do so, he may be inconvenienced in the long run" (page 42). This case would, therefore, appear to be directly against the contention of the respondent and it is only to be considered whether we are bound to follow the decision in *Parry and Co.* v. *Appasami Pillai* (2) in preference to *Voinet* v. *Barrett* (11).

*Parry and Co.'s* case (2) has, no doubt, stood in the Indian Law Reports for a long time, and there is much substance in the contention that we ought not to depart from it lightly as many parties may have proceeded on the basis of its correctness. But international law develops rapidly. The attitude of the Courts towards foreign judgments has certainly greatly changed since Lord Ellenborough said, "I will look to these foreign judgments with great jealousy" [*Molony* v. *Gibbons* (12)]. Now the Legislature of British India requires some of them to be executed as if they had been passed by the Courts of British India. Moreover, the decision in *Parry's* case (2) has recently been greatly canvassed and its soundness doubted in *Veeraraghava Aiyar* v. *Muga Sait* (1). It was not followed in *Patinjara Manakal Parameswaran Nambudri* v. *Subramania Pattar* (13), where the English decision in *Boissiere & Co.* v. *Brockner & Co.* (14) was followed without reference to *Parry and Co.* v. *Appasami Pillay* (2). The decision in *Patinjara Manakal Parameswaran Nambudri* v. *Subramania Pattar* (13), however, proceeded mainly on the ground that the defendant had filed an appeal from a decision against the foreign Court and in the appeal he had taken no objection to jurisdiction. On the other hand, Sadasiva Aiyar, J., one of the learned Judges who decided *Kuthaledath Narayana Moothol* v. *Cochin Sircar* (15), was prepared to follow *Parry & Co.* v. *Appasami Pillai* (2).

We have, therefore, the fact that there is a decision of this Court of long standing which has not been expressly overruled by a Full Bench and which Sadasiva Aiyar, J., is prepared to follow, in favour of the respondent. It is argued by the respondent that this consideration is strengthened by the fact that the only alternative to following *Parry & Co.* v. *Appasami Pillai* (2) is that we should follow the English decisions; and that the latter alternative ought not to be adopted, for this additional reason that the present state of authorities in England leaves the law in an unsatisfactory condition. (See Westlake's Private International Law, 5th Edition, page 406).

The facts with reference to voluntary or involuntary submission to jurisdiction under protest must (according to Professor Westlake's view of the present English authorities) be arranged under one of three heads:

(11) (1885) 55 L. J. Q.B. 39 at p. 40; 34 W. R. 161.

(12) 2 Camp. 502; 11 R. R. 778.
(13) 29 Ind. Cas. 456.
(14) (1889) 6 T. L. R. 85.
(15) 30 Ind. Cas. 511; 2 L. W. 637; (1915) M. W. N. 534; 26 M. L. J. 627.

(1) When the property of the defendant is at the date of appearance actually in the hands of the foreign Court.

(2) When the defendant possesses property which at the same date is within the grasp of the foreign Court, but not actually seized by it.

(3) When the defendant has business transactions in the foreign country and is frequently in such position that a judgment in a Court of that country could be executed against him there.

When the facts fall under the *first* head, the submission to jurisdiction has been considered (without ever having been so decided) to be involuntary; under the *other two* heads it has been held to be voluntary.

Professor Westlake points out that there cannot be any real distinction between the amount of pressure in cases (1) and (2). (This was the view of Wills, J., in *Voinet* v. *Breett* (16) reversed in appeal *Voinet Barrett* (11). Nor is there any solid distinction between cases (2) and (3). It would follow, therefore, that logically all three cases must result in the same manner, *i. e.*, either in each of these cases it ought to be considered that the submission has been voluntary, or the reverse.

We have, therefore, three alternative courses open to us :—

I. To hold [as held in *Parry's* case (2)] that in all three cases the submission is involuntary; in which case "the principle that jurisdiction is given by voluntary appearance would be practically abandoned." This principle has, however, as Professor Westlake points out, not been abandoned in *Boissiere & Co.* v. *Brockner & Co.* (14) nor in *Carrick* v. *Hancock* (17); still less, it may be added, in *Guiard* v. *De Clermont and Donner* (18).

II. To follow the English authorities as they stand, notwithstanding that they are anomalous.

III. To hold that in all three cases the submission is voluntary, which would be opposed to the dicta that when a person appears to protect his property, his submission may be considered to be brought about by duress and have no effect in conferring jurisdiction.

The trend of the most recent decisions in England is, however, in favour of this last course, namely, to recognise a foreign judgment whenever the defendant has appeared, *cf. Guiard* v. *De Clermont and Donner* (18) and the remarks on it in *Veeraraghava Aiyar* v. *Muga Sait* (1). In favour of the same view must be mentioned the principle that if the defendant takes the chance of a decision in his favour then he is bound: whenever he appears and defends the action on the merits, he takes such a chance. The fact that the defendant is even temporarily resident in the foreign country itself gives jurisdiction to the Court, the question of the time during which he has actually been in the country is wholly immaterial: *Carrick* v. *Hancock* (17). Jurisdiction may be given by agreement between the parties and where the suit is on a contract, it has sometimes been held by the Courts that by implication there was a contract that the foreign Court should have jurisdiction. It is important to note also that possession by the defendant of property in the foreign country is by itself considered by some countries, including Scotland, to be sufficient to give jurisdiction to the foreign country. See Dicey's Conflict of Laws, 2nd Edition, pages 56, 57; Story's Conflict of Laws, 8th Edition, section 549, where it is recognised that the property in the foreign country may be seized and attached and the decree is held not to be binding personally only if the defendant "has never appeared and contested the suit". See also *Douglas* v. *Forrest* (19) which was, however, doubted in *Schibsby* v. *Westenholz* (6) and in the *Faridkot* case (10) the possession of property was held to be no ground for jurisdiction. But it may be added that when the property is of sufficient value to induce the defendant to appear and defend the suit, the test of effectiveness, on which Professor Dicey bases the whole theory of the international competence of Courts, is satisfied.

On the other side and in support of the view that when property has been seized by the foreign Court appearance should be

(16) (1885) 54 L. J. (N. S.) Q. B. 521.
(17) (1895) 12 T. L. R. 59.
(18) 30 T. L. R. 511.

(19) 4 Bing. 686; 1 M. & P. 663; 6 L. J. (O. S.) C. P. 157; 29 R. R. 695; 130 E. R. 938.

considered involuntary and be deemed insufficient to clothe that Court with jurisdiction, we have in the first place the remarks in *Voinet* v. *Barrett* (11) though the actual decision was that the appearance was under such circumstances as to give jurisdiction to the Court. Professor Dicey says on this point: "The distinction suggested rests on good authority" (the authority is not cited) "but is not entirely satisfactory." (Conflict of Laws, page 371, footnote 2). Professor Westlake on the other hand is in favour of the view that appearance in such circumstances does not bind the defendant, saying that otherwise "the defendant would be bound to abandon his property abroad as the price of saving his English property from the grasp of a Court having *ex-hypothesi* no international jurisdiction in the case" (page 406). He is also of opinion that the obvious leaning of Lord Blackburn and his colleagues in *Schibsby* v. *Westenholz* (6) was in the same direction. The passage cited immediately before this remark is "we think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign Tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone* (20) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound" (Westlake, page 406).

There seems, however, to be no decision of the English Courts that when property has been seized by the foreign Court, the defendant's subsequent appearance must be considered to be ineffectual in the sense that the Court is not then competent to pronounce an internationally effective judgment. The *obiter dicta* in *Voinet* v. *Barrett* (11) and Professor Westlake's opinion that such ought to be the law, are of course of the greatest weight. But it seems to me, as I have already said, that the trend of the most recent authorities, the view taken by the Courts of Scotland and other countries and the test of effectiveness mentioned by Professor Dicey all indicate that the law will develop in another direction. As to Professor Westlake's remarks cited above, the defendant virtually abandons his foreign property as soon as he fails to defend the suit successfully: for such property being within the jurisdiction of the foreign Court can be seized in execution of the foreign judgment. See Story, Conflict of Laws, section 549. In the present case, the defendant appeared and took the chance of a judgment in his favour. The authorities are quite clear that in such a case the foreign Court has jurisdiction: *Schibsby* v. *Westenholz* (6), *Harchand Panaji* v. *Gulabchand Kanji* (21). No expression of opinion is necessary on the question whether, if his property had been seized, the Court would or would not have been deprived of its international competence. As no property had been seized, all I need say is that, in my opinion, in the present case there is no evidence from which it can be inferred that the defendant appeared in the Cochin Courts through such duress as to render his appearance devoid of the effect which it would ordinarily have under the 4th head mentioned by Fry, J.

My reference to some of the more general aspects of the question was necessary only in order to determine whether we ought to follow *Parry & Co.* v. *Appasami Pillai* (2) and hold, contrary to the English authorities, that though the defendant appears and pleads on the merits, his denial that the Court has jurisdiction is sufficient to prevent the Court from becoming internationally competent.

The distinction between voluntary and involuntary appearance in the three cases mentioned by Professor Westlake may be admitted to be unsatisfactory. But if in all the three cases the same decision comes to be given in England, it seems to me that that decision will be that in each case the Court becomes competent by the defendant's appearance. Hence, in any case, *Parry & Co.* v. *Appasami Pillai*(2) should not, in my opinion, be followed, when (as in the present case) it is opposed to English decisions, as far as they have already proceeded. If I had

(20) 30 L. J. Ex. 238; 6 H. & N. 301.

(21) 26 Ind. Cas. 265; 16 Bom. L. R. 620; 39 B. 34.

thought that the trend of the English decisions was in favour of the view in *Parry & Co.* v. *Appasami Pillay* (2) it would have been proper to follow it, but as I have already said it seems to me to be emphatically in the reverse direction.

I should myself be inclined, therefore, to allow the appeal, but as my learned brother thinks that we ought not to disregard *Parry & Co.* v. *Appasami Pillay* (2) unless it is overruled by a Full Bench, I agree to refer the following questions to a Full Bench of this Court :—

1. Where there is an application under section 44 of the Civil Procedure Code for execution of a foreign judgment and the judgment-debtor objects on the ground that the judgment was given by a foreign Court that had no personal jurisdiction over him inasmuch as he was not resident within the territorial jurisdiction of that Court,

(*a*) Is such objection to be upheld where it appears that the judgment-debtor had objected to the jurisdiction of the foreign Court when sued there, or

(*b*) Will the fact that the judgment-debtor has appeared to contest the suit on the merits and taken the chance of a judgment in his own favour conclude him from taking any objection to the jurisdiction of the Court, irrespective of the question whether his appearance has been voluntary? or

(*c*) Will the defendant be concluded only if his submission to the jurisdiction was voluntary?

(*d*) If the third alternative is answered in the affirmative, is the submission voluntary where the defendant appears in the circumstances of the present case ?

2. Was *Parry & Co.'s* case (2) rightly decided?

PHILLIPS, J.—The facts of the case are set out in my learned brother's judgment. The only question for consideration is whether the respondent voluntarily submitted to the jurisdiction of the Cochin Court, which passed the decree, which it is now sought to execute. The respondent appeared and defended the suit against him in the Cochin Court, but he protested against the jurisdiction of the Court. He renewed his protest in the Appellate Court, and has now taken the same objection in execution of the decree. His reasons for appearing and defending the suit were, as found by the learned District Judge, (1) that his creditor's son, to whom he had repaid the suit debt, refused to refund him the money unless he defended the suit brought by the father, (2) that if a decree were passed against him, he might be arrested when he went to Cochin on business or to see his relations. In *Parry & Co.* v. *Appasami Pillai* (2), the reason for the defendants' submission to a foreign Tribunal as given in the judgment (page 412) is "to escape the inconveniences which would attend a judgment against them if at any time they or their property might be found in French territory." That case is, therefore, on all fours with the present case and if that ruling is to be followed, this appeal would have to be dismissed. The authority of the ruling has, however, been recently doubted by the learned Chief Justice and Seshagiri Aiyar, J., in *Veeraraghava Aiyar* v. *Muga Sait* (1) in consequence of the decision in *Boissiere & Co.* v. *Brockner & Co.* (14).

There are also other English decisions which are opposed to the ruling in *Parry & Co.* v. *Appasami Pillay* (2); *Schibsby* v. *Westenholz* (6) *Voinet* v. *Barrett* (11); *Rousillon* v. *Rousillon* (9) and *De cosse Brissac* v. *Rathbona* (20). In a very recent case, *Harris* v. *Taylor* (22), where a defendant put in an appearance conditionally and applied to the Court to set aside the order for service out of the jurisdiction but did not even defend the action, it was held that the defendant had voluntarily submitted to the jurisdiction because he had sought the protection of the Court. The principle that is apparently applied in these English cases is that when a defendant submits to jurisdiction, except under duress, he is bound by the decision of the Court, because he has elected to take the chance of a decision in his favour and cannot be allowed to demur to a decision against him. A mere protest against jurisdiction does not make his submission involuntary. The ruling in *Parry & Co.* v. *Appasami Pillai* (2) is the concurrent decision of three Judges and proceeds on the grounds that a defendant having protested against jurisdiction puts the plaintiff on his guard and does not lead him to believe that the proceedings will

(22) (1915) 2 K. B. 580; 84 L. J. K. B. 1839.

be allowed to be everywhere effectual. This point of view is quite different from that adopted by the English Courts, and in a question like this, which is one of international law, Indian Courts must be guided by the decisions of English Courts. The law, however, as laid down in *Parry & Co.* v. *Appasami Pillai* (2) has been the law in this Presidency, where the circumstances are not the same as in England, for over 35 years and has not been altered, notwithstanding the decision in *Voinet* v. *Barrett* (11). On the principle of *stare decisis* I am not prepared to dissent, unless and until that decision is overruled by a considered decision of a Full Bench. I, therefore, agree to refer to a Full Bench the question proposed.

This appeal against appellate order coming on for hearing yesterday in pursuance of the above order of reference, upon perusing the said order of reference, and upon hearing the arguments of Mr. *T. R. Krishnaswamy Aiyar*, for the 2nd Appellant, and Mr. *L. A. Govindaraghava Aiyar* for Mr. *C. V. Anantakrishna Aiyar* and Mr. *T. K. Govinda Aiyar*, for the Respondent, and the case having stood over for consideration till this day, the Full Bench expressed the following

OPINION :—We think that *Parry & Co.* v. *Appasami Pillai* (2) must be overruled. No authorities are cited in the judgment of the Appellate Court, but the learned Judge who decided the case on the original side referred on the point to *General Steam Navigation Co.* v. *Guillou* (23) and to *Schibsby* v. *Westenholz* (6). The dicta in *General Steam Navigation Co.* v. *Guillou* (23), on which the learned Judge relied, were questioned in *Schibsby* v. *Westenholz* (6) which is rather against the view taken by him, as in that case the question on which the Court of Queen's Bench decided to express no opinion was "as to the effect of the appearance of the defendant, where it is so far not voluntary that he only comes in to try and save some property in the hands of the foreign Tribunal", rather implying that at any rate, where there was no property in the hands of the foreign Tribunal appearance there would amount to submission. The later English cases referred to in the order of reference and in *Veeraraghava Iyer* v. *Muga Sait* (1), including the recent decision of the Court of Appeal in *Harris* v. *Taylor* (22) as also *Harchand Panaji* v. *Gulabchand Kanji* (21), are clearly opposed to *Parry & Co.*, v. *Appasami Pillai* (2) which must be overruled. That is sufficient to dispose of the reference, as the facts of the present case are identical.

*Reference answered in the affirmative.*

(23) 11 M. & W. 877 at p. 894; 13 L. J. Ex. 168; 152 E. R. 1061.

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PUNJAB CHIEF COURT.

FIRST CIVIL APPEALS NOS. 1974 AND 2032 OF 1915.

January 14, 1916.

*Present*:—Mr. Justice Shadi Lal.

NEK MUHAMMAD AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

MAYA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Will—Construction—Duty of Court to ascertain intention of testator—Devise of absolute estate—Condition in restraint of alienation, validity of—Pre-emption suit—Plaintiffs proprietors at time of sale and at date of suit—Suit, whether maintainable—Punjab Pre-emption Act (II of 1905), s. 11, proviso.*

The duty of a Court in interpreting a testament is to ascertain the intention of the testator from all the clauses of the document and to give full effect to it. [p. 606, col. 2.]

Where a testator, having conferred an absolute estate, attaches a condition in restraint of alienation, such a condition is void in law. [p. 606, col. 2.]

*Jotendra Mohan Tagore* v. *Ganendra Mohan Tagore*, 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85, followed.

Where, therefore, a testator bequeathed his entire property to his two widows and expressly conferred upon them full powers of alienation by sale, mortgage, etc., and there was a clause in a subsequent part of the Will providing that on the death of one widow, the other would succeed to her estate and that on the death of both certain specified collaterals would inherit the property:

*Held*, that what the testator intended was that the widows should have unrestricted powers of alienation, whether during their lives or to take effect after their deaths, and that the later clause did not justify a distinction between gifts *inter vivos* and Wills. [p. 606, col. 2.]

Where plaintiffs in a pre-emption suit were proved to have been proprietors in the village at the time of the sale as well as on the date of the suit and the defendants produced no evidence in rebuttal:

*Held*, that they had complied with the requirements of the proviso to section 11 of the Pre-emption Act and were entitled to pre-empt. [p. 607, col. 1.]

NEK MUHAMMAD *v.* MAYA RAM.

First appeal from the decree of the District Judge, Jhelum, dated the 30th March 1914, dismissing the claim.

Mr. *Jai Gopal Sethi*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT

IN FIRST CIVIL APPEAL No. 1974 OF 1915.

On the 6th June 1912, *Musammat* Mula Devi, widow of one Karm Chand, sold 29 *kanals* of land for Rs. 1,000 to the defendants, who are the appellants in this appeal. The plaintiffs, Maya Ram and Hira Nand, two of collaterals of Karm Chand, instituted a suit praying for a decree declaring the alienation to be invalid or in the alternative, for a decree for possession as pre-emptors. The District Judge has refused the first prayer, but granting the second he has passed a decree for possession on payment of the price mentioned in the deed. Both the parties have preferred appeals to this Court and these appeals shall be disposed of by this judgment.

Now, it is undeniable that the land in dispute originally belonged to Karm Chand, who bequeathed it to his two widows, Bhag Sudhi and Mula Devi, by a Will dated the 10th February 1904, and it has been decided in proceedings under the Probate and Administration Act that *Musammat* Bhag Sudhi disposed of the estate inherited by her by means of her testament executed on the 2nd October 1911.

The important question for consideration is, whether the widows were absolute owners of the estate bequeathed to them and could alienate it in any manner they liked. Now the testator, Karm Chand, in devising the property to his widows states that they would be *malik* in equal shares, and he further provides that *unko ikhtiar kamil hasil hoga kih jis taur chahen jaidad har kism ba-ikhtiar kamil apne istimal men laven aur kharch karen aur bai or rehn waghaira ke zarie muntaqil karen.* It will be observed that the language used by him is very comprehensive and confers upon the devisees in express terms full power of alienation by sale, mortgage, etc.

The learned Counsel for the defendants argues that the widows had an unrestricted power of making an alienation *inter vivos* but were not entitled to will away the property. The clause relating to the power of disposition referred to above is couched in general terms, and does not draw any distinction between an alienation *inter vivos* and a Will. There is no doubt another clause in a subsequent part of the Will which provides that on the death of one widow, the other would succeed to her estate, and that on the death of both certain collaterals mentioned therein would inherit the property. But this provision does not sustain the distinction which the Counsel seeks to draw.

If Karm Chand having conferred an absolute estate intended to attach a condition in restraint of alienation, then such a condition would, it appears, be void in law. As observed by their Lordships of the Privy Council in the well-known case of *Jatendra Mohan Tagore* v. *Ganendra Mohan Tagore* (1), "If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognise." The duty of the Court in interpreting a testament is to ascertain the intention of the testator from all the clauses of the document, and it seems to me that what Karm Chand contemplated was that the widows should have full power of making alienations, whether during their lives or to take effect after their deaths, that in the event of the death of one, the other should succeed to her undisposed of property and that on the death of both, the property not covered by any alienation should devolve upon his collaterals. Whether this gift over can be sustained in law need not be determined, because it is clear that the contingency, upon the happening of which it had to come into operation, has not arisen in the present case. *Musammat* Bhag Sudhi has disposed of her property by Will, and the other widow is not entitled to inherit it.

The learned Counsel for the defendants, with a view to establish the validity of the

(1) 18 W. R. 359; 9 B. L. R. 377; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

sale, urges that both the widows could validly alienate the devised property by sale, mortgage or gift, but he denies to them the power of testation. As observed already, the clauses in the Will do not support this distinction and it appears to me that the power of making alienation *inter vivos* and the right of disposition by Will stand or fall together. Accordingly, I hold that the widows had an unrestricted power of making such alienations as they liked, and that both the Will of *Musammat* Bhag Sudhi and the sale made by *Musammat* Mula Devi, are valid transactions.

It follows that half of the land in dispute which belonged to Bhag Sudhi could not be sold by *Musammat* Mula Devi, and that the plaintiffs who have obtained Letters of Administration with the Will annexed are entitled to a declaration as to the invalidity of the sale in respect of *Musammat* Bhag Sudhi's share.

Coming now to the prayer for pre-emption, which affects only the remaining half, I agree with the District Judge that the plaintiffs have complied with all the requirements of the proviso to section 11 of the Punjab Pre-emption Act. Mr. Jai Gopal Sethi does not contest their right to claim pre-emption under section 12 of the Act, but he contends that the plaintiffs have not proved their ownership in the estate at the time of the sale. Now, it is clear that they are members of the same tribe as the vendor, and it is fully established that the plaintiff Maya Ram purchased some land by sale-deed dated the 29th June 1891, which was mutated in his favour on the 16th April 1892, and that Gopi Chand, the father of the second plaintiff, Hira Nand, became owner by purchase on the 16th December 1889, and got mutation in his favour on 19th June 1890. The entries in the Record of Rights have continued all along, and the *patwari* testifies to their being proprietors in the village at the time of the sale, as well as on the date of the suit. Defendants have produced no evidence in rebuttal, and on the evidence set out above the District Judge has rightly held that the plaintiffs have complied with the proviso to section 11.

On the question of price, I observe that Rs. 1,000 were duly paid before the Sub-Registrar, and there is no reliable evidence to justify the finding that a part of the price was returned afterwards. It is true that the market value of the land as shown by other transactions in the village is less than the sum paid, and that the land revenue assessed on the land amounts to only Rs. 2-7-6. It further appears that one of the vendees is an agent of the vendor on a salary of Rs. 3 per mensem, and it is doubtful whether he and his brother were in a position to raise Rs. 1,000 to purchase the land. These circumstances may create suspicion, but are insufficient to warrant the conclusion that a part of the money was returned to the vendees. The plaintiffs must, therefore, pay Rs. 500 as the pre-emptive price for half the land in suit.

The result of the above discussion is that this appeal by the vendees, which contests the plaintiffs' right of pre-emption, fails and is hereby dismissed with costs.

*Appeal dismissed.*

IN FIRST CIVIL APPEAL NO. 2032 OF 1915.

For the reasons set out in my judgment in Civil Appeal No. 1974 of 1915 I grant the plaintiffs a declaratory decree that the sale effected by *Musammat* Mula Devi shall not affect one-half of the land belonging to *Musammat* Bhag Sudhi; and as regards the remaining one-half I give them a decree for possession by pre-emption on payment of Rs. 500 within thirty days from this date. The plaintiffs shall get half the costs incurred in the lower Court, and the parties are directed to bear their own costs in this Court. In the event of failure to pay the price within the prescribed period the plaintiffs' suit for possession shall stand dismissed with costs.

*Appeal allowed.*

KOTHANDARAMAN CHETTY *v.* SHUNMUGAM CHETTY.

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 417 OF 1914.

December 21, 1915.

*Present*:—Mr. Justice Seshagiri Aiyar.

KOTHANDARAMAN CHETTY AND OTHERS —PLAINTIFFS—PETITIONERS

*versus*

SHUNMUGAM CHETTY AND OTHERS— DEFENDANTS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 21, scope of—"Joint contractor", meaning of—Test for determining effect of acknowledgment by third party—Decree-holder, right of—Exemption, grant of.*

The proviso in section 21 of the Limitation Act is not exhaustive of the persons for whose benefit the protection is intended. The test in each case is whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is to be arrested. In cases where the liability is several, it should be clearly established that the persons to be bound allowed themselves to be represented by the person who made the part-payment. [p. 609, col. 1.]

*Gopal Daji Sathe* v. *Gopaul* Bin *Sonu Rait*, 5 Bom. L. R. 1020; 28 B. 24[c]; *Sami Ayangar* v. *Laxmi*, 9 Ind Cas. 8; 9 M. L. T. 263; 21 M. L. J. 455, followed.

The word "joint contractor" in section 21 of the Limitation Act applies also to a surety; and, therefore, an acknowledgment by the principal debtor does not save limitation against the surety. [p. 609, col. 1.]

Ordinarily a decree-holder is entitled to have all his remedies against the judgment-debtor and exceptional circumstances should be proved in order to grant any exemption from the general liability. An order, therefore, directing the payment of a decretal amount by instalments extending over four years should be supported by very strong circumstances. [p. 609, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Trichinopoly, in Small Cause Suit No. 1148 of 1913.

Mr. *N. Rajagopala Chariar*, for the Petitioners.

Mr. *K. S. Ganesa Aiyar*, for the Respondents.

This petition coming on for hearing on the 20th and 26th August 1915 and having stood over for consideration till 27th August 1915, the Court delivered the following

JUDGMENT.—Defendants Nos. 1 and 5 executed a promissory note to the plaintiffs on the 3rd of February 1910. On the 8th of December, the 1st defendant made a part-payment. This suit was instituted on the 5th December 1913. The 5th defendant pleaded that the payment by the 1st defendant did not save limitation against him. The Subordinate Judge upheld this plea and dismissed the suit as against him. As against the 1st defendant and his sons (defendants Nos. 2 to 4) the lower Court passed a decree and allowed them to pay the amount in instalments.

The plaintiffs have filed this revision petition. The first contention relates to the liability of the 5th defendant. Mr. Rajagopala Chariar has addressed to me an exhaustive argument on the question. There is some dispute as to the character in which the 5th defendant signed the promissory note. The plaintiffs regarded him as a co-promisor with the 1st defendant. The 5th defendant pleaded that he signed only as a surety. The Subordinate Judge without deciding the point held that the claim against the 5th defendant was barred. I am not prepared without further consideration to accede to the argument of Mr. Ganesa Aiyar that it is not open to a party who signs a document to show that he was not the principal debtor *Narasimhamurthi Sastry* v. *Ramaswamy Chetty* (1) lends some support to this contention. But in *Venkatasubbiah Chetty* v. *Govindarajulu Naidu* (2) it was held that a person can show that he signed a document in the capacity of an agent. I shall, therefore, decide this case on the footing that the 5th defendant was only a surety. Even in that view, I fail to see how the payment by the 1st defendant can keep the liability alive against the 5th defendant. Section 4 of Act XIV of 1859 enacted that if more than one person was liable for a debt, none of them shall become chargeable "by reason only of a written acknowledgment signed by either of them." Part-payment stands on the same footing. The principle was thus recognised that one of the promisors should not by his individual act render his co-promisor liable. The Limitation Act of 1871 referred specially to the cases of several partners or executors. In the Act of 1877, the provision was extended to joint contractors and mortgagees.

(1) 18 Ind. Cas. 696; 24 M. L J. 91; 13 M. L. T 104; (1913) M. W N. 336.

(2) 31 M. 45; 18 M. L. J. 1; 3 M. L. T. 259.

KOTHANDARAMAN CHETTY v. SHUNMUGAM CHETTY.

These extensions must be regarded as illustrations of the general principle enunciated in the Act of 1859. I cannot accept the contention of the learned Vakil for the petitioners that the proviso in section 21 of the Act is exhaustive of the persons for whose benefit the protection was intended. The test in each case will be whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is to be arrested. In cases where the liability is several, it will have to be established clearly that the persons to be bound allowed themselves to be represented by the person who makes the part-payment. The decision in *Gopal Daji Sathe* v. *Gopal* bin *Sonu Rait* (3) is directly in point, and has been followed in *Sami Ayangar* v. *Laxmi* (4). I cannot regard *Velayudam Pillai* v. *Vaithyalingam Pillai*(5) as throwing any doubt on the correctness of the above decisions. The English decisions to which my attention was drawn proceeded on the language of the particular Statute. I have not been shown any provision in that or any other Statute which corresponds to section 21 of the Limitation Act. Even apart from authority, I am of opinion that the words "joint contractor" in section 21 would apply to a surety. So far as the promisee is concerned, the surety's liability is co-extensive with that of the principal debtor, whatever may be the relationship *inter se* between the two. Section 43 of the Contract Act, to my mind, shows by the explanation that the surety is in the position of a joint promisor. It is not necessary to be a joint promisor that the liability of both towards the promisee should be in all particulars of the same character. It is enough if the liabilities are co-extensive with that of the principal debtor. *Krishna Chandra* v. *Bhairab Chandra* (6) and *Domi Lal Sahu* v. *Roshan Dobay* (7) do not touch this case. I, therefore, agree with the Subordinate Judge that the suit is barred as against the 5th defendant.

(3) 28 B. 248; 5 Bom. L. R. 1020.
(4) 9 Ind. Cas. 8; 21 M. L. J. 455; 9 M. L. T. 263.
(5) 17 Ind. Cas. 619; 24 M. L. J. 66; 12 M. L. T. 610.
(6) 32 C. 1077; 9 C. W. N. 868.
(7) 33 C. 1278; 11 C. W. N. 107.



I am, however, unable to uphold his order regarding payment by instalments. There is absolutely no evidence on the record to show that the counter-petitioners are unable to pay the debt. Ordinarily a decree-holder is entitled to have all his remedies against a judgment-debtor. Exceptional circumstances will have to be proved to grant any exemption from the general liability. It is said that the defendants own immoveable property. If that is so, the order will have to be re-considered. Moreover the extension of the operation of a decree over such a long period as four years must be supported by very strong circumstances. I must ask the Subordinate Judge to return a finding, after taking such fresh evidence as may be tendered, whether the defendants are entitled to claim payment by instalments and if so, what is the amount of the instalment which can reasonably be enforced against them.

The Subordinate Judge of Trichinopoly will submit his finding within two months from the date of the receipt of records and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Trichinopoly submitted the following

FINDING— * * * * * * * * * I am, therefore, unable to find that the defendants are entitled to claim payment by instalments in respect of the claim in this suit and that if they should be permitted to pay in instalments, they can afford to pay more than Rs. 7 per mensem towards the suit debt.

This petition coming on for final hearing to-day after the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—I accept the finding and modify the decree of the Subordinate Judge by striking out the direction to pay the decree by instalments. Each party will bear his own costs in this Court.

*Revision rejected.*

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 56 OF 1915.
November 25, 1915.
*Present*: - Mr. Justice Ormond.
MA U AND ANOTHER—PLAINTIFFS—APPELLANTS
*versus*
MG. LU GALE AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit between vendor and a previous purchaser, when operates as res judicata between two purchasers.*

*A* sold a certain property first to *C* and then to *E*. *A* thereafter sued *C* for cancellation of the sale as void for want of consideration. It was found that the sale was good. *E* then sued *A* and *C* for possession:

*Held*, that the suit was not barred by *res judicata* inasmuch as at the time of the previous suit *A* had no longer any interest in the land and could not, therefore, bind *E* by litigation determining the title of the land.

In order that a previous decision against a transferor be *res judicata* as against the transferee, the transferee's title must have arisen subsequent to the commencement of the previous suit.

Mr. *Sohan Lall*, for the Appellants.

Messrs. *Maung Thin* and *Ginwala*, for the Respondents.

JUDGMENT.—The plaintiffs sued four defendants for possession, their title being that they had bought the property from the first two defendants, the defence of the 3rd and 4th defendants being that they (3rd and 4th defendants) had bought the property from the 1st and 2nd defendants 13 days before the alleged sale to the plaintiffs. Plaintiffs asserted that the alleged sale to the 3rd and 4th defendants was void for want of consideration. After these two alleged sales by the 1st and 2nd defendants, the 1st and 2nd defendants sued the 3rd and 4th defendants for cancellation of the deed of sale to the 3rd and 4th defendants on the ground of failure of consideration. In that case on appeal to this Court, it was found that there was consideration and, therefore, that the sale to the 3rd and 4th defendants was good. In this present suit, both the lower Courts have held that that decision is *res judicata* as against the present plaintiffs. But at the time of the previous suit, the plaintiffs in that suit, *i.e.*, 1st and 2nd defendants, had no longer any interest in this land. They could not, therefore, bind the present plaintiffs by litigation determining the title of the land. For the previous decision to be *res judicata* as against the plaintiffs, the plaintiffs' title must have arisen subsequent to the commencement of the previous suit. (See Mulla's Civil Procedure Code at page 47 and the cases there cited).

The decrees of the lower Courts are set aside and the case is remanded under Order XLI, rule 23, to be determined on its merits. Appellants will obtain a certificate for refund of Court-fees on this appeal under section 13 of the Court Fees Act. Costs of this appeal will abide the result.

*Decrees set aside; Case remanded.*



MADRAS HIGH COURT.
REFERRED CASE No. 12 OF 1914.
September 23, 1915.
*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.
V. RAMASWAMI IYER—PLAINTIFF.
*versus*
THE MADRAS TIMES PRINTING AND PUBLISHING Co., LTD.,—DEFENDANT.

*Presidency Small Cause Courts Act (XV of 1882), s. 69—Reference, contents of.*

A reference under section 69 of the Presidency Small Cause Courts Act to a High Court should state the facts found by the Full Bench of the Small Cause Court as a body with a succinct statement of the point of law on which they individually differ on those facts, and not their individual opinion on the view of the facts taken by each Judge himself. [p. 611, col. 1.]

Case stated, under section 69 of the Presidency Small Cause Courts Act of 1882, by the Court of Small Causes, Madras, Full Bench Application No. 73 of 1914 (Suit No. 2952 of 1914).

Mr. *D. Chamier*, instructed by Messrs. *Rencontre* and *Tirumalai Pillai*, for the Plaintiff.

Mr. *E. R. Osborne*, instructed by Messrs. *King* and *Partridge*, for the Defendant.

JUDGMENT.- This is a reference under section 69 of the Presidency Small Cause Courts Act. We regret that we cannot accept

it as it stands. The section requires that the Court shall draw up a statement of the facts of the case. The reference begins with the words, "The facts of the case are as follows" but on page 33, we find that the Judges differ on the very important question whether the plaintiff did any work after Exhibit E. They also state that as regards the kind of work done the learned Trial Judge has found that it is not proved, but the Judges express no opinion on that point themselves. We would also note that the learned Judges have extracted portions of letters in their statement, thereby introducing evidence into the findings. We must return the reference and request the Court to state the facts of the case as found by them as shortly and concisely as possible. We must further ask the Courts after having found the facts to decide on what questions of law they differ on those facts and give us the benefit of their individual opinion on those facts, not on the view of the facts taken by each Judge himself.

*Reference returned.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 30 OF 1915.

January 5, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

ARJUNA REDDI AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

VENKATACHALA ASARI—DEFENDANT—RESPONDENT.

*Transfer of Property Act (IV of 1882), s. 99—Sale in contravention of the section not avoided—Mortgagor's right to redeem, whether subsists.*

A sale of mortgaged property in contravention of section 99 of the Transfer of Property Act is not void but merely voidable, and if it is not avoided by proceedings in execution prior to the confirmation of the sale, the right of the mortgagor and those who represent him to redeem is absolutely extinguished, whether the purchaser at the sale be an outsider or the mortgagee bidding by leave of the Court. [p. 612, col. 2.]

*Lal Bahadur Singh* v. *Abharan Singh*, 27 Ind. Cas. 795; 13 A. L. J. 138; 37 A. 165, followed.

Where in a suit for redemption of a certain mortgage executed by the plaintiffs in favour of the defendant, the plea was set up that there was no equity of redemption left in the plaintiffs by reason of the defendant having purchased it in execution of a decree which he had obtained against the mortgagors in a suit on a simple money bond, not arising out of the mortgage:

*Held*, that, inasmuch as the plaintiffs had taken no objection to the confirmation of the sale, the present suit for redemption did not lie. [p. 612, col. 1.]

*Khiarajmal* v. *Daim*, 32 C. 296 at p. 312; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23 (P. C.); *Ashutosh Sikdar* v. *Behari Lal Kritania*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320; *Lal Bahadur Singh* v. *Abharan Singh*, 27 Ind. Cas. 795; 13 A. L. J. 138; 37 A. 165, *Muthu* v. *Karuppan*, 30 M. 313 at p. 315; 17 M. L. J. 163; 2 M. L. T. 181, followed.

*Muthuraman Chetty* v. *Ettappasami*, 22 M. 372 at p 375; 9 M. L. J. 113; *Mayan Pathuti* v. *Pakuran*, 22 M. 347; 9 M. L. J. 98; *Erusappa Mudaliar* v. *Commercial Land and Mortgage Bank, Limited*, 23 M. 377; 10 M. L. J. 91; *Sesha Ayyar* v. *Krishna Ayyangar*, 24 M. 96; 12 M. L. J. 383; *Ikkotha* v. *Chakkiamma*, 27 M. 428; *Dharanikota Venkayya* v. *Budharazu Surayya Garu*, 30 M. 362; 17 M. L. J. 325, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of North Arcot, in Appeal Suit No. 146 of 1913, preferred against that of the District Munsif, Sholingur, in Original Suit No. 301 of 1912.

Mr. *V. S. Govindachariar*, for the Appellants.

Mr. *K. S. Ganapathi Aiyar*, for the Respondents.

### JUDGMENT.

NAPIER, J.—This is a suit by the plaintiffs seeking to be allowed to redeem a mortgage executed by them (the 1st plaintiff and his deceased brother) in favour of the defendant on payment of the mortgage money. The defendant set up that there is no equity of redemption left in the plaintiffs, by reason of the fact that he had in a suit brought by him against the mortgagors not arising out of the mortgage obtained a money decree against the mortgagors in execution of which he had himself purchased the equity of redemption. It is admitted that this sale of the equity of redemption was in contravention of section 99 of the Transfer of Property Act, which provides that whatever may be the cause of action in a suit by the mortgagee against the mortgagor, the equity of redemption cannot

be sold without a suit having been instituted under section 67.

The only question is whether the equity of redemption having been sold in the previous suit in contravention of the section and the mortgagors not having objected to the confirmation of the sale, they can now exercise this remedy of redemption. It is to be noted that in seeking to redeem they have not offered to pay the amount for which the equity of redemption is sold.

It is argued by the appellants that the question is decided by the Privy Council in *Khiarajmal* v. *Daim* (1) and reliance is placed on passages on pages 312 and 315. We have examined that case very carefully and it has also been considered in a later case of this Court. The passage relied on by the appellants does not, we think, support them, whereas it is clearly stated in the course of their judgment by the Board that where the mortgagor has not set aside the sale he cannot exercise his right to redeem, *vide* pages 312, 313 and 316. It is true that this decision is not on section 99. It is based on the equitable principle, which their Lordships found applicable to India prior to the passing of the Transfer of Property Act, that a mortgagee cannot be permitted to sell the property of the mortgagor otherwise than in a mortgage suit in execution of a decree obtained for a sum covered by the mortgage, which principle may be stated to be founded on the doctrine "once a mortgage always a mortgage."

It is obvious that this case differs from the present in that here the suit was not brought in respect of a sum due on the mortgage and that, therefore, the equitable doctrine does not apply. But as the doctrine of equity has been relied on in subsequent cases in this Court, it is worthy of notice that even in a case where the equitable doctrine does apply their Lordships held that the right to redeem had been lost. In our opinion, the decision of the Privy Council is in favour of the view taken by the lower Appellate Court. Then the learned Vakil relied on the decision of the Full Bench in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2). There seems to be some doubt as to whether the majority of the Judges came to any decision on this point at all. In a later case one of them took the view which the appellants asks us to take; but the High Court of Allahabad in considering his judgment have expressed their opinion that it is inconsistent with the view taken by him in the Full Bench case. Whether that be so or not, there is the very elaborate judgment of Mr. Justice Mookerjee in the Full Bench case where he sets out the different views which can possibly be taken on this point, and if the judgment of the Full Bench has decided this point in favour of the contention of the respondent, then Mr. Mookerjee's judgment must be taken to support that view. The decision of the Allahabad Full Bench referred to is *Lal Bahadur Singh* v. *Abharan Singh* (3). There their Lordships considered all the cases including the decision of the Privy Council, the decision of the Full Bench of the Calcutta High Court and the decisions of this Court, and they take the view not only that the sale in contravention of section 99 is not void, which view is acquiesced in by all the Courts, but that being merely voidable, if it is not avoided by proceedings in execution prior to the confirmation of the sale, the right of the mortgagor and those who represent him to redeem is absolutely extinguished, whether the purchaser at the sale be an outsider or the mortgagee bidding by leave of the Court. There is no question that this decision is strongly in favour of the respondent. But our attention has been drawn to a number of decisions of this Court, some of which are not very easy to reconcile and we are asked to follow the decision in *Muthu* v. *Karuppan* (4) which the appellants rely on as supporting their contention. The first decision is that in *Muthuraman Chetty* v. *Ettappasami* (5). Speaking for myself, I do not think that it decides this question although the view has been taken in later case that it does.

(1) 32 C. 296 at p. 312; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23 (P. C.).

(2) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320;

(3) 27 Ind. Cas 765; 13 A. L. J. 138; 37 A. 165.

(4) 30 M. 313 at p. 315; 17 M. L. J. 163; 2 M. L. T. 181.

(5) 22 M. 372 at p. 375; 9 M. L. J. 113.

The next case is *Mayan Pathuti* v. *Pakuran* (6), and this admittedly leaves the question open. The third case is *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank, Limited* (7), which was dissented from in *Sesha Ayyar* v. *Krishna Ayyangar* (8), and in *Ikkotha* v. *Chakkiamma* (9). We have examined these cases very carefully and we cannot find that they decide anything which will assist us in the decision of this case. Doubts have arisen as to whether there is any difference between the case where the mortgagee purchases the property at the execution sale and the case where it is purchased by a stranger. We do not think that this question arises here, but we feel some little difficulty in appreciating the foundation of the difference, in that the section, which we have to construe and apply, says nothing about the purchaser at the Court sale but provides that the actual sale is illegal, and the equitable distinctions applicable to those different cases seem to us no matters for consideration here. We then have two decisions, *Muthu* v. *Karuppan* (4) and *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (10). It is a little difficult to reconcile those two cases because it seems to us, on the examination of the facts in the cases, that the judgments in both cases do not correctly represent the facts and that the ground of distinction taken in *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (10) does not really arise. But the case on page 362 lays down definitely that where there has been no objection to confirmation, there is no power to redeem, and what is more important is that the learned Judges follow and rely on the decision of the Privy Council in *Khiarajmal* v. *Diam* (1). In this state of the authorities, it seems to us that we should follow the decision in *Dharanikota Venkayya* v. *Budharazu Surayya Garu* (10), strengthened as it is by the decision of the Full Bench in *Lal Bahadur Singh* v. *Bharan Singh* (3) in preference to dicta which are to be found in other cases of this Court.

(6) 22 M. 347; 9 M. L. J. 98.
(7) 23 M. 377; 10 M. L. J. 91.
(8) 24 M. 96; 12 M. L. J. 383.
(9) 27 M. 428.
(10) 30 M. 362; 17 M. L. J. 325.

The appeal, therefore, will be dismissed with costs.

AYLING, J.—I agree.

*Appeal dismissed.*

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## ALLAHABAD HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 452 OF 1915.

January 22, 1916.

*Present*:—Mr. Justice Walsh.

*Musammat* SUBBA—APPLICANT

*versus*

*Haji* MAQBOOL HUSSAIN AND OTHERS—OPPOSITE PARTIES.

*Civil Procedure Code (Act V of 1908), s. 24—Application for transfer—Plaintiff, right of, to choose his own Court—Jurisdiction—Principle—Applicant, right of, to be heard first.*

A plaintiff has the right to choose his own Court for his own suit and in cases of disputes about property the Court where the property is situated is *prima facie* the better Court. [p. 614, col. 1.]

In determining whether a suit should be transferred from one jurisdiction to another the rule of equity, justice and good conscience should be followed and an applicant for transfer must be insisted upon making out a strong case of the "balance of convenience". [p. 614, col. 1.]

*Tula Ram* v *Harjiwan Das*, 5 A. 69; A. W. N. (1882) 164, followed.

Where on an application for transfer of a suit no order other than a notice to the respondent entitling them to appear and to be heard has been made, the burden is on the applicant to show sufficient ground why the Court should grant the application and, therefore, he has the right to begin. [p. 614, col. 2.]

Application for transfer of a suit.

Mr. *I. L. Banerji*, for the Applicant.

Mr. *Abdul Raoof*, for the Opposite Parties.

JUDGMENT.—This is a very simple matter. It is an application to transfer a suit from the Court at Aligarh to the Court at Bareilly, where another suit has already been brought by the applicant against the respondent to this application. Substantially it is not denied that the issues to be determined in both the suits are the same. I will assume that the bulk of the property which

is in dispute is within the jurisdiction of the Court at Aligarh where the respondent to this application has brought his suit. But in a pedigree case where oral evidence is chiefly necessary, I do not think this matters much. I fully recognise that the general rule is that the plaintiff has the right to choose his own Court for his own suit, and that in cases of disputes about property the Court where the property is situated is *prima facie* the better Court. But in this case no injustice can be done to the plaintiff himself by the transfer of his suit to Bareilly. In any case he will have to appear as defendant to the suit which has been brought in Bareilly. The plaintiff is, and will continue to be, *dominus litis*, and I have done nothing to deprive him of that right. The ground upon which the present application is based, is that the balance of convenience and of justice is in favour of the applicant. There is a strong affidavit on behalf of the applicant showing that almost all the witnesses are common to both suits and are in Bareilly, where the parties to the suit are also residents. Taking in favour of the respondent that that affidavit applies to the applicant's own witnesses it is uncontradicted on behalf of the plaintiff. The plaintiff shows no special reason against depriving him of Aligarh Court otherwise than insisting upon his ordinary right. There is no affidavit before me on his side showing what the convenience to him is in respect of Aligarh Court. It is obviously more expensive and, therefore, more inconvenient to take witnesses 200 miles than to have the suit tried where the bulk of the witnesses live. There is, in my opinion, a danger of injustice where the necessity of taking them so far arises. It may happen that from inconvenience or other causes the witnesses who could attend Bareilly Court could not attend Aligarh Court. The invariable practice in England in the absence of anything to the contrary is to follow the rule of equity, justice, and good conscience, namely, to insist upon the applicant making out a strong case of the "balance of convenience". I find that that rule has already been recognised as the real test by a decision of this Court in *Tula Ram* v. *Harjiwan Das* (1). I think the applicant in this case satisfies it. I, therefore, make the order as prayed with costs which I estimate at Rs. 32.

The question has been raised before me as to which of two parties is entitled to be heard first upon an application. The application is for a transfer of a suit from one Court to another. By an order of Mr. Justice Tudball made on the 30th of October 1915, notice was ordered to issue to the respondents to the application to show cause why an order should not be made against them, for transfer as prayed. In that notice they were informed that the application would be taken *ex parte* unless they showed cause. In my view no order has yet been made on the application other than a notice to the respondents entitling them to appear and to be heard. The burden is upon the applicant to show sufficient ground why the Court should grant the application. Under these circumstances the applicant has the right to begin.

*Application allowed.*

(1) 5 A. 60; A. W. N. (1882) 164.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3627 OF 1913.

January 11, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

ABDUL HAMID AND OTHERS—DEFENDANTS —APPELLANTS

*versus*

UDOY CHANDRA ACHARJEE AND OTHERS —PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 49, cl. (6)—Notice—Transferees of non-transferable under-raiyati holding—Ejectment—Landlord, right of, to eject,*

ABDUL HAMID *v.* UDAY CHANDRA ACHARJEE.

The landlord of a non-transferable under-*raiyati* holding, who after being aware of its transfer (by exchange) continues to receive rent from the transferees in the name of the original under-*raiyat*, cannot eject them without notice under clause (6) of section 49 of the Bengal Tenancy Act. [p. 616, col. 1.]

Second appeal against the decree of the Sub-Judge, Mymensingh, dated the 10th July 1913, reversing that of the Additional Munsif, Iswargunj, dated the 2nd July 1912.

FACTS.—The plaintiff brought a suit for the ejectment of the defendants on the allegation that the land in suit appertained to the plaintiff's *jote* and he let it out to one Zamir in 1303 B. S. for eight years from 1303 to 1311 as an under-*raiyat*; that Zamir continued to hold it till 1317 B. S., when he executed a registered *istafanama* (surrender) in favour of the plaintiff, but the plaintiff on attempting to take possession of the land in suit was resisted by the defendants, who claimed title by virtue of a transfer made in their favour by Zamir.

The defence was that Zamir was the *benamidar* for the defendants and that the defendants by their long possession of the land had acquired occupancy rights and could not be ejected.

The Court of first instance found that the defendants' case that Zamir was their *benamidar* was false but that the defendants had got the land in suit in exchange for some land of theirs from Zamir and had been in possession since 1304 B. S., and relying upon the case reported as *Raktoo Singh* v. *Sudhram Ahir* (1) held that the plaintiff's suit for *khas* possession was barred, as limitation began to run against him from the date of the exchange in 1304 B. S., when the defendants entered into possession by virtue of the exchange. The plaintiff appealed and the lower Appellate Court, relying upon the cases reported as *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (2) and *Judu Nath Belel* v. *Raj Narain Mukherjee* (3), held that limitation did not begin to run until the under-*raiyati* to Zamir came to an end in 1311, so the suit was not barred by limitation. Against this decision this second appeal was preferred.

Babu *Kumar Sanka Roy*, for the Appellants.—The case of *Kishwar Nath Sahi Dev* v. *Kali Sankar Sahai* (2) is in the defendants' favour. By the exchange in 1304, the under-*raiyati* came to an end. An exchange is a transfer, the under-*raiyat* has no right to transfer the land even by way of exchange. When he made over the land to the defendants, he abandoned his interest. The landlords, knowing of this, did not take any steps to recover *khas* possession of the lands which remained in the possession of the defendants for more than 12 years. So the plaintiff-landlord's suit for *khas* possession is barred.

In *Jadu Nath Belel* v. *Raj Narain Mukherjee* (3) this point was not gone into. The case in *Roktoo Singh* v. *Sudhram Ahir* (1) has been misconstrued by the lower Appellate Court. Referred to *Icharan Singh* v. *Nilmoney Balider* (4),

Mr. *A. K. Fazl-ul Haq*, for the Respondents.—Under section 49, Bengal Tenancy Act, the plaintiff was entitled to *khas* possession only on the expiry of the sub-lease. This sub-lease continued up to 1311 B. S., and, therefore, the suit was not barred by limitation. The defendants could not claim any right by adverse possession: they were all along paying rent as *marfardars* of Zamir, they never set up their own right as an under-*raiyat*; nor did they set up any absolute right to the land. They, by their conduct all along, admitted that the sub-lease of Zamir was subsisting and they were holding it as the sub-lease of Zamir, in whose name they paid the rent for so many years and got receipts for the rent.

Adverse possession, if any, could only be set up by the defendants from the date of Zamir's *istafanama* or the expiry of the term of the sub-lease in 1311 B. S.

Babu *Kumar Sanka Roy*, in reply.—Payment of rent as *marfardar* does not preclude a person from pleading adverse possession, *vide Probhabati Dasi* v. *Taibalurinessa Choudhurani* (5). The under-*raiyati* being non-transferable, as soon as the exchange took place, the under-*raiyati* of Zamir came to an end.

(1) 8 C. L. J. 557.
(2) 10 C. W. N. 343.
(3) 19 Ind. Cas. 884; 17 C. W. N. 459.
(4) 7 C. L. J. 499; 12 C. W. N. 636; 35 C. 470.
(5) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

JUDGMENT.—The plaintiff is an occupancy *raiyat*. One Zamir Khan was an under-*raiyat* under him under a lease of 1303, which was to last up to 1311. It appears that in or about 1304 Zamir exchanged the land of his sub-*raiyati* holding with the defendants and put them in possession. It has been found that the plaintiff was aware of this. The plaintiff nevertheless continued receiving rent of this holding in the name of Zamir. It was admitted in the case that such a sub-*raiyati* holding is not transferable without the consent of the *raiyat*-landlord. The exchange was evidently a transfer and the conduct of the parties seems to show that the plaintiff did not treat the exchange as working forfeiture of the rights of Zamir. He, therefore, accepted the exchange as one that was valid and if he did so he accepted the defendants-appellants as his tenants. Having done so, the plaintiff cannot treat the defendants as trespassers and eject them without notice under clause (6), section 49, of the Bengal Tenancy Act. As the cause of action upon which the plaintiff came to Court, was that he had received an *istafanamah* from his tenant, Zamir, in 1317 and was thereby empowered to take *khas* possession, has failed and as the facts show that he had accepted the defendants as his sub-*raiyats* by the exchange, the suit for ejectment must fail.

The appeal is, therefore, decreed with costs.

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## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 1 OF 1914.

August 19, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

GEHIMAL AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

THE MANAGER, INCUMBERED ESTATES IN SIND—DEFENDANT—RESPONDENT

*Sind Encumbered Estates Act (Bom. Act XX of 1896), s. 38—Manager, if a Revenue Officer—Finality of orders—Bombay Revenue Jurisdiction Act (Bom. Act X of 1876), s. 11—Limitation Act (IX of 1908), s. 14—Good faith, evidence of.*

The Sind Encumbered Estates Act does not confer finality on any of the orders made by the Manager of the Encumbered Estates. [p. 616, col. 2.]

The Manager, Encumbered Estates in Sind, is not a Revenue Officer as defined in the Revenue Jurisdiction Act (Bom. Act X of 1876). [p. 616, col. 2; p. 617, col. .]

There is no hard and fast rule as to what amounts to the good faith required by section 14 of the Limitation Act. It is a matter to be decided on the facts of each case. [p. 617, col. 2.]

*Maghanmal* v. *Fernandez*, 13 Ind. Cas. 260; 5 S. L. R. 181; *Fundumal* v. *Mahomed Sharif*, 4 Ind. Cas. 1156; 3 S. L. R. 175; *Abdul Wahid* v. *Manager, Encumbered Estates* 19 Ind. Cas. 838; 6 S. L. R. 250, referred to.

Mr. *Motiram Ramchand*, for the Appellants.

Mr. *E. Raymond* (Government Pleader), for the Respondent.

JUDGMENT.

PRATT, J. C. The appellant, who is the lessee of lands under management by the Manager, Incumbered Estates, Sind, sued for an injunction to restrain the Manager from selling his land to enforce a recovery of arrears of rent

The lower Court dismissed the suit on three grounds, (1) that the Manager's order was final (2) that the plaintiff should have appealed to the Commissioner in Sind and (3) that the suit is time-barred.

The *first* ground is clearly unsustainable. The Sind Encumbered Estates Act does not confer finality on any of the orders made by the Manager. Section 38 which the Assistant Judge quotes refers only to suits against the Manager personally and gives him a protection similar to that given to Judicial Officers by section 1 of Act XVIII of 1850 or to Police Officers by section 80 of Bombay Act IV of 1890. It may be remarked that the lower Court's conclusion that the Manager's order is final, is altogether inconsistent with its finding that Article 14 applies to the suit. For if the Manager's order were final, no suit would lie to set it aside and Article 14 could not be applied.

*Next*, the lower Court says that the appellant should have exhausted his right of revenue appeal, and this would be so if section 11 of the Revenue Jurisdiction Act (X of 1876) applied. But the Manager, Incumbered Estates, Sind, is not a Revenue

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Officer as defined in that Act, for he is not employed in the business of the estimation of land revenue payable to Government. He manages private estates and has for that purpose certain of the powers of a Collector of land revenue, but that does not make him a Revenue Officer as that term is defined in section 3 of the Revenue Jurisdiction Act.

Lastly, there is the point of limitation and I think the lower Court was right in applying Article 14. The plaint states that the Manager attached the land of the plaintiff and the suit is to set aside that act. Mr. Motiram argues in appeal that there was no attachment. But there has been a proclamation of a sale and an order for sale must have preceded the proclamation. The memorandum of appeal admits this. The suit is for an injunction to the Manager forbidding the sale. This is tantamount to a request to the Court to set aside the Manager's order of sale. It is said that the Manager's order is a nullity because some of the arrears accrued due prior to the date when the land went under management. But section 10 gives the Manager power to recover "rents due in respect of the property under management" and is not limited to rents accruing due subsequent to the date of the management. But even if the Manager were using his power under that section to recover debts to which the section did not apply, his order would not be a nullity. He would be violating the conditions on which the power to make the order is conferred upon him by the Legislature, and that would be a ground for setting aside the order. But the order is one which he is empowered to pass and one which must be obeyed until set aside. The order was made on or before the 21st June 1911, and the suit was filed on the 3th December 1912, more than a year later. The appellant claims exclusion under section 14 of the Limitation Act for the period from 22nd July 1911 to 18th October 19 2, when he was prosecuting this same suit in proceedings which failed because he had not given the Manager the notice required by section 80 of the Civil Procedure Code. Such omission was held by Fawcett, A. J. C., in *Manghanmal* v. *Fernandez* (1) to be evidence of want of due care and attention. But there is no hard and fast rule as to what amounts to the good faith required by section 14 of the Limitation Act. It is a matter to be decided on the facts of each case. There was unquestionably a doubt as to the necessity for notice in injunction suits. The appellant omitted to give notice, evidently relying upon the decision in *Fundumal* v. *Mahomed Sharif* (2) that notice is not required in a suit for an injunction to restrain a future act. The Manager has not sold his land and he may have thought that the suit to restrain the future sale might be filed without notice. *Fundumal's* case (2) was virtually overruled by the case of *Abdul Wahid* v. *Manager, Encumbered Estates* (3). That case was decided on the 3rd October 1913 and it was evidently in deference to that decision that appellants withdrew their suit. It seems to me that the former suit has been prosecuted with due diligence and in good faith and that appellants are entitled to the exclusion they claim.

I would, therefore, reverse the decree of the lower Court and remand the suit for trial on the merits after re-admitting the suit to the register under Order XLI, rule 23. Costs to be costs in the cause.

CROUCH, A. J. C.—I concur.

*Decree reversed.*

(1) 13 Ind. Cas. 260; 5 S. L. R. 181

(2) 4 Ind. Cas. 1156; 3 S. L. R. 175.

(3) 19 Ind. Cas. 838; 6 S. L. R. 250.

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## ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 66 OF 1915.

January 22, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

BHAGWANT AND OTHERS - DEFENDANTS—APPELLANTS

*versus*

ARJUN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 190 ), s. 164—Suit for profits-- Defendant not realizing in excess of his share, liability of.*

BHAGWANT *v.* ARJUN.

The different co-sharers in a village were in possession of separate specific plots of *sir* and *khudkasht* land under certain private arrangement. One of the co-sharers sold his share to the plaintiff. The plaintiff failed to recover possession of certain plots from his vendor or to get rent assessed on the same. He sued to make good his loss out of the profits raised by the other co-sharers in the village:

*Held*, that the plaintiff was not entitled to succeed as he had not proved that the defendants had realized anything in excess of their share of profits. [p. 6 9, col. 1.]

Letters Patent appeal against the decision of Mr. Justice Piggott, dated 23rd of April 1915, in Second Appeal No. 248 of 1913.

The Hon'ble Mr. *Gokul Prasad*, for the Appellants.

Mr. *Mohan Lal Sandal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by two persons, who allege themselves to be co-sharers, against the other co-sharers for profits for three years. It appears that the different co-sharers are recorded as the owners of certain shares. Sardar Singh and *Musammat* Hardei, the vendors of the plaintiffs, were recorded in respect of a one-fourth share and it is in respect of this share that they bring the present suit. It appears also that the different co-sharers were in possession of specific plots. There was some *khalsa* land in the hands of tenants but by an arrangement between the co-sharers two of the co-sharers, namely, Jugla and Bhagwant officiated as *lambardars*, collected the rent of the *khalsa*, paid the Government revenue and village expenses and kept the balance themselves to make up their share in the profits of the *mahal*. The *khalsa* was very much smaller than the land in the hands of the different co-sharers. Whether this arrangement was a permanent arrangement or an arrangement which depended upon the continued acquiescence of the co-sharers has not been decided in the present suit. The position was practically that the specific land in the separate possession of the different co-sharers represented at least for the time their shares. The plaintiffs' vendors were in possession of some land which was admittedly *sir*. They were also in possession of some *khudkasht* which, having regard to the length of time that they had separately cultivated, stood on the same basis as *sir*. They were also in possession of some further land which did not come under the definition of *sir*. After the sale, the plaintiffs took steps to have their vendors assessed with rent in respect of the *sir* and succeeded in so doing. They neglected to have rent assessed upon that portion of the *khudkasht* which came under the definition of *sir*. They took no steps to recover possession of the remaining portion of the *khudkasht*, with the result that their vendors remained in possession paying rent to no one. The learned District Judge held that the plaintiffs had failed to prove that the defendants had recovered any profits in excess of their share and consequently dismissed the plaintiffs' suit. It is admitted here that if in this *mahal* each co-sharer including the vendors of the plaintiffs were entitled to certain specific plots as their share in the *mahal*, the plaintiffs' suit must fail, because the plaintiffs could be in no better right than their vendors and all that they could get would be the same profits as their vendors got, subject of course to the provisions of the Tenancy Act which provide for a proprietor becoming ex-proprietary tenant of *sir*. If in the present case the profits of the land which the plaintiffs' vendors remained in possession of without payment of rent is entirely left out of count, the plaintiffs have undoubtedly failed to prove that the defendants got profits in excess of their share. If on the other hand the loss that has been sustained in whole or in part by reason of the plaintiffs' vendors remaining in possession paying no rent is to be deemed a loss falling on the general body of the co-sharers, then no doubt the other co-sharers did receive more profits than the plaintiffs. The learned Judge of this Court considered that had the plaintiffs attempted to get possession of the land in the possession of their vendors after the sale, they would have failed not only with regard to the land which came under the definition of *sir* but also in respect of all the rest of the land, and for this reason he has partly decreed the plaintiffs' claim. In our opinion it is clearly proved (if not admitted) that at the time of the sale to the plaintiffs, an arrangement existed by which the different co-sharers were entitled to possession of specific plots as representing their shares. Under

the circumstances of the present case we consider that the *khalsa* may be disregarded. Assuming that this arrangement was not of a permanent character, it ought to be deemed to continue until such time as one or more of the co-sharers, by clear notice, intimated to the other co-sharers that the arrangement should cease. It is not pretended that this was done. The co-sharers other than the plaintiffs shall continue in separate possession of specific land. We do not agree with the view taken by the learned Judge of this Court that if the plaintiffs had brought a suit for possession against their vendors, they would have failed in respect of the land which did not come within the definition of *sir*. In our opinion had they brought a suit for possession in respect of that land, their vendors would have had no answer whatever. In this connection we must refer again to the arrangemet which existed between the co-sharers as to separate possession of specific land. The case of *Debi Pershad* v. *Bhagwan Din* (1) was referred to on behalf of the respondents. In that case, no doubt, it was held that the ex-proprietary tenant was tenant of all the co-sharers, but it does not appear that the co-sharers were in possession of specific land as their shares either as a permanent division of the *mahal* or as a temporary arrangement between the co-sharers. In our opinion under the circumstances of the present case the other co-sharers cannot be expected to bear the loss which has been occasioned partly by the failure of the plaintiffs to get rent assessed and partly by their allowing their vendors to remain in possession of land, possession of which they were not entitled to hold.

We allow the appeal, set aside the decree of the learned Judge of this Court, and restore the decree of the lower Appellate Court with costs in all Courts including in this Court fees on the higher scale.

*Appeal allowed.*

(1) 16 Ind. Cas. 399; 10 A. L. J. 437; 35 A. 27.

## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1732 OF 1915.

January 2, 1916.

*Present*:—Mr. Justice Rattigan.

GAPPA MAL MANGAL RAM AND OTHERS —PLAINTIFFS—APPELLANTS

*versus*

PIARA LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. VII, r. 14 —Document relied upon in possession of third party— Plaintiff, whether may produce it in course of trial — Refusal to take a particular oath, effect of—Procedure— Practice.*

As a rule all documents that a plaintiff seeks to rely on should be produced at the opening of the suit. But a document which is in the possession of a third party and is called for in order to rebut a plea raised by the defendant may be produced in the course of the trial. [p. 621, col. 2.]

A mere refusal on the part of a party to a suit to take a particular oath is not a sufficient ground for deciding an issue against him. [p. 622, col. 1.]

*Chintaman Bhat* v. *Shrinivas Bhat*, 22 B. 680, followed.

First appeal from the decree of the District Judge, Simla, dated the 20th December 1913, dismissing claim.

Bakhshi *Tek Chand*, for the Appellants.

Pir *Taj-ul-din*, for the Respondents.

JUDGMENT.—This is a first appeal from the decree of the District Judge, Simla, dated 20th December 1913, dismissing plaintiffs' claim to recover the sum of Rs. 3,373-8-3 as compensation for damages and loss sustained by reason of defendants' breach of contract. The appeal was originally preferred to the Divisional Judge of Ambala, but the memorandum of appeal was returned to the appellant for presentation to this Court upon the authority of *Mengens* v. *Sutlej Flour Mills, Ferozepore* (1).

The facts are sufficiently stated in the judgment under appeal. The District Judge dismissed plaintiff's suit on the ground that it was the plaintiff himself and not the defendant who was responsible for the breach of the contract, and that the parties had in point of fact "squared their accounts" by a settlement arrived at subsequently between them.

(1) 27 Ind. Cas. 625; 42 P. L. R. 1915; 25 P. W. R. 1915; 30 P. R. 1915.

GAPPA MAL v. PIARA LAL.

At the same time, the learned Judge found on issues 3 and 4, that plaintiff's accounts as to the sums advanced by him to defendant and paid to other contractors who completed the work must be accepted as correct. This latter finding has not been challenged by defendant and no cross-objections as to it have been filed in this Court.

The only questions then before me for determination are (1) whether it was plaintiff or defendant who was responsible for the non-completion of the contract undertaken by defendant, and (2) whether the parties settled their differences by an amicable arrangement before suit.

As regards the *first* point, I find it impossible to accept the conclusions of the District Judge and the grounds upon which those conclusions are based. The plaintiff has adduced evidence to prove that after the lapse of some six weeks, the defendant had had the timber conveyed to a distance of only about $1\frac{1}{4}$ or $1\frac{1}{2}$ mile, and as time was obviously of the essence of the contract, plaintiff's contention is that under the terms of his agreement he was fully justified in putting an end to the contract with defendant and making it over to another contractor. This evidence was given by witnesses who reside in a Native State and as it would have been difficult, if not indeed practically impossible, to secure the attendance of these witnesses in Court, their examination and cross-examination were taken by means of interrogatories. So far as I can see from the record before me, no objections were raised by defendant to the adoption of this procedure. The learned Judge has disbelieved the evidence of these witnesses, but the only ground given by him for refusing to accept their statements seems to be that they "with a parrot-like insistence asserted that the sleepers were carried from one to $1\frac{1}{4}$ or $1\frac{1}{2}$ miles" and that they in "almost the same language tell exactly the same story". With every respect to the learned Judge, I fail to see how, if they were telling the truth, they could have done otherwise. Each of them was put the same questions, the interrogatories addressed to each being in exactly the same terms. To those questions each witness replied in brief and in the circumstances their answers must necessarily (if truthful) have been very similar.

The District Judge further discounts this evidence because two of the witnesses, Mansa and Piaru, had nothing to do with the contract between plaintiff and defendant, and had no personal knowledge of defendant and his affairs, and he adds "it is difficult to understand how they came by any first-hand knowledge." He has, however, completely overlooked the important part of their evidence, which they give as of their own knowledge, and that is that the timber was carried only about a mile or a mile and a quarter by defendant's men. The facts that they did not know defendant and that they had no concern in the contract are quite irrelevant, and in no way affect the value of their statements as to the latter point.

The District Judge prefers to believe the evidence of the witness, Phanku (P. W. No. 1). This man was, no doubt, called as a witness by plaintiff, but it is obvious from his evidence that he is hostile to the latter and has endeavoured to assist defendant as far as he could. On his own showing, he is a man whose word cannot be accepted without corroboration. He admittedly tried to defraud his own master (the defendant) in order to benefit himself, and contrived to get the contract transferred from his master to himself. On the other hand, there is nothing on the record to justify the rejection of the evidence given on interrogatories by the Mandi witnesses who have apparently no connection with plaintiff or any motive to perjure themselves on his behalf.

Furthermore, the probabilities of the case are entirely in plaintiff's favour. He had given this contract to defendant, and there is no suggestion that he did not really desire its performance within the time stipulated. Why then should he have wantonly prevented defendant from carrying it out, if in point of fact defendant was doing all that could in reason be expected of him and was actively engaged in performing his duties under the contract? When the contract was transferred to Lalu, plaintiff had to agree to pay higher rates and the District Judge has found that those rates were duly paid. But if so, what had plaintiff to gain by wrongfully and without cause taking the contract out of defendant's hands? The learned Judge has overlooked this very important aspect of the case.

GAPPA MAL *v.* PIARA LAL.

I find, therefore, that defendant had been so remiss in the performance of the contract that the plaintiff was, under the terms of his contract, justified in putting an end to it and transferring the contract partly to Lalu on the 31st October 1909 and partly to Phanku on the 9th January 1910.

The *next* question is whether plaintiff and defendant settled their accounts prior to suit. In his written statement defendant alleges that in January 1910 he objected to plaintiff's action in breaking the contract with him and transferring it to Lalu and Phanku; that plaintiff and defendant both then claimed to be entitled to damages, and that in the end it was decided between them that their accounts should be regarded as "squared" and that neither party should be held liable to pay anything to the other. This, however, is not the story told in evidence Phanku and defendant both assert that at the time of the alleged settlement a sum of Rs. 632 was found due to plaintiff and that this sum was subsequently paid to plaintiff, defendant paying Rs. 400 and plaintiff agreeing to accept Rs. 232 from one Puran. This is in itself a somewhat serious discrepancy and it has unfortunately escaped the notice of the District Judge. There is, however, an even more important piece of evidence which tells strongly against the defendant's plea and that is the entry in the book produced by the witness, Channan Mal (P. W. No. 2) (Exhibit P37). According to this entry, accounts between plaintiff and defendant in connection with the contract now in question were to be settled within one and a half months from the date of the entry (*i. e.* the 30th August 191 ). This entry is admittedly signed by defendant, but the latter alleges that he did not know at the time that the entry related to anything more than the settlement of his accounts with another partnership in which plaintiff was jointly interested with Channan Mal and others.

The District Judge has refused to admit this document (Exhibit P37) into evidence on the ground that it was produced at a late stage of the case. As a matter of fact it was produced by Channan Mal on the very first day on which evidence was taken in the suit, and as it was in possession of that witness it is difficult to see how it could have been produced earlier. It was not a document originally relied upon by plaintiff and it was tendered in evidence in order to meet defendant's plea that accounts had been squared in January 1910. The learned Judge observes, in dealing with this part of the case, that "the principle governing the rules relating to documents is that parties should at the opening of the suit produce all documents relied upon, so that no documents might be manufactured to suit the case of either party. Plaintiff, however, may produce additional documentary evidence after the defence has been disclosed, provided the defence raises new points." This summary of the law does not very accurately represent the provisions of Order VII, rule 14, clauses (1) and (2), and I confess I am at a loss to understand how plaintiff could have produced this document, which was in the possession of a third party and was called for in order to rebut a plea raised by defendant, earlier than he did. I accordingly hold that the document (Exhibit P 37) was admissible in evidence and was wrongly rejected by the lower Court.

The learned Judge was further of opinion that the entry was "not free from suspicion," and this not on the ground that the words appeared to have been interpolated since the original entry was attested by defendant, but because it was unusual to find an entry which directly related to one contract between *A*, *B*, *C* and *D* containing words which dealt with another separate contract between *A* and *D* alone. Here again I am compelled to differ from the learned Judge, as I can see nothing extraordinary in the addition. *A* has two contracts with *D*. One of these contracts (in which *B* and *C* are jointly interested with him) is being settled, but he by way of precaution adds the words that this settlement has nothing to do with the contract which was made between him and *D* alone and which has still to be settled. In my opinion this, so far from being unusual, would be a very ordinary course for a prudent man to take.

Again, if accounts were really settled between the parties, how is it that no attempt has been made to produce plaintiff's

receipts for the Rs. 400 and Rs. 232 said to have been paid to him by defendant and Puran, respectively, and why was Puran not called as a witness?

The District Judge has laid stress on the fact that defendant was prepared to swear to the truth of his evidence upon Ganges water whereas plaintiff declined to do so. I think undue weight has been given to this objection on plaintiff's part, which may be due to conscientious scruples on his part to take an oath such as that proposed. He has gone into the witness-box and denied on solemn affirmation that he settled accounts with defendant, and on the record as it stands, I must hold that defendant has failed to prove his plea. In these circumstances plaintiff's mere refusal to take the particular oath cannot be held sufficient ground for deciding this issue against him [*Chintaman Bhat* v. *Shrinivas Bhat* (2)]. I accordingly accept the appeal and grant plaintiff a decree in full for the amount claimed. Defendant must pay costs throughout.

*Appeal accepted.*

(2) 22 B. 680.

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 133 OF 1915.

January 21, 1916.

*Present*:—Mr. Justice Tudball and Mr. Justice Walsh.

*Musammat* PALIA—PLAINTIFF—APPELLANT

*versus*

MATHURA PERSHAD—DEFENDANT—RESPONDENT.

*Civil Procedure Code* (*Act V of* 1908), *O. XLVII, r.* 1 *—Review—Discovery of fresh evidence—Due diligence at original trial, necessity of, proof of.*

In making an application for review of a judgment on the ground of discovery of fresh evidence, the applicant must satisfy the Court that after exercise of due diligence he was not able to produce that piece of evidence at the trial of his case [p. 623, col. 2.]

First appeal from the order of the Additional Subordinate Judge of Bareilly, dated the 19th of June 1915.

Mr. *M. L. Agarwala*, for the Appellant.

Mr. *Sital Prasad Ghose*, for the Respondent.

JUDGMENT.

TUDBALL, J.—This appeal arises out of an order granting an application for review of judgment. The facts of the case are as follows. One Mathura Pershad, the respondent before us, executed a promissory note in favour of one Shiam Behari. The latter died and his widow *Musammat* Palia, the appellant before us, sued to recover the debt. One of the pleas taken in defence was that at the time when the money was lent or said to have been lent Shiam Bihari was a minor and, therefore, the transaction was void. The Court of first instance dismissed the suit. The Court of Appeal on the 18th of June 1914 decreed the suit. Shortly afterwards the defendant Mathura Pershad applied to the Court for review of judgment, on the ground of discovery of new and important evidence which he was unable to produce before the Court at the hearing of the case. That evidence apparently was a *patra*. The Court rejected the application on the 14th of November 1914. On the 25th of April 1915 Mathura Pershad put in a second application for review of the judgment of the 18th of June 1914 on the ground that he had discovered some fresh evidence, namely, an application by the grandfather of Shiam Bihari to be appointed guardian of Shiam Bihari and a certificate of guardianship granted by the District Judge which went to show that Shiam Bihari was a minor at the date of the transaction. *Musammat* Palia objected that no second application for review could, under the law, be made; *secondly*, that the application was out of time and that sufficient cause had not been shown and, *thirdly*, that the evidence was inadmissible and could not be

considered. The Court below decided in favour of the applicant Mathura Persbad and granted the application. *Musammat* Palia has come here on appeal and the same three points are raised before us. In regard to the *first* point that no second application for review could now be entertained by the Court below, I find it unnecessary in the view I take of the merits to decide this point. But I may say that I should find it difficult to come to any other decision than that which was arrived at in the case of *Gobinda Ram Mondal* v. *Bholanath Bhatta* (1). It is clear to me that the application for review ought to have been rejected by the Court below. I have examined the evidence produced by the applicant in the Court below. He examined himself and one Ram Sahai to show to the Court the manner in which he discovered the present evidence. The statement of these two persons is simply to this effect that Mathura Pershad went to Ram Sahai to borrow from him some money to pay the decree, whereupon Ram Sahai pointed out to him that no decree ought to have been passed as Shiam Bihari was a minor and his grandfather, Saya Mal, had actually been appointed guardian by the District Judge. Thereupon Mathura Pershad made enquiries through a Pleader and discovered the statement to be correct, whereupon he made the second application for review. Now Ram Sahai is related to Mathura Pershad. At the hearing of the original suit one Brij Lal was a witness on behalf of Mathura Pershad. The latter has admitted that Brij Lal and he were partners in a business and also that Brij Lal and Shiam Bihari, the alleged minor, were relations and co-sharers in the same property. Mathura Pershad has not attempted in his evidence to show that he made any attempt or exercised any diligence whatsoever in seeking for the evidence which he has now produced to establish the minority of Shiam Bihari. The Judge in the Court below seems to have been satisfied by holding that Mathura Pershad had no previous knowledge of the evidence. Of course it is highly probable that he had no such knowledge; but Order XLVII, rule 1, distinctly lays down that any person considering himself aggrieved by a decree or order and who from discovery of new and important matter or evidence, *which after the exercise of due diligence was not within his knowledge* or could not be produced by him at the time when the decree was passed, may apply for a review of judgment to the Court which passed the decree or order. The circumstances of the case seem to me to be such that if Mathura Pershad had exercised any diligence whatsoever, the evidence which he now wishes to tender could easily have been discovered by him. The parties reside in Bareilly and are greatly concerned with each other. The Court of the District Judge is within a mile of Mathura Pershad's residence and I find it impossible to hold that Mathura Pershad exercised due diligence in the matter. The *third* point raised relates to the admissibility of the evidence which Mathura Pershad has given. In the circumstances of the case it is unnecessary to enter into the question or decide it. The result is that I allow this appeal and set aside the order of the Court below with costs here and in the Court below.

WALSH, J.—I agree. I think the learned Judge unfortunately entirely ignored the important words in the clause with which he was dealing and under which the application for review was made to him, namely, "after exercise of due diligence." Now those words are put there for excellent reasons. The party who fails to get necessary evidence for the original trial and, therefore, fails in his suit is given certain privileges, and an opportunity to get his case re-heard. He is not entitled to ask for those privileges unless he satisfies certain clear statutory requirements. One of those requirements in justice to the other party is that he must have exercised due diligence in the preparation of his case. Now the question whether he has exercised due diligence or not involves two enquiries. The *first* is as to what he might have done and the *second* is as to what he has in fact done. As my learned brother has pointed out, this was a question merely of the discovery of a certificate of guardianship in the city of Bareilly where the applicant resided. He had ten months

(1) 15 C. 432.

to make the discovery. Unfortunately in the judgment before us the learned Judge does not appear to have directed himself either to the question of what he might have done or to the question of what he did and in quoting the rule under which he was exercising his jurisdiction he left out that important requirement, and his order cannot be supported. I agree with my learned brother's view as regards the Calcutta decision. I would point out what I discovered when my brother was delivering judgment, namely, that in this case, according to the statement of the applicant, the original decision was reviewed and upheld on his first application. This is what he says or appears to say in paragraph 3 of his application. If that were so, there had already been a review and there can be no doubt that this second application has no foundation in law. But on the assumption that the first application was refused and, therefore, there had been no review, whatever independent view I might be disposed to take of the provisions of this rule I think that in cases where no question of principle, but only a question of practice or procedure arises, it is desirable that the decisions of the various High Courts in various provinces should be as harmonious as possible and having regard to the fact that the decision of the Calcutta Bench was passed as long as twenty-three years ago, speaking for myself I should prefer to follow and adopt that ruling.

BY THE COURT.—The appeal is allowed and the order of the Court below is set aside with costs in both Courts

*Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 570 OF 1914.

December 22, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

PAYKAT MANAKKAL P. DAMODARAN NAMBUDRIPAD, *styled* CHURAVAN NARAYANAN PLAINTIFF—APPELLANT

*versus*

K. N. THEYYANKARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 1, scope of—Suit struck off as settled at request of parties, effect of—Suit for redemption—Mortgage sued on found to be invalid—Plaintiff, whether can fall back on earlier mortgage Amendment of plaint, when can be allowed.*

Order XXIII, rule 1, of the Civil Procedure Code allows a plaintiff unfettered liberty to withdraw his suit against all or any of the defendants, in other words, he can abandon the whole or any part of his claim against every defendant or against any one or more of the defendants. But such withdrawal or abandonment is done at the risk of his losing all right to litigate the subject-matter of the claim or claims so abandoned or withdrawn from the adjudication of the Court, unless he gets the permission of the Court to re-litigate the same. [p. 626, col. 1.]

Where both parties to a suit appear on the date fixed for the trial of the suit and at their request, the suit is struck off as settled, it cannot be said to be dismissed for default of appearance of both parties, the striking off amounting, in effect, to a withdrawal by the plaintiff. [p. 626, col. 1.]

*Gulkandi Lal* v. *Manni Lali*, 23 A. 219; A. W. N. (1901) 66, followed.

*Doma Rim* v *Raghu Nath Pandit*, 10 C. W. N. 40, dissented from.

*Brij Nandan Singh* v. *Kailash Tewary*, 24 Ind. Cas. 17, distinguished.

Where therefore, in a suit for redemption of a certain *kanom*, the *kanom* was found to be invalid and the plaintiff fell back upon an earlier mortgage, in regard to which a previous suit had been brought but was subsequently withdrawn:

*Held*, that, as the suit for redemption of the old mortgage had been withdrawn without liberty to bring a fresh suit, Order XXIII, rule 1, clause (3), operated as a bar, and the plaintiff could not maintain his suit. [p. 626, col. 2.]

By a manipulation of the form of the plaint in a subsequent suit in which the subject-matter and the relief claimed are substantially the same as those of a previous suit, a plaintiff cannot be allowed to get round the statutory provisions enacted by the Legislature for the protection of the defendant from repeated harassments in respect of the same subject-matter and relief. [p. 627, col. 2.]

Where, therefore, a suit for redemption is withdrawn without liberty to bring a fresh suit, it is not open to the mortgagor to bring another suit for

the same relief, even though the claim is based on his title as owner of the mortgaged properties. [p. 627, col. 1.]

*Parambath Manakkal* v. *Puthengattil Moosamu*, 28 M. 406, referred to.

*Arunachalam Chetty* v. *Meyyappa Chetty*, 21 M. 91; 8 M. L. J. 28; *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana*, 17 Ind. Cas. 445; 12 M. L T. 500; 23 M. L. J. 543; (1913) M. W. N. 1; 37 M. 70 (F. B.), followed.

But he can be permitted to redeem a mortgage admitted by the defendant to be subsisting and found to be binding on the plaintiff. [p. 628, col. 1.]

*Kadakamvalli Sankaran Mussad* v. *Mokkath Ussain Haji*, 30 M. 388; 17 M. L. J. 3:9; 2 M. L. T. 354, followed.

It is discretionary with a Court to allow a plaintiff to amend his plaint and the discretion should be freely exercised unless the amendment would make the suit relate to a wholly different subject-matter. [p. 628, col. 1.]

*Achuta Menon* v. *Achutan Nayar*, 21 M. 35 at p. 39, followed.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 904 of 1912, preferred against that of the Court of the Temporary Subordinate Judge of South Malabar at Palghat, in Original Suit No. 57 of 1910.

Messrs *T. R. Ramachandra Aiyar* and *T. R. Krishnaswamy Aiyar*, for the Appellant.

Messrs. *C. Madhavan Nair*, *J. L. Rosario*, *C. V. Ananthakrishna Aiyar*, and *V. Mahadeva Aiyar*, for the Respondents.

This second appeal coming on for hearing on the 15th, 18th and 21st October 1915, and having stood over for consideration till the 25th October 1915, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—Plaintiff is the appellant. He and the defendants Nos. 21 to24 are the *urallers* of the plaint *devaswom*. The plaintiff brought the suit on behalf of the *devaswom* to redeem a mortgage granted in February 1887 for Rs. 3,500, the first defendant having executed the registered *kaichit*, or counterpart Exhibit A, to the *devaswom urallers*. Both the Courts found that the 1st defendant acted beyond the scope of his authority in executing this *kaichit*, Exhibit A, and that he did not properly represent the *tarwad* of the defendants Nos. 1 to 16 in executing the *kaichit*. The Subordinate Judge, however, gave a decree for redemption of an old mortgage of 1833 granted by the *devaswom* to the family of the defendants Nos. 1 to 16 for Rs. 1,885-11-5. The learned District Judge, however, held that as the *devaswom* had brought a prior suit No. 320 of 1886 for redemption of this old mortgage of 1833 and had withdrawn that suit without liberty to bring a fresh suit, the plaintiff cannot be allowed under Order XXIII, rule 1, clause 3, to succeed in this second suit and to obtain the same relief which he had prayed for in the prior suit. The principal question in this case, therefore, is whether by the proceedings in the former suit of 1886, the plaintiff is debarred from redeeming the mortgage of 1833 (Mr. Ramachandra Aiyar, for the appellant, did not seriously contest the conclusion of the lower Courts that the mortgage of 1887 was not binding on the *tarwad* of defendants Nos. 1 to 16).

The case of *Brij Nandan Singh* v. *Kailash Tewary* (1), quoted by Mr. Ramachandra Aiyar, was decided on the ground that the previous suit between the parties was "dismissed for default" of both parties and that such a dismissal did not operate as *res judicata* so as to bar the second suit. The learned Judges do not state in their judgment under what provision of the Civil Procedure Code, the first suit was dismissed "for default" of both parties. If they intended to hold that the first suit was dismissed under Order IX, rule 3, their decision is, no doubt, supported by Order IX, rule 4. Whether the learned Judges were right in concluding on the facts proved in that case that the dismissal of the former suit was a dismissal for default of appearance on both sides, is a question on which I need not express an opinion, especially as I am not sure that the facts are correctly* and fully set out in the unauthorized report of *Brij Nandan Singh* v. *Kailash Tewary* (1). I might further add that, in the case in *Brij Nandan Singh* v. *Kailsash Tewary* (1), the defendant, whose former suit *as plaintiff* was treated as dismissed for default of prosecution, relied on the plea of *res judicata* because the plaintiff *as defendant in the former suit* failed to instruct his Vakil to defend the case. It is difficult to see how such a plea lies at all in the mouth of the *defendant* when his former suit was dismissed. The learned Judge's reference to *Doma Ram* v. *Raghu*

(1) 24 Ind. Cas. 17.

*The facts as stated in the judgment are quite correct.—*Ed.*

*Nath Pandit* (2) seems to me to be (with the greatest respect) irrelevant, but (as I said before) the unauthorized report might have omitted* to state all the necessary facts.

As regards the case of *Doma Ram* v. *Raghu Nath Pandit* (2), quoted in *Brij Nandan Singh* v. *Kailash Tewary* (1), I respectfully but unhesitatingly dissent from that decision, as I am unable to hold that the dismissal of a plaintiff's claim against a particular defendant for failure of the plaintiff to produce evidence against that defendant, though the plaintiff did appear in Court on the date of hearing and even obtained a decree against other defendants, was a dismissal for default of the plaintiff's appearance. In the present case, both parties appeared on the date fixed for the trial of the suit and at their request, the first suit was struck off as settled. I am unable to hold under the circumstances that the former suit was not withdrawn by the plaintiff [see also *Gulkandi Lal* v. *Manni Lal* (3)] or to hold that the suit was dismissed for default of the appearance of both parties.

Order XXIII, rule 1, allows to a plaintiff unfettered liberty to withdraw his suit against all or any of the defendants; in other words, he can abandon the whole of his claim against every defendant or against any one or more of the defendants. He can also abandon part of his claim against any one or more of the defendants. But such withdrawal or abandonment is done at the risk of his losing all rights to litigate the subject-matter of the claim or claims so abandoned or withdrawn from the adjudication of the Court, unless he got the permission of the Court, to re-litigate the same. In the present case, no such permission was obtained when the former suit was struck off owing to the plaintiff's withdrawal of the claim made in that former suit to redeem the mortgage of 1833. The present suit was brought to redeem a later mortgage of February 1887 which was found to be an invalid transaction. The plaintiff, who is the appellant in the second appeal, now wants to be allowed to treat the suit as a suit for redemption of the old mortgage of 1833, but the short answer to this claim of the plaintiff is "you brought your former suit No. 320 of 1886 in the Temelprom Munsif's Court for redemption of this same mortgage of 1833 and you withdrew it without permission and you are barred by Order XXIII, rule 1, clause 3."

It was, however, ingeniously argued on the appellant's side that the alternative claim to recover the property is not a claim as mortgagor to redeem the mortgage of 1833, but a claim to recover possession of the properties on the basis of the plaintiff's title as *jenmi* of the lands from the defendants who are not the *jenmi* owners. If I understood this over-subtle contention rightly, the steps of the reasoning seem to me to be as follows: "I (plaintiff) am the owner. An owner is entitled to possession *prima facie*. You (the defendants) admit you are not the full owners. Persons who are not full owners are *prima facie* not entitled to possession. Therefore, give me back my property. If you say that you are entitled to possession as the mortgagees under the mortgage of 1833, then receive your money and give up possession. As I offer to pay the money only in consequence of your reply to my claim for possession based on my title, that offer would not convert my suit into a suit for redemption of your mortgage of 1833 and I am not, therefore, barred by Order XXIII, rule 1, clause 3, in consequence of my withdrawal of the former suit." In support of this argument, the decision in *Parambath Manakkal* v. *Puthenguttil Moosamu* (4) is relied upon. In that case the former suit was brought to redeem a mortgage of 1884 of properties which might be called (A) properties. That mortgage was a renewal in part of a mortgage of 1876 which included both (A) properties and (B) properties. The mortgage of 1876 was relied upon in that former suit in support of the validity of the mortgage transaction of 1884 sought to be redeemed in that former suit. That first suit was dismissed on the ground of the invalidity of the mortgage of 1884. The second suit was brought by the plaintiffs

(2) 10 C. W. N. 40.
(3) 23 A. 219; A. W. N. (1904) 66.
(4) 28 M. 406.

*With due deference to His Lordship it is submitted that no part of the judgment, which contains all the necessary facts, has been omitted from the report.—*Ed.*

to redeem (A) properties alone on the strength of "the plaintiff's title and on the demises of 1876 and 1884." The decision of the learned Judges, if I have understood it rightly, concedes (*a*) that if the second suit is treated as one brought for redemption of the mortgage of 1884, it is barred as *res judicata*; (*b*) if it is treated as a suit for redemption of the mortgage of 1876 alone, it is barred by section 43 of the old Civil Procedure Code corresponding to Order II, rule 2, of the new Code; (*c*) but as it is based on the plaintiff's title as owner also, he could obtain possession on payment of whatever is due to the mortgagees on foot of the original *kanom* of 1876 and for improvements.

There are no doubt distinctions between the facts of the present case and the facts of the case of *Parambath Manakkal* v. *Pathengattil Moosamu* (4). Though the later suits in both cases were based on title also, the first suit in *Parambath Manakkal* v. *Pathengattil Moosamu* (4), was brought on the invalid later mortgage, while the first suit in this case was brought on the valid earlier mortgage. There is also another distinction between the case of *Parambath Manakkal* v. *Pathengattil Moosamu* (4) and the present case, namely, while the defence plea as to the bar of the second suit was based in *Parambath Manakkal* v. *Pathengattil Moosamu* (4) on *res judicata* and on section 43, the bar of the second suit in this case is based on Order XXIII, rule 1, clause 3. But I do not like to distinguish the case of *Parambath Manakkal* v. *Pathengattil Moosamu* (4) from the present case on these grounds. The common feature in the two cases is that the second suit claimed relief on the plaintiff's title as the owner of the properties sued for, and on that fact an agreement was alleged in that suit (and is alleged also before us) that it saves all statutory bar. And this fact was naturally pressed with great strenuousness by Mr. Ramachandra Aiyar. After giving my best consideration to his argument, I have come to the clear conclusion that it should not be accepted. The result of accepting his contention would be, that a plaintiff, who 40 years after the date fixed for redemption of a valid mortgage, withdraws a suit brought for redemption thereof without liberty to bring a fresh suit, (the defendant having admitted in the suit that he was in possession of the mortgaged properties on foot of the mortgage), can again bring a suit within 60 years of the dismissal of the first suit for possession; basing it for claim on his title as owner, and he can succeed in obtaining a decree for redemption by cleverly framing his plaint as a plaint which is not solely based on his right to redeem. As said in *Arunachalam Chetty* v. *Meyyappa Chetty* (5), quoting West J., the plaintiff's "cause of action, into what ever Protean forms it may be moulded by the ingenuity of Pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted, as a ground for the Court's interference." I think that this principle was the basis of the Full Bench decision in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (6), and it is clear to me that *Parambath Manakkal* v. *Pathengattil Moosamu* (4) must be deemed to have been overruled by the Full Bench decision in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (6). By a manipulation of the form of the plaint in the later suit, in which the subject-matter and the relief claimed are substantially the same as those of the former suit, you cannot be allowed to get round the statutory provisions enacted by the Legislature for the protection of the defendants from repeated harassments in respect of the same subject-matter and reliefs.

In the last resort the plaintiff seeks to redeem the mortgage of 1856 for Rs. 2,000 set up by the defendants in answer to the plaintiff's suit brought for redemption of the suit mortgage of 4th February 1887, which was found to be legally invalid as against the defendants. He relies on the case of *Kadakamvalli Sankaran Mussad* v. *Mokkath Ussain Haji* (7). The defendants, however, claimed to hold the lands not only under the document of 1856 (which they have not produced) but under three other *purakadoms* (or mortgages for additional sums lent), the total of the additional sums lent amounting to Rs. 4,000. These *purakadoms* (Exhibits 23, 24 and 26),

(5) 21 M. 91; 8 M. L. J. 28.

(6) 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 23 M. L. J. 543; (1913) M. W. N. 1.

(7) 30 M. 388; 17 M. L. J. 329; 2 M. L. T. 354.

however, were found either not to affect the plaint items 1 to 38 or not to be binding on the plaintiffs by both the lower Courts. The respondents' Vakils, however, contend that though those three *purakadoms* were found not to bind the plaintiff's *devaswom*, the plaintiff, having failed to prove the validity of the plaint mortgage of 1887, could be allowed to redeem the lands only on the footing that all the mortgages set up by the defendants were true and binding and he cannot be allowed to change the suit into a suit for redemption of only one of the mortgages set up by the defendants, I do not see much force in this argument. It is, no doubt, an indulgence granted by the Court in its discretion to allow the plaintiff to amend the prayer in the plaint [though the discretion of the Court should be freely exercised (see Order VI, rule 17) unless the amendment would make the suit to relate to a wholly different subject-matter]. But it does not follow that the defendants are entitled to insist that their defence in its entirety should be accepted by the plaintiff by reason of the grant of permission to the plaintiff to amend his suit. I am, however, pressed with the observations of Sir Subramania Aiyar and Benson, JJ. in *Achu'a Menon* v. *Achutan Nayar* (8). The observations are as follows: "It is scarcely necessary to say that one of the objects of section 373 (old Civil Procedure Code) is to protect a defendant from being harassed by repeated litigation with reference *not only to the allegations constituting the plaintiff's case, but also as to those which constitute the defence or any part of it.*" Now in the former suit of 1886, the defendants set up (see paragraphs 7 and 8 of Exhibit B, the written statement in that suit) that their right to hold the lands 1 to 38 rested on the *kanom* of 1856 for Rs. 2,000 and also on a *purakadom* of 1863 for a further advance of Rs. 2,000. That *purakadom* is evidently in the document Exhibit 26. In this case under the above ruling in *Achuta Menon* v. *Achuta Nayar* (8), I think that the plaintiff cannot be heard to contest the validity as against the *devaswom* of the *purakadom* of 1863 (Exhibit 26) and that he could be allowed to redeem only on payment of the sums due both under the document of 1856 and the *purakadom* of 1863 (Exhibit 26).

In the result and following *Kadakamvali Sankaran Mussad* v. *Mokkath Ussain Haji* (7), I would allow the plaintiff to redeem the mortgage of 1856 (admitted by the defendants) and the *purakadom* of 1863 (which the plaintiff could not dispute) on payment of the amount due thereunder and of the value of the improvements after deducting the value of the *purappad* due according to these documents from 13 years before suit (that is, from and including the Malabar year 1073), the plaintiff having admitted in his plaint receipt of all prior *purappads* due to him as mortgagee. The terms of the document of 1032 are set out in paragraph 7 of Exhibit B (the written statement in Original Suit No. 320 of 1886). The value per *para* of the Michavaram paddy and the value of the improvements as decided by the Munsif and accepted by the District Judge will be followed in drawing up the decree of this Court. Six months' time is granted for redemption. The costs of the contesting respondents throughout must be paid by the appellant and will carry interest at 6 per cent. per annum from this date and will be added to the amount payable for redemption. Though the decision in *Kadakamvali Sankaran Mussad* v. *Mokkath Ussain Haji* (7) does not expressly state that the plaintiff who is allowed to redeem a mortgage other than that which he sought to redeem (but which the defendant admitted as the one under which he was holding) ought to amend his plaint, I agree with the observation made by my learned brother during the course of the arguments that the better course is to direct the plaintiff to so amend his plaint before passing the decree. I would, therefore, direct the plaint to be amended by adding an alternative prayer for redemption of the mortgages of Thulam 1032 and 1039, the amendments to be made in two weeks from this date. In default, the second appeal will stand dismissed with costs. On compliance, the decree for redemption which I have already indicated will issue.

NAPIER, J.—I concur.

This second appeal coming again for hearing the Court delivered the following

(8) 21 M. 35 at p. 39.

KHIATOMAL LALCHAND *v.* FATEH MUHAMMAD.

JUDGMENT.—Interest at 12 per cent. per annum will be allowed on the *puramkatam* amount till the date when the prior *kanem* would have to be redeemed in the usual course.

Twenty-fifth April 1916 will be the date fixed for redemption.

*Appeal partly allowed.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL NO. 2 OF 1914.

August 5, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

KHIATOMAL LALCHAND—PLAINTIFF—APPELLANT

*versus*

*Nawab* FATEH MUHAMMAD—DEFENDANT RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 15—Jurisdiction, what determines—Estoppel against pleading want of jurisdiction*

It is the value put by a plaintiff that *prima facie* determines jurisdiction. [p. 629, col. 2.]

*Wadhumal* v. *Chellomal*, 19 Ind. Cas. 870; 6 S. L. R. 256, referred to.

A defendant who opposes a plaintiff's claim in a lower Court on the ground of jurisdiction is precluded from objecting to the jurisdiction of a higher Court to which the same plaint is presented as urged by him. [p. 629, col. 2.]

Appeal against the order of the Sub-Judge, Hyderabad.

Mr. *Motiram Ramchand*, for the Appellant.

Mr. *Hardasmal Gurbomal*, for the Respondent.

JUDGMENT.

PRATT, J. C.—The suit was originally filed by the plaintiff in the Tando Sub-Court and by a subsequent amendment became a suit for possession and mesne profits. The mesne profits claimed in the amended plaint are the mesne profits that have accrued subsequent to the institution of the suit but prior to the amendment. Nevertheless the defendant objected to the jurisdiction of the Court and pleaded that although the amendment could relate back to the date of the institution of the suit in all other respects, it would not so relate back in respect of the claim for mesne profits; and these mesne profits must, therefore, be treated as mesne profits prior to the institution of the suit and that the Tando Court had no jurisdiction. That Court accepted the plea and returned the plaint, which was presented to the Court of the First Class Sub Judge, Hyderabad. There the plaintiffs were required to pay the Court-fee not only on the value of the land, but also on the mesne profits *i.e.*, on the total sum of Rs. 7,200. The Sub-Judge then decided that the mesne profits being subsequent to the date on which the suit was instituted in the Tando Court did not affect its valuation and that the suit should be presented in the Court of lower jurisdiction.

Plaintiff now appeals.

It seems to us that the defendant is estopped from objecting to the jurisdiction of the First Class Sub-Judge, Hyderabad. He pleaded in Tando Court that that Court had no jurisdiction, because the amendment did not relate back as to the mesne profits and he cannot now be allowed to say that the Court of First Class Sub-Judge had no jurisdiction because the amendment does not so relate back. He may not approbate and reprobate and seek to negative the contention he successfully urged in the Tando Sub-Court.

Mr. Hardasmal contends that jurisdiction cannot be conferred by estoppel. But jurisdiction in the sense in which it is used in the present case does not refer to the competency of the Court. The Court of the Sub-Judge, First Class, is competent to try the suit. If the suit were within the limits of the pecuniary jurisdiction of a Court of lower grade, the trial by the higher Court would only be an irregularity contravening section 15 of the Civil Procedure Code, and the defendant is precluded from objecting to an irregularity which he himself has invited.

But we do not consider that section 15 precluded the Sub-Judge, First Class, from taking cognizance of the suit. As explained in *Wadhumal* v. *Chellomal* (1) it is the value put by the plaintiff that *prima facie* determines jurisdiction and that value is over Rs. 5,000, and the contrary principle that the jurisdiction of a Court of lower Court must not be ousted by an exaggerated

(1) 19 Ind. Cas. 870; 6 S. L. R. 256.

claim is not applicable here, for the plaintiff would have gone to the lower Court, if defendant had allowed him to do so.

We accordingly reverse the order of the First Court, Sub-Judge, Hyderabad, and direct him to admit the plaint. Respondents to pay the costs of this appeal.

*Order reversed.*

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LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 201 OF 1914.

January 17, 1916.

*Present*:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

SWAN TEE AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

MA NGWE—DEFENDANT—RESPONDENT.

*Appeal—Pauper, leave to appeal as, granted—Limitation Act (IX of 1908), s. 5—Stamping before inquiry as to pauperism is finished—Appeal, if within time—Co-owner's right for damages for use and occupation—"Tax, rate or assessment," meaning of—Lower Burma Town and Village Lands Act (IV of 1898), ss. 24, 25, 26—Burma Land and Revenue Act (II of 1876).*

Where an application for leave to appeal as pauper, presented beyond the proper time, is admitted under section 5 of the Limitation Act, 1908, and further inquiry as to pauperism is directed but proper Court-fees for an ordinary memorandum of appeal are paid before the inquiry is concluded, the appeal must be deemed to have been presented on the date of presenting the application for leave to appeal. [p. 631, col. 2.]

*Skinner* v. *Orde*, 2 A. 241; 6 I. A. 126; 4 C. L. R. 331, followed.

A suit for use and occupation by a co-owner against another co-owner will not lie. [p. 632, col. 1.]

Ground rent, under English Law, does not come within any of the terms "taxes, rates and assessments" but under sections 24, 25 and 26 of the Lower Burma Town and Village Lands Act ground rent due to Government is in a different position from ground or other rent due to an ordinary landlord. They virtually make ground rents, payable to Government, a tax or assessment. [p. 632, col. 2.]

Mr. *Halkar*, for the Appellants.

Mr. *Clifton*, for the Respondent.

JUDGMENT.

FOX, C. J.—The first matter to be dealt with is whether the appeal is barred by limitation.

The decree appealed against is dated the 8th April 1914, and the judgment on which it is founded was delivered on that day, but the case was ordered to be put down to speak to the minutes of the decree. On the 9th April it was ordered that the method of partition of the property should stand over for a month so that the parties might have an opportunity for coming to an agreement in regard to it. They did not agree, and on the 11th May the learned Judge added a sentence to his judgment directing a reference to the Collector for him to partition the property.

The plaintiffs presented an application on the 18th May to have an alleged clerical error in the judgment corrected under section 152 of the Code. This was rejected on the 5th June, and a copy was delivered on the 24th July. The petition for leave to appeal as paupers was presented on the 25th July. The application was time-barred, but after hearing the respondent the application was admitted under section 5 of the Limitation Act on the 30th November. At the same time further inquiry as to the pauperism of the appellants was ordered. Before the enquiry was concluded the appellants furnished the proper Court-fees for an ordinary memorandum of appeal. On the 2nd February 1915 the appeal was admitted subject to any objection at the hearing. In view of the decision in *Skinner* v. *Orde* (1) the appeal must be deemed to have been presented on the 25th July 1914 The overtime up to that date must be deemed to have been considered when dealing with the application for leave to appeal as paupers, and the question as to this to be concluded by the order admitting that application.

The many-times amended plaint was based on the plaintiffs being heirs of the former owners, and on a lease to the defendant of three plots of land by the plaintiffs' mother, Ma Shwe Tsee, as administrator of the estate of Maung Sine, deceased. This lease is dated the 14th October 1904 and is for ten years. Two of the plots of land were the property of Government, and had apparently been included within the Rangoon Town limits for a long time. The other plot was formerly in Hanthawaddy District but on extension of the Rangoon Town limits was included within the latter district. Over this plot Maung Sine had apparently acquired a landholder's right under the Burma Land and Revenue Act, Ma Shwe Tsee died on the 27th July 1907.

(1) 2 A. 241; 6 I. A. 126 (P. C.); 4 C. L. R. 331.

She and the plaintiff Kyee Swan had borrowed money from the defendant. The latter brought a suit in 1909 to recover what was due on two promissory notes and deposit of title-deeds of the lands and obtained a mortgage decree in respect of $\frac{3}{4}$th share of the properties; the other $\frac{1}{4}$th share was taken to be the share and interest of the plaintiff Swan Tee who was a minor at the time. In that suit the defendant claimed no interest on the promissory notes up to the date of filing the suit which was the 15th March 1909, but she claimed interest accruing after that date and was awarded Rs. 4,472-13-7 up to the date of decree, *i. e.*, the 31st January 1911.

The reason for her not claiming interest before suit was that what she had to pay for rent under the lease of 1904 was by agreement set off against what Ma Shwe Tsee and Kyee Swan had to pay her for interest on the promissory notes.

It may be noted here that if there had been an administrator of Maung Sine's estate at the time, the defendant would have had to pay to him or her the full rent of Rs. 275 per mensem under the lease between the above dates of 15th March 1909 and the 7th March 1912; under her decree, however, she was entitled to interest at the rate of 6 per cent. per annum on the amount decreed from the 31st January 1911. If the previous arrangement of setting off interest against rent had been continued the balance of rent payable would have far exceeded Rs. 63-8; for the 6 per cent. interest allowed in the decree would not have come to as much as the 18 per cent. interest payable on the promissory notes.

The plaint in the present suit sets out that owing to the sale of the properties under the decree the lease terminated by operation of law. This is an example of the confused ideas which permeate the case. The lease was a lease by the administratrix of an estate. The sale under the decree was a sale of the personal rights of Ma Shwe Tsee and Kyee Swan in the properties. These properties had never been conveyed by the administratrix to the heirs of Maung Sine. The rights of the heirs were to obtain their share from the administratrix. The distinction between the rights of a constituted legal representative of the estate and the personal rights of the heirs of Maung Sine has been overlooked throughout.

The plaintiff claimed first possession of a $\frac{1}{4}$th share of the properties. His other claims were for (1) balance of rent after deducting interest from the 1st July 1907 to the 15th March 1909 at the rate of Rs. 63-8 per mensem, amounting to Rs. 1,270, (2) rent from the 16th March 1909 to the 7th March 1912 at the rate of Rs. 275 per mensem amounting to Rs. 9,826-10-0, (3) damages for use and occupation of $\frac{1}{4}$th of the land from the 8th March to the 5th December 1912 at the rate of Rs. 68-12, *i.e.*, $\frac{1}{4}$th of Rs. 275 per mensem, amounting to Rs. 616 and (4) mesne profits from the date of institution of the suit, *viz.*, the 7th January 1913.

In her amended written statement the defendant took the objection that the suit would not lie but this was not gone into. It was apparently not pressed. Of the specific sums of Rs. 1,270, Rs. 6,826-10 and Rs 616 claimed, the defendant's Advocate disputed the last sum only (see the Judge's note in the course of Kyee Swan's evidence in paragraph 3 of the written statement); the defendant admitted that as an heir of Maung Sine and Ma Shwe see the plaintiff Swan Tee was entitled to a $\frac{1}{4}$th share of the properties. She, however, claimed that she was entitled to set off against what was payable by her the various sums set out in the written statement. The only issues fixed were:

1. Whether the defendant is entitled to set off any and which of the items specified in clauses 5 to 9 of the written statement?

2. Whether the plaintiffs or either of them is entitled to claim damages for use and occupation, and if so how much?

In paragraph 5 of the written statement the defendant alleged that she had paid Rs. 1,150 for the funeral expenses of Ma Shwa Tsee and two sums of Rs. 50 to the plaintiffs personally.

In paragraphs 6, 7 and 9 of the written statement she said she had paid Rs. 543-5-4 and Rs. 5,975 for ground rent to Government of part of the properties. In

SWAN TEE v. MA NGWE

paragraph 8 she stated she had paid Rs. 900 as expenses incurred in some land acquisition proceedings in connection with the properties.

The learned Judge disallowed the plaintiffs' claim for Rs. 616 for damages for use and occupation of the plaintiffs' ¼th share of the land from the 8th March 1912 to the 5th December 1912, on the ground that one tenant-in-common could not sue another tenant-in-common for damages for use and occupation. The plaintiffs appeal against this decision. No doubt a suit for use and occupation by a co-owner against another co-owner will not lie, for such a suit is founded upon an agreement between the parties, express or implied, for the occupier to pay reasonable compensation for the use and occupation fee. Foa on Landlord and Tenant, Chapter 14, and Bullen and Leake, Precedents of Pleadings, 7th Edition, page 171. There was in the present case no allegation that the defendant occupied the land with the plaintiffs' permission: she occupied it because she had a right to do so as a co-owner from the 8th March 1912.

What I take it was meant to be claimed for the plaintiff Swan Tee was, a quarter share of the reasonable profits of the land. Assuming that he and the defendant were, co-owners of the land from the time of her purchase of the interest of Ma Shwe Tsee and Kyee Swan, he was entitled to such share in the profits and he should not be deprived of his rights merely because his Pleader put his claim in wrong and inappropriate words. I would allow Swan Tee's appeal in so far as it appeals against the disallowance of the Rs. 616 claimed in the plaint. The learned Judge did not deal with the claim for mesne profits from the date of suit until realization. The plaintiff Swan Tee was and is clearly entitled to a quarter share of the profits of the land, until he receives a quarter of it on partition, and the decree should be amended accordingly.

The learned Judge disallowed the defendants' claim to set off the sums of Rs. 1,150 and Rs. 100 mentioned in the 5th paragraph of the written statement, and Rs. 900 mentioned in the 8th paragraph. The defendant has not appealed against this decision.

In regard to the sums of Rs. 543-5-4 and Rs. 5,975 paid for ground rent to Government, he held that the defendant was entitled to set off what she had paid on this account up to the 21st December 1911, the date of Exhibit V, a lease to her by Government of holding No. 2, one of the plots included in the lease of 1904, Exhibit I. He held that this ground rent was not a tax, rate or assessment which she was bound to pay under this last mentioned lease, and that clause (*g*) of section 108 of the Transfer of the Property Act allowed her to deduct what she had paid for ground rent from the rent she had to pay under Exhibit I. Under English Law ground rent would not come within any of the terms "taxes, rates and assessments"; but it does not follow that what is charged by Government in this country does not do so. Under section 24 of the Lower Burma Town and Village Lands Act, 1898, all sums of money payable to Government in respect of land, including sums for rent, are recoverable as if they were arrears of land revenue under the Burma Land and Revenue Act, 1876. Under section 25, every sum due to Government in respect of any land is given priority over every other charge on the land, and under section 26, every sum due to Government in respect of land is payable by all persons in possession (which means occupation) of the land, at the time the sum is demanded, and by all persons in possession during the period for which the sum is payable. These provisions put ground rent due to Government in a very different position from ground or other rent due to an ordinary landlord. They virtually make ground rent payable to Government a tax or assessment. Moreover it seems clear that the parties to the lease regarded the Government charge as falling within what the lessee had to pay. From the receipts in the bundle, Exhibit B, it appears that Ma Shwe Tsee paid only Rs. 8-12 per annum as rents of lots 2 and 3 from 1897 to 1905. No receipts from 1905 to 1908 have been produced, but from the first receipt in the bundle, Exhibit H, it appears that the defendant was assessed for a payment of Rs. 543-5-4 from the 18th September to the 31st December 1908.

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Kyee Swan says that there had been a previous increase of the ground rent to Rs. 75-11 per annum which the defendant paid. She herself said that she had paid rent to Government because Government gave her notice to do so, and she also said that she paid ground rent to Government through Ma Shwe Tsee every year, since the commencement of the lease of 1904.

It is not clear how it came about that the Government demand for rent was made in 1908 from the defendant. In paragraph 8 of her amended written statement the defendant states that in 1908 the Collector took proceedings to acquire the land at a low figure and she contested the proceedings for the benefit of the estate of Ma Shwe Tsee. The proceedings are not before us. Exhibit D is a notice from the Collector to the successors of Ma Shwe Tsee to show cause why they should not be evicted. There is a letter, Exhibit A, from the defendant's Advocate to Kyee Swan's Advocate, asking for some notice from the Collector to facilitate payment into Court, but what the money was for, does not appear. The next document in order of date before us is the Collector's receipt for Rs. 513-5-4, the date of payment entered on it being the 28th January 1909. Exhibit E shows that on the 20th March 1909 the defendant accepted an offer of the Collector to give her a lease at a rental of Rs. 175 per mensem which would amount to Rs 525 per quarter. This was paid by her from the 1st April 1909. Something further must have happened, for Exhibit 111 dated the 19th November 1909, shows that a penal rent was at one time assessed on the land, but was afterwards cancelled and the defendant was called on to pay the usual rent of Rs. 525 for the previous quarter. She has been paying at that rate up to the 21st December 1911 when she obtained Exhibit 5, a quarterly lease at a rate of Rs. 120 a quarter for lot No. 2. What has happened as regards lot No. 3 does not appear. I gather from the document that to avoid possible eviction of the plaintiffs from these lots and her own possession of the lands being thus brought to a close, the defendant must have put herself forward as the person who had the best right to occupy the land, and that thus she obtained recognition by the Government who treated her as its tenant from certainly the 18th September 1908. She, however, has never claimed either in the suit of 1909 or in this suit that the heirs were ousted from all rights to these two lots. She put herself forward and accepted personally a heavier burden in the way of a higher ground rent, and it appears to me that it is not open to her to now claim a set-off from the plaintiff for this ground rent. Her claim is a stale one and is evidently an after-thought, for if she had understood that the ground rent was not payable by her she would have set it off against the rent she had to pay under the lease of 1904, when calculating what was due to her, before bringing her suit in 1909. In my opinion her, claim to set off the two sums of Rs. 543-5-4 and Rs. 5,975 should have been disallowed. I would allow the appeal, set aside the decree of the original Court, and give the plaintiff Swan Tee a decree against the defendants for possession of 1/4th of the lots of land mentioned in the plaint, the land to be partitioned by the Collector, and for payment by the defendant of Rs. 11,712-10-0 and costs on the amount and directing an enquiry under clause (*c*) of rule 12 of Order XX as to rents and mesne profits of the lands, from the institution of the suit until delivery of possession of $\frac{1}{4}$th of the lands to the plaintiff Swan Tee or the expiration of three years from the date of this judgment, whichever, event first occurs. I would also order the defendant to pay Swan Tee his cost of this appeal and would order Swan Tee to pay the Court-fees which would have been payable if he had wholly succeeded in the suit originally and if he had not been allowed to sue as a pauper.

PARLETT, J.—I concur.

*Appeal allowed.*

MOTISING *v.* SOBHOMAL.

## SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 25 OF 1915.

July 30, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

MOTISING AND ANOTHER—APPLICANTS

*versus*

SOBHOMAL AND OTHERS—OPPONENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, rr. 25, 28, O. XLII—Court of second appeal, issues remanded by, for recording evidence and findings—Lower Appellate Court, power of, to delegate the function to Original Court.*

Judicial functions cannot be delegated without statutory authority.

When issues are remanded by a Court of second appeal to the lower Appellate Court against whose decree an appeal has been preferred, the latter cannot delegate this function to the Original Court, but it has authority under rule 28, Order XLI, Civil Procedure Code, 1908, to require evidence to be recorded by the Original Court and then itself record the findings on the issues remanded.

*Sabri* v. *Ganeshi*, 14 A. 23; A. W. N. (1891) 205, referred to.

*Khair Mahomed Yakhtiar Khan* v. *Hiromal Choithram*, 4 Ind. Cas. 605; 3 S. L. R 120, approved.

Application for revision against the order of the Joint Judge, Sukkur.

Mr. *Mathradas Ramchand*, for the Applicants.

Mr. *Fatehchand Asudomal*, for Opponent No. 1.

JUDGMENT.

PRATT, J. C.—This is an application for revision of an order of the District Judge, Sukkur, remanding for finding and evidence to the original Court issues remanded to him for trial under Order XLI, rule 25, in Second Appeal No. 13 of 1913.

It is contended that under Order XLI, rule 25, the lower Appellate Court to whom issues are remanded by the Court of second appeal, and not the Original Court, is the Court that records additional evidence and findings on the issues. This order and rule are applied by Order XLII to appeals from the appellate decrees. That being so the words in rule 25 "the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred" must mean that the issues are referred for trial to the lower Appellate Court.

The Allahabad High Court in *Sabri* v. *Ganeshi* (1) held that the lower Appellate Court has no jurisdiction in such cases to refer the issues for trial to the original Court. And this decision is correct, for judicial functions may not be delegated without statutory authority. But although there is no statutory authority for delegation of the judicial function of finding on the issues, still rule 28 gives a lower Appellate Court authority to require evidence to be recorded by the original Court.

When the issues are remanded by the Court of second appeal to the lower Appellate Court for trial, it seems to us that the lower Appellate Court resumes its functions as the Court of first appeal and though it is the only Court which can record a finding on the issues remanded, yet it may under rule 28 require the additional evidence to be taken before the Original Court.

This appears to be in substance the view taken in *Khair Mahomed Yakhtiar Khan* v. *Hiromal Choithram* (2) and establishes a procedure which is certainly far more practicable and convenient to the parties than that contemplated by the Allahabad High Court which seems to us to have taken an unnecessarily extreme view.

We amend the order by deleting the direction to the Original Court to record findings. In other respects the order will stand. Costs to be costs in the cause.

*Order amended.*

(1) 14 A. 23; A. W. N. (1891) 205.
(2) 4 Ind. Cas. 605; 3 S. L. R. 120.

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LAKHRANI KUAR *v.* DHANRAJ SINGH.

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1676 OF 1914.

January 8, 1916.

*Present*:—Mr. Justice Walsh.

*Musammat* LAKHRANI KUAR—PLAINTIFF—APPELLANT

*versus*

DHANRAJ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 11, 47—Suit for possession on basis of decree, maintainability of—Decree barred by limitation.*

Where a person has obtained a decree for possession and has not executed it within limitation, he

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can maintain a fresh suit for possession basing it upon the judgment obtained in his favour, and his suit is not barred by sections 11 and 47 of the Code of Civil Procedure, 1908. [p. 637, cols. 1 & 2; p 638, col. 1.]

Second appeal from the decision of the District Judge, Azamgarh, dated the 18th June 1914.

Dr. *S. N. Sen*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal raises at least one very interesting question of law about which I feel considerable doubt, but I do not think I should gain anything by taking time to consider my judgment. I am glad to think that my decision can be reviewed, if so desired, under the Letters Patent.

The action is brought by the plaintiff for possession of certain property which belonged to her husband as a separated Hindu. Her husband died in 1904. She brought a suit for possession against the defendant in 1907 and succeeded in the first Court. That judgment was affirmed by the Appellate Court in November 1907. The defence had been that the land had been given orally to the defendant by the plaintiff's husband. That defence failed. It was also alleged that the defendant had been in continuous possession since 1895, but of course that would have given the defendant no right in itself. The judgment of the Appellate Court was appealable to the High Court but was not appealed against. That is a decision between the present plaintiff and the present defendant, that the plaintiff was entitled to the property in question and was also entitled to immediate possession in 1907. The question of title, therefore, between the parties is *res judicata*. The plaintiff applied for execution of the decree which had been given in her favour in the Court of first instance in September 1913. That application was not unnaturally rejected by the Munsif on the 10th of January 1914 on the ground that it was made more than three years after the decree and was, therefore, time-barred. Between 1907 and 1913 something appears to have happened to which I will refer later in my judgment. Upon her application being thus rejected, the plaintiff brought this suit on the 26th February 1914 and obtained a decree for possession in her favour on the 28th of April 1914 in the Munsif's Court. That decision was reversed in appeal by the District Judge on the 18th of June 1914, and from that latter decision this appeal is brought.

Now, the plaint in this, suit undoubtedly alleged a cause of action founded upon the decree of 1907. It also alleged, for some reason or another, a right of action accruing in 1905. That was clearly wrong because any cause of action anterior to the judgment of 1907 was merged in the judgment. It also alleged in paragraph 2, that the plaintiff could not obtain possession within three years of the decree, and it did not allege that the plaintiff had in fact been in possession at any time between 1907 and the commencement of this suit. So that when the case came before the Court of first instance, the sole cause of action alleged, which the defendants had any reason to anticipate would be urged against them, was the previous decree. However, as appears from the judgment of the learned Munsif and from the extracts of evidence read by the respondents' Counsel to me, it happend that during the hearing of the suit, five days prior to the decision, a witness gave evidence that the plaintiff had been in possession of the land in dispute a year after the decree, *viz.*, in 1908. It is perfectly true, as I have pointed out, that no reliance had originally been placed by the plaintiff upon that fact. It must have taken the defendants and their Pleaders by surprise, and it was clearly a matter in which in justice to the defendants (if the defendants and their Pleaders had desired it) they ought to have been given any further opportunity which they reasonably asked to meet that further allegation. They do not appear to have done so, but one of the defendants Dharam Singh, himself went into the witness-box and apparently contradicted the witness. The learned Munsif was unable to accept the evidence of this defendant and gave excellent reasons for accepting the evidence given by the witness to whom I have referred, and he held as a fact, after hearing the evidence on both sides on a point which, as I have said, had not been raised in the plaint, that the plaintiff had been in possession of the land within 12 years, *viz.*, in 1908. In my opinion, if that is true, it was a satisfaction of the decree and a fresh cause of action would accrue to the plaintiff.

if at any time subsequent to that the defendants re-took possession. It was alleged by the same witness (to whom I have referred) called by the plaintiff, that the defendants did re-take possession, although that statement does not appear in the learned Munsif's judgment but was read to me by the respondents' Counsel. Now there are cases, no doubt, in which parties are taken by surprise and in which it is unjust to allow their rights to be defeated by proof of matters which are not alleged and which they have no opportunity of meeting. On the other hand it is undesirable in the interests of justice, where no injustice will otherwise be done to anybody, that a Court should wilfully shut its eyes to relevant facts which are proved in the course of the hearing, raising a cognate though different cause of action to that originally relied upon by the plaintiff. Everybody knows that it may occur that in the early stages of a case, all the facts are not known to the Pleader who draws out the plaint, and every risk of injustice can be avoided by allowing an adjournment, by raising the point on appeal, or by penalising the successful party in costs. In this particular case the defendants appealed. Upon the hearing of the appeal it was open to them to raise any question of law or to point out to the Appellate Court any unjust consequences which had ensued to them arising out of the admission of the evidence to which I have referred, and the finding at which the learned Munsif arrived. They advanced six grounds of appeal but they took no point about this alleged injustice. The finding of fact to which I have referred is not dealt with at all in the judgment of the lower Appellate Court and must be taken, therefore, not to have been overruled. It, therefore, stands as a finding of fact by which, I am bound, as to which it would be a great misfortune, in my opinion, if I were not entitled to take notice of it, and which, in my opinion, entitled the plaintiff to succeed. I do not think that under the circumstances of the case, I should be doing right if I sent the case back or referred any further issue on this point. On that single ground, therefore, I allow this appeal and give judgment for the plaintiff. To put the matter in right form I re-settle an issue under Order XLI, rule 24, to the following effect:—"The plaintiff, while in possession of the land in question in 1908, was wrongfully dispossessed by the defendant" and I hold that the plaintiff is entitled to succeed on that ground.

There is, however, *another* point to which I have already referred which is raised by this appeal, namely, even if the plaintiff was not entitled to have the fact of physical possession in 1908 found in her favour in this suit and to recover judgment upon that fact alone, whether she is not entitled to sue as she originally did, and to succeed, upon the decree of 1907. That is a question which is by no means free from difficulty. There has been a considerable amount of discussion upon it in one form or another and some divergence of judicial opinion, but I do not think it desirable to go at length through all the decisions on the point. I would first refer to a decision by Wilson, J., in 1881 reported as *Attermoney Dossee* v *Hurry Doss Dutt* (1) which commends itself to my judgment and to certain observations contained in a recent judgment of two Judges of the Calcutta High Court reported as *Kali Charan Nath* v. *Sukhada Sundari Debi* (2). Most, if not all, of the cases are set out in that judgment. The passage to which I would refer is at the end of the judgment on page 62, being a passage cited from the judgment by Baron Parke in *Williams* v. *Jones* (3): "The principle...is, that, where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." The Calcutta High Court goes on to say: "No mischief can result from the acceptance of this principle, if it is adopted subject to the qualification recognized in modern English Law, *viz.*, that an action is permissible only where the judgment cannot be enforced in some other way." The only other case I need refer to is a decision of the Chief Justice of Bombay reported as *Mancharam* v. *Bakshi Sahib* (4). In that case the Chief Justice appears to me to have recognized the principle that judgments and

(1) 7 C. 74; 9 C. L. R. 357; 4 Shome. L. R. 192.
(2) 30 Ind. Cas. 824; 20 C. W. N. 58; 22 C. L. J. 272.
(3) 13 M. & W. 628; 2 D. & L. 680; 14 L. J., Ex. 145; 53 E. R. 262; 67 R. R. 767.
(4) 6 B. H. C. R. 231 at p. 234.

decrees may be sued upon when it is the only practicable remedy open. Now I take my stand upon the broad principle that a judgment, certainly in a contract case, I think in all cases, is a contract of record. By the comity of nations, most countries recognize the judgments of foreign countries and give effect to them by allowing suits to be brought upon them, provided they are delivered by Courts of competent jurisdiction, acting within that jurisdiction, and lay down no principle repugnant to the policy of what I may call the domestic country. It would appear that domestic judgments ought to have at least the same force as foreign judgments. It would also appear from a decision which was much relied upon by the respondents' Counsel reported as *Fakirapa* v. *Pandurangapa* (5) that countless actions have been brought at any rate in Bombay on Small Cause Court judgments or decrees. It is, therefore, as it seems to me, difficult to hold that a suit, upon a domestic judgment of some kind or another, is not cognizable under the Code in this country. Some limit, of course, there must be and it is obvious that whichever way this case is decided, there must be some conflict of what I may call equitable doctrines.

The period for enforcing a decree by Article 182 of Act IX of 1908 is three years and it is urged with great force that to give effect to a suit upon judgment brought within 12 years under Article 122 is directly in conflict with Article 182. On the other hand to refuse to give effect to a suit upon a judgment which has resulted in a decree for the recovery of possession of land after the expiration of three years would be in conflict with Article 122 and also, as was pointed out by the appellant's Counsel, with section 28 of the Limitation Act. It is not immaterial that the Limitation Act itself in Article 122 recognizes—of course it does not enact—the admissibility of judgments obtained in British India as a cause of action under the Code. Mr. Agarwala, for the respondents, argued with great force that there was a wide distinction between a judgment and a decree. So there is. I am of opinion that the word "judgments" contained in Article 122 means "decrees". The word "obtained" is not really applicable to the reasons which a Judge gives in his judgment; it is more applicable to the decree which a successful party gets in his favour and I think that in two places in section 5 of the Limitation Act the word "judgment" is used in the sense in which "decree" is defined by the Civil Procedure Code.

Now the question still remains, whether there is anything in the Code itself which indicates that such suits are not admissible in this country. Before I refer to the sections which are relied upon, I would observe, what I have already pointed out, that if the Code did contain anything expressly or impliedly excluding from the consideration of the Courts in this country suits upon judgments, then for many years past some if not all of the High Courts in this country have been decreeing suits upon judgments without any jurisdiction at all. The first section relied upon is section 11 and at first sight it would seem clearly to prohibit the re-litigation of any question which had already been determined in any suit, that is to say, it seems to me to go further than the principles of *res judicata* founded upon the *Duchess* of *Kingston's* case (6) and reads as if no party, not even a plaintiff, can sue upon any matter which has been determined. I think the answer is, that the plaintiff, in such a case as this, is not suing upon the same cause of action; he is alleging that he has obtained judgment and that the defendant is under a legal obligation to him under that judgment and that obligation arises out of matters subsequent to those litigated in the original suit. A decree determines questions between parties in litigation at the commencement of the suit; the plaintiff here is relying upon something in his favour at the end of the suit and independent of the questions originally litigated. Indeed questions originally litigated cannot be re-considered in the suit upon the decree and that is all section 11 provides.

Section 12 was also relied upon and I, therefore, refer to it but it is obvious that only relates to cases where the plaintiff is in default under the rules contained in the Schedule or has brought a suit and has been nonsuited, and it does not bear upon the question now before me. Lastly,

(5) 6 B. 7.

(6) 34 H. L. Jo. 655; 20 Howell St. Tr. 537; 2 Sm. L. C. 731.

section 47 has been relied upon, and indeed it has formed in many judgments dealing with this matter a prominent subject of discussion under the name of section 244 of the old Code. As the section now stands, it reads: "All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a suit." To my mind the question whether a judgment can be sued upon in a Court of co-ordinate jurisdiction or not, is a totally different question to that which is dealt with by this section. Such a suit does not and could not relate to the "execution, discharge, or satisfaction of a decree" and with great respect to the Judges who have dealt with this question, this section, in my opinion, has nothing whatever to do with a suit of the present nature.

Finding, therefore, nothing in the Code which prohibits the entertainment of such a suit, and finding that suits have been entertained over and over again in one form or another, and finding that the period for enforcing this decree has expired and that, therefore, the plaintiff has no other practicable remedy, I think the plaintiff was entitled to bring the present suit on the second ground as well.

I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiff will get her costs in all Courts.

*Appeal allowed.*

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LOWER BURMA CHIEF COURT.

SPECIAL CIVIL SECOND APPEAL NO. 39 OF 1915.

January 11, 1916.

*Present:*—Mr. Justice Maung Kin.

MAUNG AUNG NYUN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

MAUNG GYI—PLAINTIFF—RESPONDENT.

*Contract Act (IX of 1872), s. 11—Minor - Contract to purchase, validity of—Suit by minor, maintainability of—Sale of minor's property by guardian, if valid—Benefit or necessity of minor.*

If there is only an agreement on the part of a minor to buy and on the part of a major to sell and nothing more, and the former afterwards refuses to perform his part of the contract, the latter would not be able to hold him liable under the contract, because a minor is not, under the Indian Contract Act, competent to make a contract; but where in addition to the agreement the minor has paid the price and has obtained a transfer of the property, the *transfer* is not void, as it was the act of the seller who was at the time competent not only to contract but also to make a transfer to any one he liked. [p. 639, col. 2.]

*Mohori Bibee* v. *Dharmodas*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114, distinguished.

A sale of a minor's property by his *de facto* guardian for the benefit or necessity of the minor is valid. [p. 639, col. 2.]

Mr. *Ba U*, for the Appellants.

*Maung Pu*, for the Respondent.

JUDGMENT.—There are three points for determination, namely,

1. Is the suit barred by limitation?

2. Was the plaintiff the owner of the property in suit, when the last defendant, Maung Aung Nyun, sold it as alleged by the defence to the 2nd defendant and her husband, since deceased?

3. If it was his property then, is the sale by Maung Aung Nyun binding on the plaintiff?

The plaintiff describes the suit as one to set aside a deed of sale executed by the 1st defendant and for possession of the land conveyed by that deed. But the facts alleged by him show that it is one by a ward to recover property improperly alienated by his *de facto* guardian, the 1st defendant. However, in any view of the case as to the nature of the suit, it cannot be held to be time-barred. The Sub-Divisional Judge has found that the plaintiff was 18 years and 2 months old at the time of the institution of the suit. The Divisional Judge on appeal has said that it might not be possible to state the plaintiff's age correctly but that it was certain that he was then little over 18. Under section 6 of the Limitation Act the plaintiff had three years in which to file a suit, from the date on which he attained majority. That being the case, the suit was not barred by limitation.

As regards the *second* point, I agree with the learned Divisional Judge in finding that Ma Ngwe sold the land to her grandson, the plaintiff, alone. It is unfortunate that his uncle, Shwe Po, and his aunt,

Ma Shwe Hnya, have not been called. But in my judgment the evidence on the record is sufficient to justify a finding in his favour. Three respectable witnesses, who say they were present on the occasion of the sale, support him. There was a mutation of names in the Register No. IX commonly known as *pyatpaing*. But the register relating to it has been destroyed by fire. Secondary evidence of its contents being held admissible, Shwe Aung, the then Revenue Surveyor, gives evidence on behalf of the defence that Ma Ngwe reported the sale to him as one to Maung Aung Nyun and at her request he entered the plaintiff's name also in the *pyatpaing*, as she said that he was the son of Aung Nyun and that his father had taken a second wife who might claim an interest in the property afterwards. Shwe Aung is not, however, supported by the assessment roll, where we find the land shown as that of "Maung Gyi father Maung Aung Nyun." The entry means Maung Gyi, son of Maung Aung Nyun. If his story is true, the entry should have been "Aung Nyun son Maung Gyi" which would mean Aung Nyun and his son Maung Gyi. In this instance, "Son Maung Gyi" cannot be taken as a description of Aung Nyun, as it is not usual to describe a man in the Revenue Registers as so and so whose son is so and so. But it is quite common and also usual and proper to describe a minor as the son of so and so in the registers. In such a case the description is given as briefly as possible as in this case, "Maung Gyi father Aung Nyun" instead of "Maung Gyi son of Aung Nyun". The former words means Maung Gyi, father's name, Aung Nyun. The entry, therefore, shows that the land was put in the name of Maung Gyi. Further there was a good reason why Ma Ngwe should have thought of selling the property to Maung Gyi in the way alleged, because that was one way of protecting the interests of her motherless young grandson, whose father had taken a second wife, whose advent into the family was likely to work a mischief against the boy in the future.

Next, it has been argued that the sale to Maung Gyi was void, because he was then a minor. In my opinion there is no warrant in law for this proposition. If there was only an agreement on the part of Maung Gyi to buy and on the part of Ma Ngwe to sell and nothing more, and the former afterwards refused to perform his part of the contract, the latter would not be able to hold him liable under the contract because a minor is not, under the Indian Contract Act, competent to make a contract which is defined as being an agreement enforceable by law. But where in addition to the agreement the minor has paid the price and has obtained a transfer of the property, I do not see how the *transfer* could be held to be void, especially as it was the act of the seller who was at the time competent not only to contract but also to make a transfer of her property to anyone she liked. The well-known Privy Council case of *Mohori Bibee* v. *Dharmodas* (1) cannot apply. That was a case in which a mortgage by a minor was held to be void under section 10 of the Indian Contract Act. A mortgage involves (1) a covenant to re-pay the loan and (2) a transfer of an interest in the mortgaged property as security for the loan and the transfer involves an agreement on the part of the mortgagor to allow the mortgagee to treat the property as security for the loan. Such being the nature of a mortgage it is quite right in holding that a minor is incompetent to enter into such a transaction. The transfer in the present case was entirely different; I, therefore, hold that the sale to Maung Gyi was valid.

The *third* question is whether or not the sale of the property by Maung Nyun, the *de facto* guardian of Maung Gyi, to the 2nd defendant and her husband was valid. If it was made for the benefit of the minor or because of his necessity, there is authority for holding that it would be valid. But the question, whether Aung Nyun had sold the property for the minor's necessity or his benefit, has been answered by both the lower Courts in the negative. I entirely agree with them. The burden

(1) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.).

of proof which is on the defence has not been discharged, as there is no evidence on their side. And it has been proved beyond all doubt that Aung Nyun was a confirmed gambler and never contributed to the support of his young son.

The appeal is dismissed with costs.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 858 OF 1915.

January 5, 1916.

*Present*:—Mr. Justice Shah Din.

AZIM ULLAH AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

GOKAL CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 5—Appeal filed out of time under advice of Pleader—Pleader misled by change in law—Sufficient cause.*

It is not an inflexible rule of law that in no case can the circumstance that a litigant has, under the erroneous advice of Counsel or Pleader, presented an appeal out of time be deemed a sufficient cause within the meaning of section 5 of the Limitation Act. The true rule is whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention or there was any negligence or inaction or want of *bona fides* on the part of the appellant.

*Sundar Koer* v. *Raghunath Sahai*, 12 Ind. Cas. 677; *Rakhal Chandra Ghosh Mozumdar* v *Ashutosh Ghosh*, 19 Ind. Cas. 931, 17 C. W. N 807, followed

Where, therefore, an appellant filed an appeal in the Court of a District Judge after the specified period of 30 days under the advice of a legal practitioner, who was misled by a change in the law of limitation relating to appeals:

*Held*, that there was sufficient cause within the meaning of section 5 for not filing the appeal within the prescribed period of limitation.

Second appeal from the decree of the District Judge, Rawalpindi, dated the 9th March 1915, affirming that of the Subordinate Judge, Rawalpindi, dated the 13th August 1914, decreeing the claim.

Mr. *Abdul Ghani*, for the Appellants.

Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—The sole question for decision in this case is whether the appellants had "sufficient cause" for not filing their appeal in the Court of the District Judge within the prescribed period of limitation so as to be entitled to the benefit of section 5 of the Limitation Act. This question has to be decided with reference to the circumstances of this particular case; and considering it in the light of those circumstances, I think that the appellants had "sufficient cause" within the meaning of section 5 of the Limitation Act for not preferring their appeal within the period of 30 days prescribed by Article 152 of that Act.

The appellants have filed an affidavit stating that the appeal in the Court of the District Judge was filed after the expiry of 30 days but within the period of 60 days under the advice of a legal practitioner of Rawalpindi, and that their Counsel was misled because there had been a change in the law of limitation relating to appeals in the District Judge's Court, by the repeal of the old Punjab Courts Act by Punjab Act III of 1914. The principle applicable to cases like the one under consideration is that laid down in *Sundar Koer* v. *Raghunath Sahai* ( ) and in *Rakhal Chandra Ghosh Mozumdar* v. *Ashutosh Ghosh* (2). That principle is that it cannot be laid down as an inflexible rule of law that in no case can the circumstance that a litigant has, under the erroneous advice of Counsel or Pleader, presented an appeal out of time, be deemed a sufficient cause within the meaning of section 5 of the Limitation Act. The true rule is whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention, or there was any negligence or inaction or want of *bona fides* on the part of the appellant.

In accordance with this rule the appellants were, in my opinion, entitled to the benefit of section 5 of the Limitation Act, and the District Judge should have entertained their appeal and disposed of it on the merits. I accordingly accept this appeal and setting aside the decree of the District Judge remand the case to him for a re-hearing of the appeal. The costs will abide the event.

*Appeal allowed.*

(1) 12 Ind. Cas. 677.
(2) 19 Ind. Cas. 931; 17 C. W. N. 807.

NGA MYA *v.* EMPEROR.

## LOWER BURMA CHIEF COURT.
## FULL BENCH.

CRIMINAL REVISION PETITION No. 229-B OF 1915.

September 14, 1915.

*Present*:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Twomey, Mr. Justice Ormond, Mr. Justice Parlett and Mr. Justice Robinson.

NGA MYA—APPLICANT

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 297, 299, ill. (a)—Trial by Jury—Judge's duty—Interpretation of Statute—Weight to be attached to illustrations—Penal Code (Act XLV of 1860), s. 300, excep. 4—Evidence Act (I of 1872), s. 105.*

An omission on the part of a Judge to explain to the Jury the difference between murder and culpable homicide not amounting to murder is not in every case a material misdirection. [p. 642, cols. 1 & 2.]

*Hla Gyi* v. *Emperor*, 3 L. B. R. 75; 11 Bur. L. R. 298; 3 Cr. L. J. 1, referred to.

The statements of law in the illustrations used in an Act cannot be taken as laying down substantive law; they merely go to show the intention of the framers of the Act and may be useful if correct. [p. 642, col. 2.]

The only express provision as to the duty of a Judge in charging a Jury is that in section 297. It is not incumbent on a Judge to explain a part of the law to the Jury, which if they acted on they would have gone wrong. [p. 642, col. 2; p. 643, col. 1.]

Before a Judge leaves a case to the Jury for finding as to whether the accused's case comes within one of the exceptions to section 300, Indian Penal Code, there must be evidence, at least an allegation by the accused, on which they might reasonably and properly conclude the facts to be established. [p. 643, col. 2; p. 644, col 1.]

*Emperor* v. *Upendra Nath Das*, 30 Ind. Cas. 113; 21 C. L. J. 377; 16 Cr. L. J. 561; 19 C. W. N. 653 (F. B.), referred to.

It is not the duty of a Judge to invent facts in the interest of accused persons. [p. 644, col. 1.]

Per *Twomey, J.*—When the facts appearing in a case are consistent only with an intention to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence can only be murder and it would, in such a case, clearly be misleading to discuss culpable homicide done with any lesser criminal intention. [p. 644, col. 1.]

In doubtful cases of murder a Judge is bound to explain the law as to the minor offence of culpable homicide not amounting to murder as well as the major offence of murder. [p. 645, col 1.]

Per *Parlett, J*—A judicial decision must be taken as arrived at under the particular circumstances of the case in which it was given and to govern another case only if its circumstances are similar. [p. 650, col. 1.]

It is quite possible to explain fully and correctly what murder is without stating what it is not. A Court is bound to presume the absence of circumstances bringing the case within an exception unless and until the existence of these circumstances is proved or at least alleged. If there is material only for some of such circumstances but not others, it would not be right for a Judge to raise the applicability of the exception before the Jury as by so doing he might mislead them into contravening section 105 of the Evidence Act. [p. 650, col. 2.]

Per *Ormond, J.*—The examination of an accused is to be taken as evidence in the case. The facts, therefore, stated by an accused must be considered by the Jury in the same way as facts deposed to by the witnesses in the case, the Jury being at liberty to accept as true all or some only of the facts stated by the accused. But it is the duty of a Judge to explain to the Jury not only the law applicable to the facts as deposed to by the witnesses in the case, but also the law which is applicable to the facts as stated by the accused. [p. 646, col. 1.]

Review of the order of the Hon'ble Mr. Justice Robinson, dated the 20th August 1915, passed in Criminal Sessions Trial No. 28 of 1915.

Messrs. *May Aung* and *Ba Dun*, for the Applicant.

Mr. *Mg. Kin*, Assistant Government Advocate, for the Crown.

JUDGMENT.

FOX, C. J.—The case is before this Bench for review under section 12 of the Lower Burma Courts Act upon the following certificate of the Government Advocate:—

"Criminal Sessions Trial No. 28 of 1915.

I hereby certify under section 12 of the Lower Burma Courts Act, 19. 0, that it should be further considered by the Chief Court

1. Whether the learned Judge who presided at the Sessions Trial held at Rangoon, at which the case above named was tried on or about the 20th day of August 1915, erred in omitting to explain to the Jury the distinction between murder and culpable homicide not amounting to murder.

2. Whether the learned Judge erred in omitting to direct the Jury that, if they believed there was a row over a gambling dispute and a fight during which the deceased was stabbed, it was open to them to consider the effect of exception 4 to section 300, Indian Penal Code.

NGA MYA v. EMPEROR.

3. Whether misdirection or misdirections (if any) have in fact occasioned a failure of justice under section 537 (*d*) of the Code of Criminal Procedure.

(Sd.) G. RUTLEDGE,

*Government Advocate, Burma.*"

The only charge which the accused was called on to plead to was a charge of murder. It is not contended that there was any error or defect in the learned Judge's explanation to the Jury of the law of murder so far as such law was applicable to the case.

The wording of the 1st paragraph of the certificate is very wide, but it is not contended that the learned Judge should have gone through the whole range of the circumstances under which the taking of the life of another does not amount to murder but amounts to culpable homicide not amounting to murder.

The *first* error committed by the learned Judge is said to have been in omitting to tell the Jury that whoever causes death of a human being by doing an act with the intention of causing such bodily injury as is likely to cause death is guilty of culpable homicide not amounting to murder which, when intention is involved, requires in the ordinary case either an actual intention to cause death or an intention to cause bodily injury sufficient in the ordinary course of nature to cause death.

It is contended that it is the imperative duty of a Judge to lay before a Jury these distinctions in every case in which an accused is charged with murder by an act done with the intention of causing bodily injury. The words "*A* is tried for the murder of *B*; it is the duty of the Judge to explain to the Jury the distinction between murder and culpable homicide" in illustration (*a*) to section 299 of the Code of Criminal Procedure, are relied on in support of this contention, as is a ruling upon which the illustration may possibly have been brought into the Code. The case of *Hla Gyi* v. *Emperor* (1), in which it was held that omission on the part of the Judge to explain the difference between murder and culpable homicide not amounting to murder was a material misdirection is also relied on. There could be no question that there was material misdirection, in that case, but if the judgments lay down that such an omission is a material misdirection in every case, they go too far.

The weight to be attached to apparent statements of law in illustrations used in Acts has been the subject of consideration in many cases enumerated in Woodroffe and Ameer Ali's Law of Evidence at page 98 of the 6th Edition. The general consensus of opinion is that they cannot be taken as laying down substantive law, and that they merely go to show the intention of the framers of the Act, and in that and other respects they may be useful, provided they are correct. Substantive law can only be made by express enactment in an Act. There is no express enactment laying down the rule stated in illustration (*a*) to section 299 of the Code of Criminal Procedure. The only express provision as to the duty of a Judge in charging a Jury is that in section 297, which says that he shall sum up the evidence for the prosecution and defence and lay down the law by which the Jury are to be guided. The act which the accused in the present case was charged with having committed was the plunging of a sharp-pointed kitchen knife, the blade of which was $9\frac{1}{2}$ inches long, into the upper part of the back of the man who was killed by him with force sufficient to drive it down $5\frac{1}{2}$ inches into the man's body until it came out in part of the man's chest. The accused is said to have accompanied his blow with an exclamation that could only mean that he struck the blow intentionally. He is said to have followed this up with other savagery in keeping the knife in the wounded man's body and not withdrawing it, although attacked by others in order to make him do so. The wounded man did not die instantaneously, but he lived only for a very short time after receiving the stab. *Prima facie* the case was one of wilful murder. If it was proved to the satisfaction of any reasonable man that the accused did the acts he was alleged to have done, no reasonable juryman acting according to his oath and his conscience could come to any other conclusion than that the accused had killed the man and that he had stabbed him with the intention of killing him or at least with the intention of causing him bodily injury sufficient in the order of nature to cause his death. There was, in my opi-

(1) 3 L. B. R. 75; 11 Bur. L. R. 298; 2 Cr. L. J. 1

nion, no room for any reasonable man coming to the conclusion that he may have stabbed with the intention merely of causing bodily injury likely to cause death. In such a case it appears to me that in performing the duty of laying down the law by which the Jury was to be guided, it was not incumbent on the Judge to explain a part of the law which if they had acted on they would have done wrong. In such a case they were to be guided not by the law as to culpable homicide not amounting to murder but by the law as to murder. I am unable to hold that the Judge erred in omitting to explain to the Jury the distinction between murder and culpable homicide not amounting to murder.

Another ground of objection to the charge to the Jury raised before us in the course of the argument is that the learned Judge erred in omitting to explain to the Jury the bearing of drunkenness on the question of the intention of a man in doing an act such as the accused was alleged to have done. This ground does not appear to me to fall within the matters to be reviewed under the Government Advocate's certificate, and we cannot go beyond that certificate. I may say, however, that it appears to me that there was nothing in the accused's own statement, or in the evidence of any of the witnesses he called, sufficient to show that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, and consequently there was nothing to rebut the presumption that he intended the natural consequences of his act in stabbing Po Myit in the way he did.

The remarks in the case of *Emperor* v. *Upendra Nath Das* (2) as to the conduct of a case by Counsel not being a negligible factor in a Criminal Court bear on this part of the present case. The efforts of the Advocate for the accused in this case appear to have been chiefly directed to trying to get the Jury to come to the conclusion that the evidence for the prosecution was so unreliable that the accused should not be convicted on it, and that his story that he did not stab and kill Po Myit should be believed. It was open to him to have also put before them considerations as to his intention in the event of their coming to the conclusion that he did stab the man, but the learned Advocate did not do so. The learned Judge cannot be said to have erred in omitting to raise a case for the accused which his Advocate had not raised in any explicit way, and a case for which there was no real foundation.

The *second* matter which the Government Advocate has put before the Court for consideration is whether the learned Judge erred in omitting to direct the Jury that if they believed there was a row over a gambling dispute and a fight during which the deceased was stabbed, it was open to them to consider the effect of exception 4 to section 300 of the Indian Penal Code. The wording of that exception is:—"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner." Under section 105 of the Evidence Act it lay upon the accused to bring himself within that section. Neither he nor his Advocate alleged any such case, involving as it does the admission that he had killed Po Myit but that he had done it under circumstances stated in the exception. There was nothing whatever to support such a case. In his statement to the Magistrate he said that he with others had played the game of *ket* in the house where the occurrence took place. He had put down 8 annas as his stake but Po Mya did not pay the equivalent. For some reason which he did not explain Po Mya, Sein Thi and Tha Dun surrounded him and hit him with their fists. So he struck Po Mya with what he thought a stick. As he was under the influence of liquor at the time he did not know whom he struck. Po Myit was near him. He did not stab Po Mya with a *da*. Such is his version of what occurred in the house. It is not supported by any evidence except as to gambling having gone on in the house. It is a statement of facts. I fail to see how it could be the duty of the learned Judge to put before the Jury another state of facts which the accused did not even allege, and then to tell the Jury that if those

(2) 30 Ind. Cas. 113; 19 C. W. N. 653; 21 C. L. J. 377; 16 Cr. L. J. 561 (F. B.).

other facts were true they should consider whether the case fell within exception 4.

The Calcutta Full Bench case *Emperor* v. *Upendra Nath Das* (2) makes it quite clear that before a Judge leaves a case for finding as to whether the accused's case comes within one of the exceptions to section 300, there must be evidence on which they might reasonably and properly conclude the facts to be established.

Even if it be taken that what the accused really meant to say was that, on being struck by their fists (by Po Mya, Sein Thee and Thee Dun) he took up the nearest thing to hand which turned out to be a *dah* and struck at Po Mya but unfortunately hit Po Myit, even then there would have been no case falling under exception 4, though there might possibly be one under exception 1 with which we are not concerned.

It is, however, not a duty of a Judge to invent facts in the interest of accused persons.

In my opinion the learned Judge did not err in not putting to the Jury that it was open to them to consider the effect of exception 4 to section 300 in connection with the case.

I would refuse to interfere in the case.

TWOMEY, J.—There are two species of culpable homicide, *viz*, murder and culpable homicide not amounting to murder, and the difference between the two lies in the intention or knowledge with which the offender did the criminal act. When the facts appearing in the case are consistent only with an intention to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence can only be murder and in such a case it would clearly be misleading to discuss culpable homicide done with any lesser criminal intention. Examples are given in illustrations (*a*) and (*c*) to section 300. The cases described in these illustrations fall clearly under the major species of culpable homicide. It would be different if the facts showed that the offence was near the border line between the two offences, for example, if the weapon used was a club or if the wound was in such a part of the body or of such a kind as to raise doubts about the offender's intention. In such doubtful cases the Judge would be bound to explain the law as to the minor offence as well as to the major offence. In the present case if we look only to the weapon used and the nature of the injury, there can be no doubt at all that the offender's intention fell within clause (*i*) and clause (*iii*) of section 300. If the offender was in his right mind, no other intention could be attributed to him than an intention to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death. It has been argued, however, that the learned Judge missed the significance of the evidence as to the offender being intoxicated, that this evidence was important as bearing on the question of intention and that it was the Judge's duty to explain to the Jury the difference between murder and the less serious species of culpable homicide, because a man may be so intoxicated that he is incapable of forming the particular intention requisite for the offence of murder. This argument would have great force if there were evidence of such intoxication. But in addressing the Jury on the subject the Judge would necessarily be guided to a great extent by the attitude taken up by the accused and his Advocate, and would be slow to raise this special defence if neither the accused nor his Advocate relied on it. There is evidence of drunkenness in this case. The prosecution witness Po Mya said in cross-examination that the accused appeared to have been drinking. Po Set in answer to questions by the Court said he got the smell of liquor from the accused. The defence witness Ma Kin said that the accused was drunk, another defence witness said he was very drunk and staggering about, and a third said that he did not talk properly. But the Advocate for accused did not question the important eye-witnesses Tha Dun, Sein Thi, and Po Set at all about drunkenness. The accused himself in his examination did not mention that he was drunk till he reaches the climax of his story. After describing the alleged gambling at Po Mya's house in detail he says: "Po Mya, Sein Thi and Tha Dun surrounded me and punched me with their fists. So I struck Po Mya, I think with a stick. As I was drunk (*a-et-mu*) I did not know whom I struck." His statement is not consistent with a plea that he was too drunk to know what he was doing, for according to his own account he was able to take part in the game of *ket*, which

presumably requires some cunning. Mr. May Aung says in addressing the Jury he laid stress on the accused's drunkenness. The learned Judge has no note of this, though he kept a note of Mr. May Aung's address. At any rate, the fact of drunkenness seems to have been pressed merely as adding to the improbability that the accused was the man who actually stabbed the deceased Po Myit. The learned Counsel did not specifically urge that the accused owing to drunkenness was incapable of forming either of the intentions described in clauses (*i*) and (*iii*) of section 300, and the evidence was, in my opinion, insufficient to justify the Judge in himself raising for the accused an alternative line of defence which would be inconsistent with the line actually taken up by the learned Counsel.

Stress is laid on the first illustration to section 299 of the Criminal Procedure Code, but I cannot see that it obliges the Judge in all cases of murder to descant also on culpable homicide not amounting to murder. From its contents the illustration is clearly an injunction not to the Judge but to the Jury, so far as it is an injunction at all. It defines the Judge's province on which the Jury are not to encroach, but it assumes, I think, that the case before the Court is one of which the facts are suspectible of two different views, *viz.*, one view according to which the offence committed by *A* would be murder and another view according to which *A* would be guilty of only culpable homicide not amounting to murder. It is not meant at all to apply to cases like those stated in illustrations (*a*) and (*c*) to section 300 where only one view of the facts is possible.

The Government Advocate's certificate propounds a special question as to the bearing on this case of section 300 exception 4. If he thought that the effect of the other exceptions to section 300, should be considered in connection with this case he would doubtless have propounded further special questions as to those exceptions. I, therefore, assume that the first question in the certificate relates to the subject of intention only. In accordance with the views I have expressed on that subject I would answer the *first* question in the negative.

The *second* question in the certificate suggests the possibility that the accused Nga Mya stabbed the deceased Po Myit without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken any undue advantage or acted in a cruel or unusual manner. This suggestion is founded on the statement of the accused that Po Mya, Sein Thi and Tha Dun surrounded and beat him. Thus according to the accused, there was a fight in which the deceased took no part. There is no other evidence that such fight took place. According to the prosecution evidence he was assaulted but only after he had stabbed Po Myit. It is urged that the defence evidence and the admissions of the prosecution witnesses gives rise to a strong probability that gambling was going on. But assuming that the men were gambling, I do not see that this circumstance would give much colour to the accused's statement that he was set upon and that there was a fight. People who are gambling are perhaps more apt to quarrel than people otherwise engaged, but this is a very slender basis for the superstructure we are asked to place upon it. It is, of course, possible that there was a fight and that the deceased though not engaged in the fight was somehow stabbed by the accused in mistake for one of his assailants. But even the accused did not himself say that this was what occurred and his learned Advocate did not advance such a theory at the trial. In these circumstances and looking to the absence of evidence as to a fight, I think we cannot hold it a misdirection of duty on the Judge's part that he did not ask the Jury [in the words of Woodroffe, J., in he case of *Emperor* v. *Upendra Nath Das*(2)] "to consider whether the evidence disclosed circumstances which would have established such a defence had it been specifically raised."

I would, therefore, answer the *second* question also in the negative.

ORMOND, J.—It is the duty of the Judge to explain to the Jury only such law as is applicable to the case. And if in a trial for murder, a verdict of culpable homicide not amounting to murder could not properly come to upon any aspect of the case before the Court, the Judge is not called upon to explain the law relating to such offence,

Considering the nature of the weapon and the nature of the wound, I think the Judge was justified in not putting the case to the Jury as possibly one of culpable homicide no amounting to murder on the ground that the accused may have had the intention of inflicting an injury which was one likely to cause death.

The statement of the accused shows that the question of drunkenness affecting in law his intention does not arise in this case; and the Judge was right in not explaining the law on this subject to the Jury.

But can it be said in this case that a verdict of guilty of culpable homicide not amounting to murder could not have been properly brought in by the Jury, if they had found that the accused, when being fisted by two or three others, ad picked up the knife and stabbed the deceased with it? Such an aspect of the case was, I think, sufficiently before the Court to make it incumbent upon the Judge to explain the law applicable thereto.

The examination of the accused is to be taken as evidence in the case, (section 287, Criminal Procedure Code). The facts, therefore, stated by him must be considered by the Jury in the same way as facts deposed to by the witnesses in the case. The Jury are at liberty to accept as true all, none or some only of the facts stated by the accused. But it is the duty of the Judge to explain to the Jury, not only the law applicable to the facts as deposed to by the witnesses in the case, but also the law which is applicable to the facts as stated by the accused.

The accused's statement necessarily implies, I think, that he picked up the weapon during the fight, and his statement comes to this: that he did not stab the deceased; but that if it is found that he did stab him, he did so when he was being fisted by three others, intending to stab one of his assailants with the knife which he found handy at the time. In determining whether any part of the accused's story was true or not, the Jury would consider the fact that there was no evidence as to where the knife came from and the probability or otherwise of unarmed men attacking the accused when he was in possession of the knife.

The accused's Counsel should no doubt have put the accused's alternative case clearly before the Court; but his opinion does not relieve the Judge from his duty to do so.

I think it was incumbent on the Judge to explain to the Jury the law contained in exception 4 of section 300 coupled with section 301, Indian Penal Code. The alternative case set up by the accused would be a fight: whether the stab was given in self-defence, or because the accused was first fisted.

I would answer the *second* question referred to in the affirmative.

ROBINSON, J.—Nga Mya was tried at the last Sessions before me and a special Jury on a charge under section 302, Indian Penal Code. The Jury brought in an unanimous verdict of guilty and I sentenced the accused to death.

The Government Advocate has granted a certificate under section 12 of the Lower Burma Courts Act which raises three points in respect of my summing up. I will only deal with the first two.

As the Trial Judge, I will first record what took place at the trial. I have carefully read my notes and have searched my memory, for on this point my statement is conclusive. *Reg.* v. *Jestonji Dinsha* (3). I will also briefly set out the case for the Crown and the defence respectively as shown in the evidence and the addresses of Counsel for, in my opinion, the questions involved necessitate this.

The charge laid was under section 302 only. In opening the case for the prosecution the Assistant Government Advocate read section 299, Indian Penal Code, to the Jury. Then he read the commencement of section 300 and stated that he would not trouble the Jury with any of the exceptions as they did not, as far as he knew, arise in the case. He explained first and the third clauses of the definition of the offence.

The case for the Crown as disclosed by the prosecution evidence was, that Po Nya and Po Sett, his brother-in-law, were in their kitchen having their evening meal. They were pointed out by Tha Dun who sat down and chatted while they had their meal. Then accused, deceased and Sein Thi came in. It is said that Sein Thi and the deceased were coming to Po Nya to ask him to go and gamble at Settdan.

(3) 10 B. H. C. R. 75.

Accused saw them passing a liquor shop where he was and joined them. All sat there talking. Accused asked the deceased to lend him 2 pice. Deceased said he had not got any pice and asked Po Mya to lend accused 2 pice. Po Mya said he had not any. The accused said it did not matter and left, not long after he returned and came and stood behind deceased with his hands behind him and then suddenly stabbed deceased in the back with the knife produced. It is a large pointed kitchen knife with a blade $9\frac{1}{2}$ inches long. Po Mya and Tha Dun at once jumped up and seized accused calling to him to *remove and drop the knife.* He did not do so and they fisted him in the face to make him do so. In the struggle the three men and the deceased got on to the inner room, which is slightly higher than the kitchen. Accused dropped the knife and the deceased lay there. The two witnesses dragged accused out of the house and handed him over to the ward headman who blew his whistle. The Police came and the accused was handed over to them as the man who had stabbed the deceased. A constable at once returned with the headman and Po Mya to the house and they found deceased lying dead with the blood-stained knife close by.

If these be the true facts, it seems clear that it was a case of wilful murder and nothing less.

In his statement to the Committing Magistrate accused stated that he went with the deceased and Sein Thi to Po Mya's house. They played *ket* with Po Mya who was the *Daing.* He denied asking for 2 pice and leaving the house. He said "I placed eight annas at stake but Po Mya did not pay its equivalent. Moreover Po Mya, Sein Thi and Tha Dun surrounded and fisted me. So I struck Po Mya with what I think was a stick." (I had the translation of this sentence checked and corrected by adding the words "what I think was".) "As I was then under the influence of liquor I did not know whom it struck. Po Myit was near me. I did not stab him with *da.*"

I asked him if he made the statement which was read to him and if he wished to say anything more. He said yes, and he did not fight with deceased with whom he was on good terms.

Mr. May Oung then opened the case for the defence. He stated that there were two points that he would press on the earnest consideration of the Jury. They were that there was gambling going on in that house that night and that the prosecution witnesses had deliberately denied this, that he would establish it, and if so, the prosecution witnesses who had lied on this matter, could not be believed at all or that, at any rate, their evidence must be received with the greatest caution. The second point was that there was absolutely no motive.

He then produced his witnesses. The first three were called to prove there was gambling that night and the first also stated that accused and deceased were on friendly terms. The third witness said he went to Po Mya to collect interest due. Accused, deceased and Sein Thi came up. Deceased asked Po Mya to get money to gamble and pressed him also to stay and gamble. He refused and left. He says accused was very drunk. Three other witnesses were called to prove that accused and deceased used to go about and drink together, the last of whom says that on the night of the occurrence accused and deceased were drinking together when Sein Thi came up and said to them "Let us go to the gambling good gambling is going on."

Mr. May Oung then addressed the Jury. He emphasised the fact that gambling had been going on there and urged that it was proved that a row took place in the course of which the deceased was stabbed, and argued that the prosecution witnesses denied it to save themselves from suspicion. He implied that one of the prosecution witnesses had stabbed deceased. He tells us that he urged that accused was drunk, but I have no note of this nor did I understand that it was urged as affecting the intention to be imputed to the accused. He pressed on the Jury that there was no motive. and lastly said that they must be quite certain before they found his client guilty. He told us that he did not address the Jury as to the law.

My summing up was recorded by the shorthand writer. I explained the first and

third branches of the definition of culpable homicide amounting to murder in section 300, but I did not deal with exception 4 to the section and I did not tell the Jury they should also consider the possibility of the accused having acted with the intention of merely causing an injury likely to cause death. I did place the evidence as to the row over a gambling dispute before the Jury but did not refer to it in connection with exception 4. I did not deal with the accused's being drunk as affecting his intention.

The certificate that has been granted is not sufficiently clear or definite. It raises the question of my omitting to explain to the Jury the distinction between murder and culpable homicide not amounting to murder. This may refer to my not laying before them that the intention with which the accused acted might have been an intention to cause injury merely likely to cause death, or it may cover also the omission to refer to the exception which, if proved, would reduce the offence to one punishable under section 304. The *second* point is that I omitted to direct the Jury that if they believed that there was a row over a gambling dispute and a fight during which deceased was stabbed, it was open to them to consider exception 4. It was, however, made clear during the argument that the *first* point refers to my not referring to the intention to cause injury merely likely to cause death and the *second* to the exception.

As to the *first* it is clear that on the case as put forward by the Crown, and on the evidence for the prosecution there was no case of anything but wilful murder. Then the accused in his statement said he was too drunk to know what he picked to defend himself with, against the attack of the three prosecution witnesses. One of his witnesses also said he was very drunk. But it is significant that none of the witnesses for the prosecution were asked if the accused was drunk. I myself questioned one of them and he said he got a smell of liquor from him, but Mr. May Oung never suggested to any of the witnesses that he was drunk at all. There was thus nothing but the accused's own statement and the evidence of the third witness for the defence to suggest he was so drunk that it would affect the question of the intention with which he acted.

I will now deal with the *second* objection before I touch on the legal points arising, as they seem to me partly to overlap.

It is said that accused having stated there was a row over a bet which ended in a fight, I should have put exception 4 to the Jury. It is true that the accused did say so, but he does not suggest that deceased took any part in this alleged fight. To me he said distinctly "I did not fight with Po Myit" and to the Magistrate he said "I did not stab him with *dā*." The evidence of the only other persons who were there, as far as we knew, is that there was no such fight. I cannot think that the bare statement of the accused that there was a fight compels the Court to put exceptions 1 and 4 to the Jury. There was no evidence of a fight and even the accused in his statement says deceased was not in it, even if there was one.

I come now to the legal points. It is urged that illustration (*a*) to section 299 of the Code of Criminal Procedure shows that it is always the bounden duty of the Judge to explain both culpable homicide and murder to the Jury. I cannot agree. An illustration to a section cannot extend or restrict the provisions of the section to which it is attached, *Koyalash Chunder Ghose* v. *Sonatun Chung Barooie* (4). This particular illustration, if it has this effect, seems wrongly placed. It is attached to a section that lays down the duty of the Jury and not the duty of the Judge. It is given merely to explain the duty of the Jury and cannot be taken as a substantive enactment of the duty of the Judge. There are no doubt many cases in which the Judge should and must explain the distinction between culpable homicide and murder. It may be that in most cases he should do so but it does not, therefore, follow that he must in all cases do so. His duty is laid down in sections 297 and 298 and it is there merely said that he must "lay down the law." That must be with regard to the case as put forward

(4) 7 C. 132; 4 Shome L. R. 144; 8 C. L. R. 281; 5 Ind. Jur 642.

and as developed by the evidence. It would be unreasonable, for instance, to argue that in such a case as is given in illustration (*a*) to section 300 the Judge must put all the details of the very complicated definitions of culpable homicide and murder together with all the exceptions. That would not help the Jury and would only tend to confuse them and lead them astray. The duty of the Judge must be regulated by the facts of the case before him. These facts are not merely the facts alleged by the prosecution; they must also include the case for the defence. And the Judge is justified in considering not only the accused's statement, which is read as evidence, but also the case as presented by the Counsel for the accused. I am far from wishing to confine the case to that put forward by the Counsel. He may think it wiser to maintain that his client did not do the act which caused the death, but if he does so and yet facts appear which may rightly be taken to afford a defence, the Court can and should put those facts to the Jury. But before the Judge does so, he must be satisfied that there is evidence to support this view or facts from which inferences supporting this view may properly be drawn by the Jury. It is not enough for the accused to say "I was too drunk to know what I was doing", to make it the bounden duty of the Judge to put it to the Jury that the accused was so drunk that his intention may have been other than that which should be inferred or imputed. Outside the statement of the accused there was, in this case, little or nothing to support the plea of such drunkenness. He may have been drinking, but that is a far cry from such a state of intoxication as should be taken to affect his liability.

In this case the evidence for the prosecution exhibited a case of murder and nothing less. Counsel for the Crown asserted that there was nothing less. Counsel for the defence did not contest this either in opening his case or in his final address. When I summed up he did not suggest that I had omitted to lay before the Jury any such plea. He said he did not venture to do so, though it had been his case throughout, out of respect to the Court. But that was surely an error. No Judge would regard as disrespectful a suggestion that perhaps there had been an oversight—certainly not in a case involving such serious issues. It certainly never occurred to me and it did not, as far as I can see, occur to Counsel for the Crown that there was any such plea. The evidence did not appear to me to afford any real foundation for any such plea and so I did not put it to the Jury.

As to the *first* ground of the certificate, therefore, I do not think that I ought to have put it to the Jury that the accused might have intended to cause injury that was merely likely to cause death. Having regard to the whole of the evidence for both the prosecution and the defence including the medical evidence and to the case as presented by the Counsel and to the law, I do not consider I should or ought to have done so though it may be said there was some evidence.

As to the *second* ground I think the same. it is not sufficient for the accused to say there was a fight to raise the question of the exception. It was not sufficient even if there was a fight, for he must also prove several other matters and in particular that he took no undue advantage and that he did not act in a cruel or unusual manner. In this case we have no evidence at all except the accused's statement that there was a fight. The evidence of the prosecution is that there was no such fight. The accused says that the fight was with Po Mya, Tha Dun and Sein Thi and that the deceased took no part in it. The suggestion put forward is, that when attacked by these three he picked up something which he thought was a stick and with that he struck Po Mya. He denies striking deceased. If we disbelieve him and hold that he did strike deceased what foundation is there for the exception? Is not this defence really that he stabbed deceased by accident? If so, there is no question of this exception. Can it be said that a man who stabs another and causes his immediate death under the circumstances is pleading this exception. His Counsel never affirmatively raised it; he never told the Jury what is necessary to establish this exception nor how it was to be held to be established in this case. Section 105 of the Evidence Act requires

the Court and the Jury to hold that it does not exist unless and until it is proved by or for the accused—that means that all its necessary ingredients must be proved. Can it be said that a man who seizes a knife such as the exhibit in this case and stabs deceased, who was unarmed and not taking any part in the fight, with it took no unfair advantage and did not act in a cruel or unusual manner? There is in this case then no evidence beyond the statement of the accused of any fight and none whatever of any of the other facts that must be proved before the exception is even *prima facie* established. There is no evidence from which it could legitimately be inferred. Whether there was or was not any such evidence is for the Judge, as a matter of law, to decide and if he is of opinion that there is no such evidence, then he is not entitled, much less bound to put it before the Jury.

In my opinion, therefore, there was neither non-direction nor misdirection.

I have not referred to the authorities cited because most, at any rate, must be held to have been overruled by the Full Bench decision of the Calcutta High Court in *Emperor* v. *Upendra Nath Das* (2) to which I entirely agree.

I would only add that I must not be taken to have expressed any opinion as to the truth or falsity of any of the evidence given in this case.

PARLETT, J.—I think the *first* point referred to for consideration should be answered in the negative.

A judicial decision must be taken as arrived at under the particular circumstances of the case in which it was given and to govern another case only if its circumstances are similar, and I do not gather from the published report in *Hla Gyi* v. *Emperor* (1) that that principle was intended to be departed from in that case.

I think that illustration (*a*) to section 299 of the Criminal Procedure Code, so far as it explains the duty of the Judge, must be read with sections 297 and 298, sub clause (*a*) of clause (*i*) of the latter of which section lays upon the Judge the duty of deciding all questions of law arising in the course of the trial, and that the illustration means that if the legal question of the distinction between murder and culpable homicide not amounting to murder arises in the course of the trial, the Judge must explain it to the Jury, it being part of the law by which they are to be guided; where no such question arises, it cannot be said to be his duty to enter into an irrelevant explanation which may have the effect of misguiding the Jury, nor is there any force in the argument that as the definition of culpable homicide is the basis of that of murder it is necessary in all cases to explain the distinction between the two. It is quite possible, as the present case shows, to explain fully and correctly what murder is, without stating what it is not. The plea was never set up that the accused was by reason of intoxication incapable of forming the intention requisite to constitute the offence of murder, nor does the record disclose that such a plea was maintainable. The Crown preferred a charge of murder only and the evidence at the trial was such that, if it was believed, the only reasonable conclusion was that the accused did an act with such intention as to constitute his offence murder, and nothing less, and on the materials I do not think it was open to the Judge to suggest that it was anything less.

The *second* point in the certificate should also, I think, be answered in the negative.

The Court is bound to presume the absence of circumstances bringing the case within an exception unless and until the existence of these circumstances is proved. Where, as here, the exception requires the concurrence of several different circumstances before it can become applicable, there must be material from which the existence of each such circumstances can be properly inferred; such material must, at the lowest, be an allegation by the accused. If there is material for inferring some only of such circumstances but not others, I consider that it would not be right for the Judge to raise the applicability of the exception before the Jury, as by so doing he might mislead them into contravening section 105 of the Evidence Act. In the present case I am of opinion that the circumstances the existence of which might bring the case under the exception in question, could not properly be inferred from the evidence or the accused's statement, and, therefore,

the effect of that exception did not fall to be considered. I do not think that the verdict can be interfered with.

OPINION OF THE FULL BENCH.

Upon reading an application for revision presented by Messrs. May Oung and Ba Dun, Advocates for the above-named applicant, against the conviction and sentence of death passed on him by the Hon'ble Mr. Justice Robinson under section 302, Indian Penal Code, on the 20th day of August 1915 in Criminal Sessions Trial No. 28 of 1915 and upon reading the proceedings in the said Sessions Trial No. 28 of 1915 and the certificate of the Government Advocate of Burma and after hearing Mr. May Aung for the applicant and Mr. Mg. Kin, Assistant Government Advocate, for the King-Emperor,

It is ordered that the conviction and sentence of the said applicant be not interfered with.

And it is further ordered that a copy of this order be sent to the Officer in charge of the Jail at Rangoon for the information of the said applicant.

*Ordered accordingly.*

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UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 503 OF 1915.

August 5, 1915.

*Present:*—Mr. Saunders, A. J. C.

NGA KYAW ZAN—APPLICANT

*versus*

NGA KYI DAN—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss. 195, 476—Sanction for prosecution—Application for sanction, if necessary—Deputy Commissioner, whether authorised to act under s. 476—Penal Code (Act XLV of 1860), s. 182—"Public servant", meaning of.*

A sanction to prosecute given under section 195 of the Criminal Procedure Code implies an application for sanction and not a mere general and vague order. [p. 651, col. 2]

*In the matter of the petition of Banarsi Das*, 18 A. 213; A. W. N. (1896) 32, followed.

A Deputy Commissioner passed an order dismissing a complaint and saying that the accused was at liberty to prosecute the complainant if he so wished:

*Held*, that this was not a sanction within the meaning of section 195 of the Criminal Procedure Code. [p. 651, col. 2.]

Section 476 of the Criminal Procedure Code, while it authorises the sending of a case for trial by a Civil, Criminal or Revenue Court of its own motion, gives no authority to a Deputy Commissioner. [p. 652, col. 1.]

The public servant referred to in section 182 of the Indian Penal Code is the public servant to whom the information is given and not the public servant whom it is sought to injure, and it is the former whose sanction is required by section 195 (1) (*a*) of the Criminal Procedure Code. [p. 652, col. 1.]

Mr. *Mitter*, for the Applicant.

Mr. *Banerjee*, for the Respondent.

JUDGMENT.—The applicant has been convicted under section 182 of the Indian Penal Code on a charge of giving false information to a public servant intending to injure another public servant.

Upon the merits there appear to be no grounds for interference. The Magistrate found, and I think was entitled to find, that the only object of the applicant was to injure the Village Headman against whom he made a complaint and that the complaint was false. The complaint should, of course, have been filed in the proceedings. The whole proceedings, however, have been referred to as an exhibit though they are not filed as such.

An objection is taken on the ground that there was no valid sanction to the prosecution. This appears to have been the case. The complaint of the applicant was originally referred to the Sub-Divisional Officer to be enquired into by him, and upon his report the Deputy Commissioner passed the following order:—"The complaint is summarily dismissed. The Thugyi is at liberty to prosecute the complainant if he so wishes." This, if it meant anything, was an intimation to the Thugyi that if he applied for sanction it would be granted to him. It was certainly not a sanction within the meaning of section 195 of the Code of Criminal Procedure. Such a sanction implies an application for sanction and not a mere general and vague order: *In the matter of the petition of Banarsi Das* (1). In the

(1) 18 A. 213; A. W. N. (1896) 32.

case of *Nga Paw U* v. *Emperor* (2), a similar procedure appears to have been followed, and it was there remarked that the Deputy Commissioner's so-called sanction to the prosecution of Nga Lat appears to have been really a complaint. The Deputy Commissioner's sanction was not in question in those proceedings, but I do not think that it is possible to treat it as a complaint, by which presumably is meant an order within the meaning of section 476 of the Code of Criminal Procedure. That section, while it authorises the sending of a case for trial by a Civil, Criminal or Revenue Court of its own motion, gives no authority to a Deputy Commissioner. The proceedings of the Sub-Divisional Officer in his enquiry were not a judicial proceeding, nor did they come before the Deputy Commissioner in the course of a judicial proceeding. There was, therefore, no valid sanction.

In an order, dated 22nd January 1915, a copy of which is filed in the diary of these criminal proceedings, the Deputy Commissioner as District Magistrate has referred to the case of *Nga Paw U* v. *Emperor* (2) quoted above, and has extracted from it the conclusion that a public servant is not obliged to obtain sanction to prosecute. This order was presumably recorded in haste without due consideration, for it is obvious that the public servant referred to in section 182 of the Indian Penal Code, with which alone we are concerned, is the public servant to whom the information is given and not the public servant whom it is sought to injure, and it is the former whose sanction is required by section 195 (1) (*a*) of the Code of Criminal Procedure

Apparently the irregularity was noticed early in the proceedings, and it was open to the applicant to bring it to notice and apply for orders setting the sanction aside.

I am of opinion that no failure of justice has occurred within the meaning of section 537 of the Code of Criminal Procedure, and it is unnecessary to interfere.

The application is, therefore, dismissed. The applicant must now be committed to prison to undergo the unexpired portion of his sentence which, under the circumstances, was not severe.

*Application dismissed.*

(2) U. B. R. (1907) Cr. Pro. Code 1; 6 Cr. L. J. 25.

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## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1737 OF 1915.

January 22, 1916.

*Present*:—Mr. Justice Shah Din.

PIYARE LAL ACCUSED—PETITIONER

*versus*

THAKAR DAT SHARMA—COMPLAINANT—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 96 (1) – Search warrant directing seizure of all goods of certain description, legality of—Duty of Magistrate to state reasons.*

A Magistrate has no authority for issuing, on the application of the complainant, a search warrant ordering the summary seizure of all the goods of a certain description in the possession of the accused [p. 653, col. 2.]

Where, therefore, in the course of a trial under sections 482, 483 and 486 of the Penal Code, the Magistrate issued, on the application of the complainant, a search warrant directing seizure of all articles bearing the complainant's trade mark and remarked without giving reasons that the accused would not produce these things if he were required by summons to do so:

*Held*, that inasmuch as the Magistrate gave no reasons whatever for believing that the accused would not produce the articles in question if a summons were issued to him for their production, the requirements of sub-section (1), section 96, Criminal Procedure Code, were not complied with and the order of the Magistrate issuing the search warrant was illegal and improper. [p. 653, col. 2; p. 654, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Lahore, dated the 26th October 1915, affirming that of the Magistrate, First Class, Lahore, dated the 9th October 1915, issuing a search warrant and directing the seizure of the goods belonging to the petitioner.

Mr. *Gokal Chand Narang*, for the Petitioner.

Messrs. *B. Beeni Pelman* and *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—This revision and Criminal Revision No. 1840 of 1915 are connected and both can be conveniently dealt with in one order. The facts of the case out of which these two criminal revisions have arisen are fully and clearly stated in the

order of the learned Sessions Judge, Lahore Division, dated the 26th of October 1915. By that order the Sessions Judge refused to cancel the search warrant issued by Mr. J. E. Keough, Magistrate, First Class, Lahore, under sections 96 and 98, Criminal Procedure Code, and to order the restoration of the goods belonging to the petitioner, Piyare Lal, which had been seized by the Police from the said petitioner's shop in execution of the search warrant aforesaid. The learned Judge, however, directed stay of the criminal proceedings against the petitioner, Piyare Lal, under sections 482, 483 and 486, Indian Penal Code, pending the decision of the civil suit instituted against the said petitioner by Pandit Thakar Dat Sharma, who is respondent in Criminal Revision No. 1737 of 1915 and petitioner in Criminal Revision No. 1890 of 1915.

The petitioner, Piyare Lal, has now moved this Court on the revision side to cancel the search warrant issued by the Magistrate and to direct that all the goods belonging to the petitioner which were seized by the Police in execution of that search warrant be restored to him; while, on the other hand, the rival petitioner, Pandit Thakar Dat Sharma, has applied to have so much of the order of the Sessions Judge set aside as directs stay of the criminal proceedings against Piyare Lal during the pendency of the civil litigation between the parties.

The record shows that the Magistrate issued the search-warrant complained of under sections 96 and 98, Criminal Procedure Code; but, as pointed out by the learned Sessions Judge, section 98 was wholly inapplicable to the facts of the case, and the warrant must be taken to have been issued under section 96 of the Code. In his order, dated the 9th October 1915, the Magistrate says: "The accused would not himself produce all his soap and other medicines which he has been selling under the complainant's trade mark and would certainly not produce the block or blocks by which he has counterfeited complainant's trade mark if he were required to do so by summons. I, therefore, consider it necessary to issue a search warrant under sections 96 and 98, Criminal Procedure Code, to search and take possession of any articles bearing the complainant's trade mark 'Amrithar, or Amridhar' and any labels and blocks, etc." In this passage the Magistrate gives no reasons whatever for believing that the accused would not produce the articles in question if a summons were issued to him for their production, and, therefore, the requirements of the first clause of sub-section (1), section 96, Criminal Procedure Code, are not complied with. The Sessions Judge thinks that the Magistrate issued the search warrant because he considered—though he does not expressly say so—that the purposes of the trial would be served by a general search. I am not prepared to accept this explanation of the Magistrate's action. The Magistrate's own order is silent on the point; and I cannot see myself how the purposes of the trial were to be served by ordering a general search of the house, shop and godowns of the accused, Piyare Lal, and the wholesale seizure of all the articles bearing the trade mark "Amrithar" or "Amridhar" and any labels or blocks, etc. The Magistrate would have been perfectly justified in requiring the accused to produce, for purposes of the trial, a few specimens of the articles complained of which were in his possession; but regard being had to the nature and circumstances of the criminal proceedings pending before him and in which the question involved, namely, the criminal liability of the accused Piyare Lal for the alleged infringement of the complainant's trade mark or property mark, was one of some difficulty and importance, the Magistrate had no justification for issuing, on the application of the complainant, a search warrant and to order the summary seizure of all the goods of a certain description in the possession of the accused. The list of the goods seized which is on the record shows that, roughly speaking, about 3,000 boxes, cardboard covers and packets, etc., were seized by the Police from the accused's shop; and these goods are up to the present moment either in the custody of the Court or of the Police, although no definite order impounding the goods has been passed by the Magistrate under section 104, Criminal Procedure Code. The accused's Counsel very rightly complains of the arbitrary character of the Magistrate's proceedings, for one effect of those proceedings has been to deprive the accused, by a summary process not warranted by the terms of section 96, Criminal Procedure Code, of his

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right of possession over the articles in question, which is a very valuable right, and to grant to the complainant by indirect means a relief which has been denied to him by the Civil Court in the course of the litigation pending between the parties.

I have no hesitation in holding that the order of the Magistrate issuing the search warrant and directing the seizure of the goods belonging to the accused was illegal, and, if legal, certainly improper, and I direct that the goods seized from the accused's shop be restored to him forthwith, with the exception of a few specimens of the articles which form the subject-matter of the criminal prosecution.

As regards the order of the Sessions Judge directing stay of the criminal proceedings pending the decision of the civil suit instituted by the petitioner, Pandit Thakar Dat Sharma, against Piyare Lal, I am of opinion that the order in question is, in the circumstances of the case, a perfectly proper one and I maintain it.

The result is that while the petition for revision filed by Piyare Lal is accepted, that filed by Pandit Thakar Dat Sharma is dismissed.

*Petition accepted.*

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## LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 130-B OF 1915.

July 7, 1915.

*Present*:—Mr. Justice Twomey.

EMPEROR—APPLICANT

*versus*

NGA AW—RESPONDENT.

*Excise Act (XII of 1886), s. 51—Possession of over 4 quarts of* tari.

Where an accused had affixed ten receiving pots to his two toddy trees the previous night and the Excise Officer early next morning found that these pots contained over four quarts of *tari* allowable under the Excise Act:

*Held*, that the accused was in possession of the *tari* and was rightly convicted under section 51 of the Excise Act. [p. 654, col 2.]

Review of the order of the Additional Magistrate of Allanmyo, dated 27th April 1915, in Criminal Trial No. 96 of 1915, fining the respondent Rs. 20 for an offence under section 51, Excise A

Mr. *Eggar*, for the Applicant.

ORDER.—The following reference has been made to this Court by the District Magistrate, Thayetmyo:—

"I doubt if the Magistrate has correctly interpreted the meaning of *Crown* v. *Nga Than Nyin* 1).

The facts are that the accused was working two toddy trees and early one morning the Excise Officer found ten pots in the trees, that is, pots hung under the tapped portion of the trees to catch the sap. These pots contained $8\frac{1}{2}$ quarts of toddy. Accused was held to be in possession of this amount and was convicted under section 51, Excise Act.

I do not think that constructive possession of this kind is punishable under section 51 and I submit the proceeding to the Chief Court with a recommendation that the conviction and sentence be set aside and accused acquitted."

The Assistant Government Advocate has been heard in support of the convictions. The accused admitted that the two *tari* palms were his and that he and his brother climbed them, but he said that only eight of the ten receiving pots found on the trees were his. He made no attempt to prove that any one but himself and his brother had affixed the pots to the trees and in the absence of evidence to the contrary it was rightly presumed that the pots were his. It is true that a man who affixes receiving pots to a *tari* palm cannot know till he examines the pots how much *tari* they contain and it is only when they contain over four quarts that the question of an offence under the Excise Act can arise. But every toddy-climber presumably knows the limits of fluctuation in the yield of a given tree in a given period of, say, 12 hours if a given number of pots is affixed to it. He will know the maximum quantity that can be drawn off by, say, 10 pots as in this case. Being in possession of the trees and the pots he is in possession of the *tari* in the pots whatever the quantity may be, for he knows that the result of affixing the pots is that they will receive *tari* and it is his business to know the maximum quantity likely to be received. If the pots on examination are found to contain more than four quarts, he is liable to prosecution but he can rebut the charge by proving

(1) 1 L. B. R. 214.

that owing to exceptional unforeseen circumstances the quantity received in the pots was unusually great and that under normal conditions the quantity received would not exceed four quarts. The burden of proving any such circumstances would clearly lie on the accused under section 10[illegible], Evidence Act. There is no reason to interfere with the conviction in this case.

*Conviction upheld.*

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PUNJAB CHIEF COURT.
CRIMINAL REVISION No. 1338 OF 1915.
September 25, 1915.
*Present*:—Mr. Justice Shadi Lal.
EMPEROR—PROSECUTOR
*versus*
SAUDAGAR AND OTHERS—ACCUSED.

*Cattle Trespass Act I of 1871, ss. 10, 24—Occupier, whether entitled to seize cattle trespassing on his land—Claim by owners of cattle to ownership of land, effect of.*

A person who is in exclusive possession of a plot of land is an occupier thereof within the purview of section 10 of the Cattle Trespass Act and as such is entitled to seize or cause to be seized, any cattle trespassing on the land in his possession.

The fact that the owners of the cattle claim to be owners of the land as well does not affect his right, and if they resist the removal of the cattle they make themselves liable to a conviction under section 24 of the Act.

*Sheikh Tunnoo* v. *Kureem Bukhsh*, 23 W. R. 2 Cr., followed.

Case reported by the District Magistrate, Kangra.

Mr. *Lakshmi Narain*, for the Crown.

Mr. *N. C. Mehra*, for the Accused.

FACTS.—Sandhoor Singh, *Jamadar* of the Raja of Lambagraon, presented a complaint against 11 persons of Tika Gharun. He alleged that cattle had trespassed on a plot of ground belonging to the Raja and preserved by him for grass and trees.

He further alleged that when Churandu, Guard, was driving them off to the pound, the accused collected and prevented their removal.

The accused, on conviction by Lala Arjan Das, exercising the powers of a Magistrate of the first Class in the Kangra District, were directed by order dated 29th May 1915, under section 24 of Act I of 1871, to pay a fine of Rs. 20.

GROUNDS.—It is not proved that the cattle were liable to seizure.

The right of accused to graze on the land in dispute has always been asserted and the matter has not been finally decided.

In the Settlements of 1891-9 and of 1911-12 the land is recorded as "*shamilat, waqbuza malikan hasab hisas malguzari.*" In 1914, the villagers applied, under section 150 of the Land Revenue Act, to have an encroachment made by the Raja removed. This was rejected.

At present, therefore, the entries in the Revenue Records are in favour of the accused; those entries have been repeated in the present Settlement. On the other hand, the Revenue Officer refused to remove the encroachment made by the Raja.

The view, I hold, is that the question of the right of accused to graze is still undecided and is open to reasonable doubt and, therefore, this criminal conviction should be set aside.

ORDER.—It is absolutely clear that the accused opposed the seizure of cattle in the manner alleged by the prosecution and the question is whether the cattle were liable to be seized under the Cattle Trespass Act. Now the Magistrate has found, after full consideration of the evidence on the record, that the Raja of Lambagraon was in exclusive possession of the land upon which the trespass was committed and upon that finding it is manifest that he was the occupier of the land within the purview of section 10 of the aforesaid Act and as such was entitled to seize, or cause to be seized, any cattle trespassing on the land in his possession. The question of title upon which the recommendation of the learned District Magistrate is based does not affect the right of the occupier to seize the cattle trespassing on the land in his possession [*vide, inter alia, Sheikh Tunnoo* v. *Kureem Buksh* (1)].

For the aforesaid reasons, I am of opinion that the order of the Magistrate is fully justified and that the recommendation made by the learned District Magistrate, which proceeds upon a wrong view of law, cannot be accepted.

*Revision rejected.*

(1) 23 W. R. 2 Cr.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 929 OF 1915.
December 21, 1915.
*Present*:—Mr. Justice Piggott.
ABDUL RAB—APPELLANT
*versus*
EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 237—*Charge—Procedure.*

When a Court finds it necessary to make use of section 237 of the Criminal Procedure Code in order to convict an accused person of an offence with which he has not been charged, the Court should be particularly careful to formulate to its own mind the charge upon which, had it been duly framed, it would be prepared to convict. [p. 656, col. 1.]

Criminal appeal against an order of the Sessions Judge of Azamgarh, dated the 11th November 1915.

Mr. *Satya Chandra Mukerjee*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant, Abdul Rab, was a Police constable employed at Police station Man, in the Azamgarh District. He fell out with another constable of the name of Ram Raj, and the latter gave information to the Circle Inspector accusing Abdul Rab of having been concerned in various malpractices. There was an inquiry, with the result that a Magistrate committed Abdul Rab for trial before the Court of Session on two specific charges, each framed under section 161, Indian Penal Code. The learned Sessions Judge has convicted Abdul Rab on one of these charges as framed; but with reference to the other has used the powers conferred on the Court by section 237 of the Code of Criminal Procedure to record a conviction for an offence of extortion punishable under section 384, Indian Penal Code. When a Court finds it necessary to make use of the section above referred to in order to convict an accused person of an offence with which he has not been charged, I think it should be particularly careful to formulate to its own mind the charge upon which, had it been duly framed, it would be prepared to convict. I do not think the learned Sessions Judge has done so in the present case, for I find it very difficult to understand, either from the evidence or from his judgment, what was the injury of which the persons who gave evidence against Abdul Rab were put in fear in order to induce them to deliver to Abdul Rab the sum of Re. 1 alleged to have been paid. The transaction as a whole, according to the story told by the prosecution witnesses, was one to which section 161 rather than section 384 would ordinarily be applicable. The story told is that certain butchers had purchased 12 head of cattle and were bringing them to their homes, when the cattle were seized and detained at the Police station; they were not released until an illegal gratification of Re. 1 had been paid to the Police officer concerned. According to the complainants the payment was made to the appellant Abdul Rab. The records of the Police station show that 12 head of cattle were in fact stopped and detained for a time at the Police station, nor does the accused himself deny that this was the case. It is clear, however, that this was done by the authority of Mohammad Askari, Head Constable. It is quite probable that under pretence of satisfying themselves that the animals were not stolen property, the officers in authority at Police station Man detained these 12 head of cattle, put the persons in charge of them to a certain amount of inconvenience, and did not finally release them until their palms had been oiled. I am by no means satisfied on the evidence that this offence is brought home to the appellant Abdul Rab in particular. Once the transaction is placed on its proper footing as an offence punishable, if at all, under section 161, Indian Penal Code, it becomes patent that the whole of the evidence for the prosecution is accomplice evidence, and has to be received with caution as such. In my opinion this charge was not satisfactorily proved against Abdul Rab and I set aside the conviction and sentence in respect of the same.

The other offence charged seems to rest on a securer basis of fact. There is a great deal of evidence, including statements made by persons who cannot strictly be regarded as accomplices, to the effect that a vicious system had grown up amongst the butchers at Man of making a monthly payment to the officials at the local Police station in return for which they were permitted to make their cattle as much of a nuisance on the public thoroughfares as they chose, without interference on the part of the Police. I think the evidence on the record does prove that Abdul Rab was the Police

officer to whom this payment was actually made. I am prepared to affirm the conviction under section 161, Indian Penal Code, which has been recorded in respect of the second charge. The learned Sessions Judge has given good reasons for passing a lenient sentence on this conviction. It has been suggested to me that the sentence of three months' rigorous imprisonment might still further be reduced but on the whole, I think, in the interest of public justice it may be allowed to stand.

The result is that this appeal prevails with regard to the conviction and sentence on the first charge and is dismissed with regard to the conviction and sentence on the second charge.

*Appeal partly allowed.*

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## CALCUTTA HIGH COURT.

REFERENCE No. 6 OF 1915.

December 22, 1915.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

*In re Babu* POORNA CHANDRA ADDY—PETITIONER.

*Legal Practitioners Act (XVIII of 1879), ss. 13, cl. (b), 14—Professional misconduct of Pleader—Act done as suitor—Error of law, effect of—Reference, legality of—Bench and Bar amity between, necessity of—Anonymous communications to Court, impropriety of.*

A Pleader practising in a Munsif's Court and his cousin had an execution case before the Munsif, which being unjustifiably struck off, a notice signed by the cousin and written out by the Pleader was given to the Munsif threatening him under erroneous legal advice with a suit for damages. On the report of the Munsif, the District Judge asked the Pleader to apologize, which he refused to do. A reference was then made against him under section 14 of the Legal Practitioners Act:

*Held*, that the reference was incompetent, not being one warranted by clause (*b*) of section 13 of Act XVIII of 1879, inasmuch as what was done by the Pleader was done in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally. [p. 658, col. 1; p. 659, col. 1.]

*In re Wallace*, (1866) 1 P. C. 283; 4 Moore P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269; *In the matter of Jogendra Narayan Bose*, 5 C. W. N. 48; *In re a Pleader*, 18 M. L. J. 18; 3 M. L. T. 237; 7 Cr. L. J. 333, applied.

*Held*, also, that the error committed by the Pleader was an error of law which could not be treated as professional misconduct. [p. 658, col. 2.]

*In the matter of a Sarat Chandra Guha*, 4 C. W. N. 663, followed.

Necessity of amity and mutual understanding between the Bench and the Bar noted. [p. 658, col. 2.]

Anonymous communications to a Court against a party to a pending case commented upon. [p. 659, col. 1.]

Reference under section 14 of the Legal Practitioners Act, XVIII of 1879, by the District Judge of Cuttack.

Babus *Sarat Chunder Roy Chowdhury*, *Satya Charan Sinha* and *Dhirendra Krishna Roy*, for the Petitioner.

Babu *Ram Churn Mitter*, for the Opposite Party.

### JUDGMENT.

D. CHATTERJEE, J.—Babu Purna Chandra Addy is a Pleader practising in the Court at Puri. He and his cousin Mohes had an execution case before the second Munsif of Puri. On the date fixed for sale the decree-holders found out that the sale proclamation had not been duly published. They applied for the issue of a fresh sale proclamation on the ground that the non-publication was due to the negligence of the Court officers. If the facts were as stated above, the most proper and just course for the learned Munsif would have been to grant the application. He rejected it, however, and struck off the case and the whole cost of the execution was lost for no default of the decree-holders. They were naturally annoyed and took legal advice as to whether they could recover damages from the Munsif. It is said that they were advised that such a case would lie, their advisers relying on the case of *Tarucknath Mookerjee* v. *Collector of Hooghly* (1). Mohes insisted upon fighting out the case and a notice was given to the Munsif signed by Mohes but written out by Babu Purna Chandra to the following effect:—"We have by your illegal and unwarrantable conduct as aforesaid suffered a loss of Rs. 7-7-3, being the amount of costs incurred as specified below....I hereby give you notice, that both the aforesaid Babu Purna Chandra Addy and myself shall adopt legal proceedings

(1) 13 W. R. 13; 4 B. L. R. A. C. 37

*In re* PURNA CHANDRA.

against you for the said sum." The learned Munsif made a report to the District Judge of Cuttack and the said officer instituted proceedings under section 14 of the Legal Practitioners Act against Babu Purna Chandra for grossly improper conduct in the discharge of his professional duty, inasmuch as the letter of notice was in his handwriting and must have been written with his knowledge and by his advice and inasmuch as he knew that no such suit would lie, his action in writing it and allowing it to be signed by Mohes was not *bona fide* and was dictated by a desire to harass the Munsif. Babu Purna Chandra in showing cause said that the notice was given under legal advice without any intention of harassing the learned Munsif and even if the advice was wrong, he had acted *bona fide* as a litigant in the exercise of his legal rights and not as a Pleader acting for a client and no charge of professional misconduct could lie.

The learned Judge asked him to apologize, but he chose to stand upon his legal rights and did not. The learned Judge has, therefore, made this reference under section 14 of the Legal Practitioners Act, holding that the Pleader was guilty of grossly improper conduct in the discharge of his professional duty.

It is contended before us that the reference is incompetent and should be discharged.

I think that this contention is right. What was done in this case was done "by an individual in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character, or anything done by him professionally". See *In re Wallace* (2), *In the matter of Jogendra Narayan Bose* (3), *In re a Pleader* (4), *In the matter of a first grade Pleader* (5). The learned Senior Government Pleader, who appeared in this case on notice from the Court, did not support the reference as one warranted by clause (*b*) of section 13, but he said that the language used was intemperate and as the Pleader did not accept the invitation of the Judge to make an apology he deserved some censure by this Court. The language was perhaps a little harsh, but it was the language of a litigant smarting from what he considered a wilful disregard of his just rights merely for the sake of administrative despatch when the greater part of the fault was not with him but with the office of the Court. Then, again, the part he took in helping his co-litigant to give the notice was an insignificant one: he merely copied the letter and refrained from joining openly in the assertion of what he was advised was his legal right. It is admitted by his learned Vakil that the advice was wrong, and in the absence of malice his client had no right to maintain a suit for damages for a judicial act, but that does not take the case further than this that he and his advisers committed an error of law. No doubt the error was rather serious in this case, as it led to a breach of that amity and mutual understanding which should always exist between the Bench and the Bar. Justice to the litigant is the end for which the Bench and the Bar are the means and the powers of the one and the privileges of the other are ordained for the attainment of that end by their harmonious co-operation. It is to be regretted, therefore, that there was a discord in this case. The error, however, was nevertheless an error of law which cannot be treated as professional misconduct. See *In the matter of a Sarat Chandra Guha* (6). He has, however, in this Court through his Vakil expressed his regret for what has happened and there is an end of the matter.

I may in this connection mention that while the case was awaiting judgment I received a type-written envelope posted at Puri and enclosing some newspaper cuttings containing aspersions against the Munsif concerned in this case. Babu Purna Chandra through his Vakil disowns all knowledge of this and expresses his regret that anybody should have done it. I accept his statement and hold him blameless in the matter. I think it my duty,

(2) (1866) 1 P. C. 283; 4 Moore P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.
(3) 5 C. W. N. 48.
(4) 18 M. L. J. 184; 3 M. L. T. 237; 7 Cr. L. J. 333.
(5) 24 M. 17.

(6) 4 C. W. N. 663.

however, to say that whoever may be responsible for the sending of these cuttings in an anonymous cover with a type-written superscription which cannot be identified is guilty of a gross contempt of Court. It is an attempt to interfere with the due administration of justice; it is unfair to the party for whose benefit it is done; it is unfair to the party slandered who has no means of meeting it and it is unfair to the Court which might, humanly speaking, be unconsciously influenced without being able to deal with the perpetrator in due course of law. Conduct like this is cowardly, ungentlemanly and in the highest degree reprehensible and I hope no one connected with the Puri Bar had any hand in it.

In this view of the case, I discharge the Rule.

BEACHCROFT, J.—I agree that the reference ought to be discharged on the ground that the case is not one within section 13 (*b*) of the Legal Practitioners Act. I am, however, sceptical of the truth of the Pleader's allegation that he took and acted on other legal advice in sending the objectionable letter to the Munsif. But even if it be assumed that it was sent with the intention of annoying the Munsif, I do not think it necessary to take any further notice of the matter.

We have no explanation from the Munsif as to why he rejected the prayer for issuing a fresh sale proclamation in the execution proceedings, but on the facts stated his orders dismissing the execution case appear to be wholly indefensible. The Munsif ought to have been thankful to the decree-holders for bringing to his notice the defect in the execution proceedings, and incidentally in the working of his office, instead of penalizing them for it. Human nature being what it is, one must not view the action of the Pleader too seriously. Having had time for reflection he would have been well advised to accept the suggestion of the learned District Judge and offer an apology to the Munsif. I am not impressed by the offer of an apology in this Court at the eleventh hour when the Pleader felt that he might get into trouble. But in the circumstances the matter may now be allowed to rest.

I associate myself with the strictures of my learned brother on the sending of anonymous communications.

*Rule discharged.*

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## MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 443 OF 1915.
(TAKEN UP NO. 39 OF 1915.)
December 13, 1915.

*Present*:—Mr. Justice Coutts Trotter.

*In re* CHARLES GEORGE HEDINGER—ACCUSED.

*Foreigners Ordinance*, 1914, *ss.* 3, 8—*Delegation of power of Governor-General in Council to Local Government—Notification of Local Government regulating liberty of foreigners, whether* ultra vires—*Change of residence, meaning of.*

Where the Governor-General in Council has delegated his powers under section 3 of the Foreigners Ordinance to a Local Government, a notification of that Local Government compelling foreigners residing or being in British India to notify their change of residence is not *ultra vires*. [p. 660, col. 1.]

Change of residence implies something of a more definite character than a mere casual journey involving a couple of nights spent away from home. [p. 660, col. 1.]

Mr. *K. P. M. Menon*, for the Accused.

The Public Prosecutor, for the Government.

ORDER.—This case was called up on revision by a Judge of this Court. The facts are these. The accused Mr. C. G. Hedinger is a Swiss gentleman, who was registered as a foreigner in the District Magistrate's office at Calicut where he resided. He has been convicted of two offences alleged to be violations of the direction of the Governor-in-Council contained in a Notification No. 632, dated the 6th of September 1914. By section 3 of the Foreigners Ordinance, 1914, the Governor-General in Council has power to regulate or restrict in such manner as he thinks fit the liberty of foreigners residing or being in British India; and by section 8 of the same Ordinance the Governor-General in Council is empowered to delegate his powers under the Ordinance to any civil authority in British India. By Notification No. 907, dated the 22nd August 1914, the Governor-General in Council has delegated his powers under sec-

tin 3 of the Ordinance to the Local Government of the Presidency. The Notification No. 632 is, therefore, *intra vires* the Ordinance; and the only question is whether the accused has violated its provisions.

The facts are not in dispute. On the 5th February he left Calicut and went to Madras, as he says, on a visit of pleasure, stayed two nights at an hotel and returned to Calicut on the third day. On the 10th April he notified the authorities that he was proceeding to Zercaud, but broke his journey for two days at Madras. The District Magistrate held that these acts constituted changes of residence within the meaning of the notification and convicted him. It is contended for the prosecution that the object of this Notification is to enable the Government to know at any given moment where persons of foreign nationality are to be found, if they are not for the time being in the place of registration where their usual residence is. That such a provision, however inconvenient to individuals, would be salutary and necessary in times of national emergency, no one is likely to question. The only other matter for my determination is whether the Notification as framed has achieved what I have assumed to be its object. I am unable to hold that it has. Change of residence seems to me to import something of a more definite character than a mere casual journey involving a couple of nights spent away from home. The matter is one of first impression, for the authorities referred to were cases involving questions of jurisdiction, which, in my opinion, throw no light upon the construction of this Notification. It is not easy to draw the line at any definite point; but wherever it is drawn I think a casual journey of this nature would fall outside it. If the Local Government were minded to say that no foreigner shall travel outside a certain radius from his residence without informing the authorities of his intention to do so and obtaining their permission, it is no doubt within the power conferred upon the Government by the Ordinance and the Notification of the Government of India. But I am unable to read that meaning into the notification actually issued by the Government of Madras, and accordingly I set aside both the convictions and order the fines, if paid by the accused, to be refunded to him.

*Conviction set aside.*

## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 708 OF 1915.

August 28, 1915.

*Present*:—Mr. Justice Shadi Lal.

MANGAYA SHAH—CONVICT—PETITIONER

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Penal Code* (*Act XLV of* 1860), *ss.* 379, 403, 411—*Criminal misappropriation—Camel found in possession of accused* 7 *months after it was lost—Reasonable explanation of getting it—Offence, if committed—Principle—Criminal Procedure Code* (*Act V of* 1898), *s.* 439—*Revision—Burden of proof—Prosecutor, duty of.*

Where a man is found in possession of a camel about seven months after it strayed away and there is no other evidence against him but that of possession he ought not to be called to account for it, particularly when he gives a reasonable explanation of how he got hold of it. [p. 661, col. 1.]

*Reg.* v. *Cooper*, 3 C &. K. 318; 16 Jur. 750, followed.

Where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it (and who is known to be a real person), it is incumbent on the prosecutor to show that the account is false; but if the account given by that man is unreasonable or improbable on the face of it, it is his duty to establish the truth of his story. [p. 631, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Additional Sessions Judge, Shahpur, at Mianwali, dated the 17th March 1915, varying that of the Magistrate, First Class, Khushab, dated the 2nd December 1914, convicting the petitioner.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—In this case, the learned Chief Judge, after examining the evidence on the record, passed on the 5th of June 1915 the following order: —

"I am doubtful, of the guilt of the petitioner. Notice to District Magistrate. Bail may be taken—bond in Rs. 250 with two sureties."

The case has now come up before me for final decision, and after hearing the arguments of the learned Counsel for the petitioner, I am of opinion that the camel found in the possession of the accused has been proved to be the property of Alu, complainant, and that the only question for determination is whether the accused acted dishonestly within the meaning of

section 403, Indian Penal Code. Now it appears that the animal had strayed away on the 17th of February 1914 and that it was recovered on the 27th September 1914. Considering the length of time that elapsed between the two dates it is difficult to say that the possession itself required explanation. As observed by Maule, J., in *Reg.* v. *Cooper* (1): "Where a man is found in possession of a horse six or seven months after its loss and there is no other evidence against him but that of possession, he ought not to be called to account for it."

But, I notice, the accused has offered an explanation that he bought the camel from Ditta and Gulsher, and he has offered some evidence in support of it. It appears that he requested the Magistrate to summon other witnesses but this request was refused. It is obvious that Ditta and Gulsher could not be expected to admit that they had sold the animal to the petitioner and their denial does not weaken the evidence produced by the accused. Be that as it may, the mere fact that the defence has not accounted for possession to the satisfaction of the Court, does not raise the presumption of the guilty intention which is a *sine qua non* to a conviction under section 403. The observations made by a Judge in England, which are quoted with approval in *Tabi* v. *Queen-Empress* (2), are apposite here:

"In cases of this nature you should take it as a general principle, that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner is unreasonable or improbable on the face of it, the onus of proving the truth of it lies on the prisoner."

For the aforesaid reasons, I am of opinion that the offence of criminal misappropriation has not been made out. I accordingly accept the application for revision, and setting aside the conviction and sentence I direct that the accused be released from his bail bond.

*Appeal accepted.*

(1) 3 C. & K. 318; 16 Jur. 750.
( 15 P. R. 1891 Cr.

## CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 921 OF 1915.

December 20, 1915.

*Present*:—Mr. Justice Chitty and Mr. Justice Walmsley.

P. L. CAUSLEY—APPELLANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 463, 464—Forgery—Signing of certificates by purchaser of revolvers in false name and address, whether amounts to forgery—"Fraudulently".*

The signing by a purchaser of revolvers and ammunition of certificates, required for the identification of the purchaser, in a false name and with a false address, amounts to forgery, as the act though not dishonest is fraudulent. [p. 662, cols. 1 & 2.]

*Reg.* v. *Toshack*, 1 Den. C. C. 492; *Empress* v. *Dhunum Razee*, 9 C. 53; 11 C. L. R. 169; 7 In. Jur. 196 and *Queen-Empress* v. *Abbas Ali*, 25 C. 512; 1 C. W. N. 255, applied.

FACTS.—This was an appeal by Phillip Lloyd Causley who had been convicted on three counts of forgery under section 465, Indian Penal Code, and sentenced by the Presidency Magistrate of Calcutta to eight months' rigorous imprisonment on each count. The alleged offence consisted in the appellant's purchase of revolvers and ammunition from three gunsmiths and in filling up the upper portion of the certificates which accompanied the sales with false names and addresses.

The appeal came up for hearing on the 15th December 1915.

Mr. *Norton* with Babu *Santosh Kumar Bose*, for the Appellant, contended that giving a false name and address did not constitute an offence under section 463 and section 464, Indian Penal Code. One of the ingredients of forgery is "criminal intent" which was absent. Referred to Archbold, page 473 and *Reg.* v. *Martin* (1); *Reg.* v. *Tylney* (2). It might be that the accused gave a false name and address to screen himself from any enquiry by the Police or to prevent a third person from tracing the revolver to his possession; but this did not amount to forgery, *Vide* Mayne's Criminal Law of India, 3rd Edition, page 603. There was no intention to commit fraud as these sales

(1) (1879) 5 Q. B. D. 34; 49 L. J. M. C. 11; 41 L. T. 531; 28 W. R. 232; 14 Cox. C. C. 375; 44 J. P. 74.
(2) 1 Den. C. C. 319; 18 L. J. M. C. 36; 3 Cox. C. C. 160;

would have taken place even if the appellant had given his true name and address. It was not the prosecution case that the appellant was not entitled to purchase these revolvers and ammunition, so whether he gave his true name or a false name was quite immaterial as regards the question of his intention, which was not to defraud any body or to cause wrongful gain or wrongful loss.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown, argued that the accused executed a false document by giving a false name and address with the object of obtaining revolvers and ammunition from the firms. The certificates are necessary for the identification of the purchaser, and when false names and addresses are given the object of getting the certificates signed by the purchaser is altogether defeated. The gunsmiths would not have sold the revolvers and ammunition if they believed that the purchaser was not giving his true name and address. The very fact of his giving a false name and address shows his guilty knowledge and criminal intent.

Babu *Santosh Kumar Bose*, replied.

*C. A. V.*

JUDGMENT.—In this case the appellant Phillip Lloyd Causley was found guilty on three charges under section 465, Indian Penal Code, and sentenced to two years' rigorous imprisonment, *i. e.*, eight months on each charge. The appellant is stated in the Magistrate's judgment to be a lad of 16 or 17 years of age. We are told by his mother that he is only 15. The appeal was admitted on the question of sentence, but has been argued before us also on the question of law arising in the case. The facts are not in dispute. They are fully set out in the judgment of the Magistrate and need not be re-stated here. The question is whether the signing of the certificates in a false name, and giving in each case an address which was not his, amounts to forgery on the part of the appellant. It may be that the action of the appellant was not "dishonest", taking that word in the sense ascribed to it by the Indian Penal Code, sections 23 and 24. There can, however, be no doubt that he acted "fraudulently". His intention was undoubtedly to deceive both the firms, who sold him these revolvers and ammunition, and also the Government, which has prescribed the formalities to be observed in such sales. He must be taken to have known that the certificate was required for the identification of the purchaser and the weapons purchased. This purpose he deliberately defeated by his action in making out false certificates. His acts came directly within the definition of forgery as contained in sections 463 and 464, Indian Penal Code. The cases of *Reg.* v. *Toshack* (3), *Empress* v. *Dhunum Kazee* (4) and *Queen-Empress* v. *Abbas Ali* (5) are in point and support the view which we take in this case. The conviction must, therefore, be upheld.

With regard to the sentence, we take into consideration the extreme youth of the appellant. On the other hand the offence is a very serious one, and it has been aggravated in his case by the fact that he has declined to give any information regarding the revolvers purchased by him or the use to which they have been put. We think, however, that he will be sufficiently punished if he be kept in Jail for one year, that is to say, for four months on each charge, and we reduce the term of imprisonment accordingly.

*Conviction upheld; Sentence reduced.*

(3) 1 Den. C. C. 492; T. & M. 207; 13 Jur. 1011; 4 Cox. C. C. 38

(4) 9 C. 53; 11 C. L. R. 169; 7 Ind. Jur. 196.

(5) 25 C. 512; 1 C. W. N. 255.

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## ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 914 OF 1915.

December 4, 1915.

*Present*:—Mr. Justice Piggott.

JANU BHAR—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Tribes Act (III of 1911), ss. 22, 24—Trial, regularity of—Charge, framing of, necessity of—Conviction, legality of.*

An accused was convicted under the Criminal Tribes Act without framing any charge and without being given an opportunity for cross-examining the prosecution witnesses and without any evidence that he was a registered member of the criminal tribe:

*Held*, that the accused was prejudiced and his trial was bad in law. [p. 663, col. 2.]

*Obiter dictum.*—A charge can be framed against an accused prosecuted under the Criminal Tribes Act on his mere statement before a Magistrate if it shows that he has no real defence and he can be convicted under section 22, if not under section 24 of the Act. [p. 663, col. 1.]

PERRU MUHAMMAD LEBBAI *v.* SWAMINATHA PILLAI.

Criminal revision against an order of the Sessions Judge of Benares.

Mr. *Jung Bahadur Lal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application for revision by one Janu Bhar, who has been convicted of an offence under section 24 of the Criminal Tribes Act, III of 1911, and whose appeal against his conviction and sentence has been dismissed by the Sessions Judge.

As a matter of fact two men Janu and Banu were tried together and the irregularities which I am about to notice were committed at the trial of both of them. I propose, however, to distinguish between the cases of the two men and to confine my interference to the case of Janu. Banu did not appeal to the Court of the Sessions Judge and the statement made by him in the Magistrate's Court shows that he had no real defence. On that statement alone it would appear that a charge could have been framed and a conviction recorded under section 22, if not under section 24, of the Criminal Tribes Act. Dealing with the matter, therefore, as if Janu had been the only person on his trial, I note as follows.

The Magistrate took up the case on the 12th of June 1915, when he recorded evidence as to the circumstances under which Janu was arrested. He then proceeded to examine the accused. He asked him questions as to matters which were not in evidence against him and which, therefore, could not have been put for the purpose of enabling the accused to explain any circumstances appearing in evidence against him. He asked him other questions for instance as to his previous convictions, which related to matters such as could not legally be put in evidence against him in a trial on this charge. It is by no means clear to me from this examination that it was made clear to Janu what was the nature of the offence in respect of which he was being tried. The hearing was then adjourned to the 19th of June 1915, on which date formal evidence was taken as to the publication of a notice regarding the registration of the criminal tribe to which Janu belongs. It does not appear that the Magistrate had before him, from first to last, anything which could be called legal evidence that Janu was a registered member of the criminal tribe. A conviction was then recorded, no charge having been framed and no opportunity offered to the accused for cross-examining the prosecution witnesses as required by section 256 of the Code of Criminal Procedure. When the appeal was filed by Janu and was heard by the learned Sessions Judge, it would appear that the attention of that Court was directed to the lacuna in the prosecution evidence for the learned Sessions Judge records that he had examined a certain register in order to satisfy himself that Janu was, as he puts it, "a registered Bhar." The Sessions record does not show how this register came to be before the Sessions Court, much less that it was lawfully tendered in evidence and proved or presumed to be genuine.

On these facts I hold that the trial of Janu was bad in law. I am not prepared to say that he was not prejudiced by the circumstances above mentioned.

I set aside the conviction and sentence passed on this accused and direct that he be re-tried by a competent Magistrate.

*Conviction set aside: Re-trial ordered.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 288 OF 1915.

November 23, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

PEERU MUHAMMAD LEBBAI—COUNTER-PETITIONER—PETITIONER

*versus*

SWAMINATHA PILLAI—PETITIONER—RESPONDENT.

*Penal Code (Act XLV of 1860), ss. 186, 224—Running away to avoid arrest under warrant of Civil Court, whether offence.*

A mere running away of a person not charged with any offence, whom an official of a Civil Court tries to arrest under a warrant of that Court, does not amount to obstructing a public servant in the discharge of his functions within the meaning of section 186, Indian Penal Code, nor does it come within section 224, Indian Penal Code. [p. 664, col. 1.]

Petition, under section 115 of Act V of 1908 and section 15 of the Charter Act,

praying the High Court to revise the order of the Court of the District Munsif of Ambasamudram, in the course of the proceedings in Small Cause Suit No. 1907 of 1914.

Mr. *K. V. Krishnaswami Aiyar*, for the Petitioner.

Mr. *C. Sidney Smith*, for the Government.

JUDGMENT.

ABDUR RAHIM, J.- On the materials placed before us, we do not know how it can be said that any offence under section 224 or section 186, Indian Penal Code, has been committed by the petitioner. The *Amin* says that he tried to arrest him under a warrant of a Civil Court, but the petitioner ran away. That is surely not either obstructing a public servant in the discharge of his public functions within the meaning of section 186, Indian Penal Code, nor does it bring the matter within section 224, Indian Penal Code, which deals with the offence of offering resistance or illegal obstruction to the lawful apprehension of a person for an offence with which he is charged. It is not suggested that there was an offence charged against the petitioner. I would set aside the order of the District Munsif, dated 23rd March 1915.

AYLING, J.—I agree. There is no basis for the District Munsif's jurisdiction. Process service report on the face of it discloses no offence.

*Order set aside.*

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ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 529 OF 1915.

January 19, 1916.

*Present*:—Justice Sir George Knox, KT.

BHAWANI DUTT—APPLICANT

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 366, 498—Conviction for adultery—Deposition—Complaint.*

An accused person was tried under section 366 of the Penal Code at the instance of the Police. During the course of the trial the husband was examined and from his deposition it appeared that he wanted the conviction of the accused as he had committed adultery with his wife:

*Held*, that the deposition of the husband was a complaint on which the accused could be convicted under section 498 of the Penal Code. [p. 665, col. 1.]

Criminal revision against an order of the Sessions Judge of Kumaun.

Mr. *Hamilton*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The accused, Bhawani Dutt, has been convicted of an offence under section 498 of the Indian Penal Code. He presented an appeal from his conviction and sentence but the appeal was rejected. He comes in revision to this Court. The grounds he puts in revision are (1) as the husband has never made any complaint the Courts, by reason of sections 199 and 238 (3) of the Criminal Procedure Code were debarred from taking cognizance of an offence under section 498, Indian Penal Code, (2) the husband's petition dated the 18th May shows that the Court proceedings initiated by the Police were continued in spite of his desire to the contrary; (3) the circumstance that the husband appeared as a witness for the prosecution in the proceedings under section 366, Indian Penal Code, cannot be regarded as amounting to the institution of a complaint of an offence under section 498, Indian Penal Code, nor can his deposition cure the initial omission to present a formal complaint having special reference to an offence under section 498.

There was a further plea but it was not argued. On looking to the record I find that the case brought before the Courts was a case in which Bhawani Datt was charged with an offence under section 366 of the Indian Penal Code. The husband was not a complainant; apparently the Police took up the case but the husband appeared as a witness. While the case was proceeding under section 366 of the Indian Penal Code, he gave his evidence on the 6th of July 1915. In the *interim* apparently he had asked that the proceedings under section 366 should be dropped, but when examined on the 6th of July he explained that his action in this matter was due to deception practised on him by one Ratti Ram. Both the Courts below have believed him on this point, and I agree with them in their view, and hold that the application, whatever

*In re* MADU CHINNAGI REDDI.

its value may be, was an application procured by fraud.

Now on the 6th of July Bahadur Singh in most emphatic terms says that he wishes to prosecute the accused. In cross-examination he repeats it and says he wishes that the accused should be punished. It is contended that this statement made in the deposition cannot be regarded as a complaint and that no case under section 498 can be entertained unless and until there is a complaint made by the husband of the woman or in his absence by some person who had care of the woman on his behalf at the time when such offence was committed. On turning to section 4 (*b*) I find that "complaint" includes "allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence." I consider that the words used by Bahadur Singh on the 6th of July fall within the definition of "complaint" contained in the Code. Authorities have been cited to me which take an opposite view. The case of *In the matter of Ujjala Bewa* (1) is an authority in the contrary direction and so to my mind is another case of this Court, *Queen-Empress* v. *Kangla* (2), in which the accused was charged with an offence under section 457 with intent to commit theft. It was proved to the satisfaction of the Magistrate that the accused did enter the house of complainant in order to commit adultery with the wife of complainant and the conviction was a conviction for having entered the complainant's house in order to commit adultery. The learned Judge of this Court refused to interfere.

The present case is one in which I think I ought not to interfere. I have not the least doubt that the husband did intend that the accused should be prosecuted for an offence under section 498 and that he made an allegation before the Magistrate that the offence should be inquired into.

I am not prepared to exercise my revisional powers and I dismiss the application.

*Application dismissed.*

(1) 1 C. L. R. 523.
(2) 23 A. 82.

## MADRAS HIGH COURT.

CRIMINAL APPEAL No. 605 OF 1915.

December 15, 1915.

*Present*:—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

*In re* MADU CHINNAGI REDDI AND OTHERS—PRISONERS—APPELLANTS.

*Penal Code (Act XLV of 1860), ss. 467, 471—Conviction both for forging document and for using it as genuine, whether illegal—Entries in account books proved to be in handwriting of deceased person—Books not proved to be kept in regular course of business—Objection as to admissibility, when to be taken.*

When a person is convicted under section 467, Indian Penal Code, for having forged a promissory note, a further conviction and sentence under section 471 for using that note as genuine is not illegal in the course of the same trial. [p. 667, col. 1.]

*Queen-Empress* v. *Umrao Lal*, 23 A. 84, dissented from.

Where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business, ought to be taken at the time of the trial. [p. 666, col. 2.]

Appeal against the order of the Court of Session of the North Arcot Division, in Case No. 38 of the Calendar for 1915.

Messrs. *W. Barton* and *B. N. V. Deva*, for the Appellant.

The Public Prosecutor, for the Government.

JUDGMENT.

ABDUR RAHIM, J.—The first accused has been convicted under sections 467 and 471, Indian Penal Code, and sentenced to three years' rigorous imprisonment and the 2nd and 3rd accused have been convicted under section 467, Indian Penal Code, and sentenced to one year's rigorous imprisonment each. The document said to have been forged and used as genuine is Exhibit J in the case. It is a promissory note which purports to have been executed on the 3rd October 1909 for the sum of Rs. 260. The alleged executant of the note is one Meda Lakshmayya, who died on the 8th September 1911 leaving as his heirs two minor sons. On his death the 1st accused instituted a suit in the Court of the District Munsif on the 21st November 1911 claiming a sum of Rs. 460 with interest on the basis of the promissory note. Exhibit J purports to be attested by accused Nos. 2 and 3 who do not deny the same. They admit that they attested it. Their defence, as also that of the 1st accused, is that

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it is a genuine document executed by Meda Lakshmayya. This Exhibit J recites another promissory note, Exhibit K3, which is for Rs. 200, and that purports to have been executed in 1906. That promissory note is also alleged to be a forged document. It appears that the 1st accused and Meda Lakshmayya had dealings with each other, that the 1st accused cultivated the land belonging to Meda Lakshmayya and that Meda Lakshmayya borrowed a sum of Rs. 200 in 1903 on a promissory note, Exhibit K1.

The case of the prosecution is that the parties did not settle their accounts until some time in 1911, not long before the death of Meda Lakshmayya, and that in that settlement of account Rs. 60 was found due to the 1st accused and a promissory note was executed on 25th July 1911.

The promissory note, Exhibit K3, bears a unified stamp and the evidence adduced on behalf of the prosecution conclusively shows that such a stamp was not available in the Presidency and probably in no other province in India on that date. It came into vogue in this Presidency some months afterwards. That is a fact which requires explanation and the explanation given by the 1st accused is that as a matter of fact the account was settled between him and Meda Lakshmayya on the date which Exhibit K3 bears, that as no stamp was available in the village of the 1st accused where the note was written, the executant went away to his own village promising to put a stamp on it afterwards and to execute it, that as a matter of fact in *Pongal* 1907 Meda Lakshmayya executed that note, an unified stamp which was then procured being affixed at the time. It is, however, pointed out by the learned Sessions Judge that this was not the explanation which was put forward by the 1st accused at the time the application for sanction was made by P. W. No. 5, who is the brother of the deceased Meda Lakshmayya. It seems to me extremely unlikely that no stamp was available at the time the promissory note Exhibit K3 was written. There was a stamp-vendor about two or three miles from the village of the 1st accused and there was also a stamp-vendor in the village of the deceased Meda Lakshmayya. Then if the accused's explanation was true, it is inconceivable that it should not have been put forward at the earliest stage. On the other hand in his answer to the petition for sanction, the 1st accused suggests that as a matter of fact the unified stamp was available on the date on which Exhibit K3 was written and that as a matter of fact it was affixed on that date. That circumstance alone would be sufficient to show that Exhibit K3 is a false document. If Exhibit K3 is false it cannot be argued that Exhibit J could be genuine. Besides this fact there is also evidence to show that there was a settlement of account between the 1st accused and Meda Lakshmayya on the 25th July 1911. This is spoken to by P. W. No. 5, who is a respectable trader who knew both the parties and who has been believed by the learned Sessions Judge and is supported by the account produced on behalf of the prosecution. The entries in those accounts so far as they relate to this transaction are in the handwriting of Meda Lakshmayya and unless they are forged, they entirely bear out the case of the prosecution. The 1st accused denies that there was any promissory note executed on the 25th July 1911 and the learned Counsel who appeared for him and the other accused before us has strenuously argued that the accounts, Exhibits M and N, have not been kept in the regular course of business. There is considerable evidence to show that the entries in question are in the handwriting of Meda Lakshmayya. P. W. No. 5, his brother, in the examination-in-chief, said that he was present when the transaction took place and that the entries were made in his presence. It is pointed out to us that this witness stated before the District Munsif that he did not know very much of the accounts. In a matter like this where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business ought to be taken at the time of the trial. If the objection were then taken the matter could have been very easily rectified by formal evidence being given that they

were kept in the regular course of business.

As regards the question whether those accounts are genuine or not, there can be no doubt whatever of their genuineness. It is inconceivable that Meda Lakshmayya in whom the 1st accused admittedly placed much confidence should have made false entries in anticipation of the present suit being instituted by the 1st accused. There is nothing whatever in the evidence to suggest that Meda Lakshmayya would have been guilty of such a conduct. Unless there was some good reason for making such a supposition, we cannot hold that the entries showing a settlement of account in 1911 are not genuine. It is also argued by Mr. Barton that though his client did cultivate the land for twelve years prior to suit, he had nothing to do with it since then. There is the evidence of P. W. No. 3 to show that as a matter of fact he did cultivate the land for twelve years before the institution of this case. On the other hand, the accused has cited some witnesses to prove his allegation. The most important of those witnesses is the *karnam*, D. W. No. 1. But as the learned Sessions Judge pertinently points out, it is impossible that this man should have known whether the 1st accused did cultivate the land or not. I think that fact is clearly made out. Upon these facts there can be no doubt that Exhibit J is a false document. The 1st accused has been convicted both under sections 467 and 471 and sentenced altogether for three years' rigorous imprisonment. It is argued that if he was a forger and if he is rightly convicted of forgery, he could not at the same time be convicted of the offence of using that forged document. In support of this contention reliance is placed on a ruling, *Queen-Empress* v. *Umrao Lal* (3). That ruling does seem to bear out the contention of the learned Counsel for the accused, but I am unable to agree with the learned Judge's interpretation of section 471. Mr. Justice Aikman says at page 85 of the report that the words in section 471 "shall be punished in the same manner as if he had forged such a document," point to the conclusion that the section applies only to the case of persons other than the forger himself. With all respect to the learned Judge it does not seem to me that those words bear that interpretation. Those words only mean that punishment will be the same as for an offence of forgery under the section previously mentioned. The Legislature might have used a different language, but I do not think the language which has been used bears any other meaning than what I have stated.

As regards the case of the 2nd and 3rd accused, they are relations of the 1st accused. They knew both the parties and there can be no doubt that since Exhibit J which is attested by them is a false document, they were parties to the conspiracy. The convictions and the sentences must be upheld and the appeal dismissed.

PHILLIPS, J.—I agree.

*Convictions and sentences upheld.*

(3) 23 A, 84.

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ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 711 OF 1915.

December 21, 1915.

*Present*:—Justice Sir P. C. Banerji, KT.

SARJU AND ANOTHER—APPLICANTS

*versus*

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 379—Crops sown and cut down by accused—Theft—Criminal Procedure Code (Act V of 1898), s. 145.*

Where an order under section 145 of the Code of Criminal Procedure was made in favour of the complainant, but as a matter of fact the crops had been sown by the accused:

*Held*, that the crops being the property of the accused, the cutting down of these crops by them could not constitute the offence of theft. [p. 668, col. 1.]

Mr. *Malcomson*, for the Crown.

JUDGMENT.—The two accused in this case have been convicted of theft of certain crops. The allegation of the complainant was that the crops were sown by him and that the accused had wrongfully cut them.

The learned Sessions Judge has found that the crops were not sown by the complainant, Mahabir, and that they were sown by the accused. Under this circumstance the crops being the property of the accused, the cutting down of these crops by them could not constitute the offence of theft. The learned Sessions Judge thinks that because an order was made in favour of Mahabir under section 145 of the Code of Criminal Procedure, he must be deemed to have been in possession of the crops. This view is not, in my opinion, correct. Besides even if he be deemed to have been in possession of the fields he was clearly not in possession of the crops and, therefore, the accused were not guilty of the offence of theft. I accordingly set aside the conviction of the accused, acquit them of the offence of which they were convicted and direct that the fines, if paid, be refunded. As the sentence of imprisonment passed on Sarju has already been served out, no order of release is called for.

*Conviction set aside.*

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## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 394 OF 1915.
CRIMINAL REVISION PETITION No. 315 OF 1915.

December 22, 1915.

*Present*:—Mr. Justice Srinivasa Aiyangar.

A. P. T. VEERABHADRA PILLAI—A. PARTY—PETITIONER

*versus*

A. P. T. SHUNMUGAM PILLAI—B. PARTY—RESPONDENT.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 145—*Joint possession of property in dispute—Magistrate, jurisdiction of.*

Where both parties to a dispute relating to immoveable property are found to be in joint possession thereof, a Magistrate has no jurisdiction to issue an order under section 145 of the Code of Criminal Procedure, prohibiting either the one party or the other from disturbing the possession of the other till evicted in due course of law.

*Tarujan Bibee* v. *Asamuddi Bepari*, 14 C. W. N. 426; *Kandasami Asari* v. *Narayana Asari*, 26 Ind. Cas. 644; 16 Cr. L. J. 52; 2 L. W. 107, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 15 of the Charter Act, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Namakal Division, in Miscellaneous Case No. 3 of 1915.

Mr. *T. R. Ramachandra Aiyar*, for the Petitioner.

Messrs. *T. Rangachariar* and *S. Varadachariar*, for the Respondent.

Mr. *P. R. Grant*, for Acting Public Prosecutor, for the Crown.

ORDER.—The Magistrate in this case has found that as regards the villages of Sithambur and Bommanapolliem, Veerabadra Pillai and Shanmugam Pillai, the two parties to the dispute, were jointly in possession. On that finding he was not entitled to issue any order under section 145 of the Criminal Procedure Code, directing either the one party or the other, from disturbing the possession of the other till evicted in due course of law. It was so held in *Tarujan Bibee* v. *Asamuddi Bepari* (1), and it has been followed in this Court by Mr. Justice Sadasiva Aiyar in the case reported as *Kandasami Asari* v. *Narayana Asari* (2). Unfortunately the exact order issued by the Magistrate is not before me. If, as a matter of fact, he has issued any order with regard to these two villages, that will have to be cancelled. The remainder of the order was within the jurisdiction of the Magistrate to pass and Mr. T. R. Ramachandra Aiyar has not convinced me that I have jurisdiction to interfere whatever errors might have been committed by the Magistrate in arriving at the conclusion which he did. There will be no costs on either side.

*Petition dismissed.*

(1) 4 C. W. N. 426.
(2) 26 Ind. Cas. 644; 2 L. W. 107; 16 Cr. L J. 52.

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL BAIL APPLICATION No. 24 OF 1915.

August 2, 1915.

*Present*:—Mr. Pratt, J. C.

FAIZ MUHAMMAD—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code* (*Act V of* 1898), *ss.* 107, 114 —*Warrant of arrest issued under s.* 114—*Bail*—*Accused, rights of*—*Jurisdiction.*

A Magistrate has no jurisdiction to refuse bail to a person arrested under section 114, Criminal Procedure Code, against whom proceedings have been taken under section 107 of the same Code.

*Chidambaram Pillai* v. *Emperor*, 31 M. 315, 3 M. L. T. 311; 7 Cr. L. J. 360, followed.

*Narainasawmy Naicken* v. *Emperor*, 15 Ind. Cas. 79; (1912) M. W. N. 169; 11 M. L. T. 253; 22 M. L. J. 357; 13 Cr. L. J. 447; 36 M. 474, distinguished.

Application against the order of the Sub-Divisional Magistrate, Tatta, refusing bail.

Mr. *Rewachand Vassanmal*, for the Applicant.

Mr. *Raymand*, Public Prosecutor, for the Crown.

JUDGMEMT.—These proceedings against the applicant were based on an information filed before the Sub-Divisional Magistrate, Tatta, under section 107, Criminal Procedure Code.

The Magistrate made an order under section 112, Criminal Procedure Code, requiring the accused to show cause why he should not be ordered to execute a bond for keeping the peace and at the same time issued a warrant under the proviso of section 114, Criminal Procedure Code, for the arrest of the accused and his production before the Court. The accused was arrested and brought up before the Magistrate on the 14th of July and the Magistrate then refused to enlarge the accused on bail and justified his refusal by reference to the case of *Narainasawmy Naicken* v. *Emperor* (1).

That case is, however, based on section 107 (4) and it decides that when the conditions of section 107 (4) are fulfilled, the Magistrate has jurisdiction to detain in custody the accused until the completion of the inquiry.

(1) 15 Ind. Cas. 79; 36 M. 474; (1912) M. W. N. 169; 11 M. L. T. 253; 22 M. L. J. 357; 13 Cr. L. J. 447.



But these conditions are not fulfilled in the present case. The accused was not arrested by a Subordinate Magistrate under section 107 (3), nor was he sent by such Magistrate to the Sub-Divisional Magistrate under section 107 (4). The accused was arrested under a warrant under section 114 and the Magistrate had no jurisdiction to refuse bail. This was so decided by a Full Bench of the Madras High Court in the case of *Chiddambaram Pillai* v. *Emperor* (2).

I accordingly direct the accused to be released on bail on his own bond in a sum of Rs. 500 with two sureties for Rs. 250 each, to appear when called upon in the Court of the Sub-Divisional Magistrate, Tatta.

*Bail allowed.*

(2) 31 M. 315; 3 M. L. T. 311; 7 Cr. L. J 360.

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## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 117 OF 1915.

September 23, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

NASIRSHAH—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 476—*Sanctioning prosecution of witness for perjury pending trial, propriety of.*

*In re* KAYAMBU TEVAN.

Although proceedings under section 476, Criminal Procedure Code, against a witness for giving false evidence ought not to be taken until the close of the trial, as such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial; yet this is a consideration which affects the accused under trial, and not a witness.

*Reg.* v. *Kashinath Dinkar*, 8 B. H. C. R. 126 Cr., referred to.

Application against the order of the Resident Magistrate, Naushero.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application to revise an order passed by the Resident Magistrate, Naushero, under section 476, Criminal Procedure Code, directing the prosecution of the applicant for an offence under section 193, Indian Penal Code.

The applicant had acted as an arbitrator between certain parties and he said in his evidence that the parties did not agree to his arbitration. The Magistrate thinking that this evidence was false directed his prosecution.

Mr. De Verteuil urges that the evidence was based on the recollection of the applicant, and if his recollection was incorrect, the applicant has not committed the offence of deliberately giving false evidence.

We do not wish to express an opinion on this defence but would only point out that *prima facie* there is no ground to set aside the Magistrate's order, because the applicant's recollection is not supported by the note made by himself at the time and two witnesses Isardas and Dhanumal had told the Magistrate that the account given by the applicant was not true.

It is no doubt true that the Magistrate ought not to have taken proceedings under section 476, Criminal Procedure Code, until the close of the trial. The reason is that pointed out in the case of *Reg.* v. *Kashinath Dinkar* (1) that such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial. But that is a consideration which affects the accused under trial and not the applicant.

Mr. De Verteuil urges that it might have affected the applicant, because it is possible that other witnesses might have given evidence to support the applicant. But that is a mere speculation and even if there is any ground for it, it is open to the applicant to call these witnesses in his defence at his trial.

We see no reason to interfere and reject this application.

*Application rejected.*

(1) 8 B. H. C. R. 126 Cr.

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MADRAS HIGH COURT.

CRIMINAL APPEAL No. 673 OF 1915.

CRIMINAL REVISION CASE No. 793 OF 1915.

(TAKEN UP No. 65 OF 1915.)

January 10, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

*In re* KAYAMBU TEVAN—PRISONER—APPELLANT.

*Penal Code (Act XLV of 1860), s. 300, except. 2—Proclaimed offender murdering Police Official trying to arrest him—Publication of proclamation not proved—Criminal Procedure Code (Act V of 1898), s. 87 (3)—Failure to file statement, effect of.*

A proclaimed offender was tried for murdering a Police Officer trying to arrest him. The prosecution failed either to file the statement referred to in clause 3, section 87, of the Criminal Procedure Code or to adduce any other evidence of publication:

*Held* that the accused was entitled to the benefit of exception 2 to section 300, Indian Penal Code, and was guilty of culpable homicide not amounting to murder. [p. 671, col. 1.]

Appeal against the order of the Court of Session of the Madura Division in Case No. 49 of the Calendar for 1915 and case taken up for enhancement.

Mr. *M. H. Hakim*, for the defence, under G. O., dated 17th December 1884, No. 3273, Judicial.

The Public Prosecutor, for the Government.

DHANI BUX v. EMPEROR.

JUDGMENT.—It is not contested that accused caused the death of deceased Sankaranarayana Pillai by stabbing him under the shoulder blade, severing two ribs and penetrating the pleural cavity. The nature of the injury fully justifies the inference that accused intended to cause either death or such bodily injury as was likely to cause death, and we do not understand why the Sessions Judge convicted accused only under the second clause of section 304, Indian Penal Code.

The main contention of appellant's Counsel is that he is entitled to the benefit of section 100, Indian Penal Code, but we can find no ground for holding that the appellant was under any apprehension of death or grievous hurt; and we have no hesitation in rejecting this plea.

The Sessions Judge has applied exception 1 to section 300 in accused's favour; but, in our opinion, the more appropriate clause is exception 2. If there were legal evidence (which there is not) that accused had been duly proclaimed under section 87, Criminal Procedure Code, it would be a question whether it might not be inferred that the accused knew that the men who seized him were acting under the law. In that case, the offence must be viewed as murder (section 302, Indian Penal Code). The prosecution has, however, omitted to file the statement referred to in clause (3) of section 87 or to adduce other evidence of publication; and we must take it that this is not proved. In such circumstances accused might be entitled to the benefit of exception 2 to section 300, though we are unable to accept the contention of his Counsel that the sentence is in any way severe.

We confirm the conviction and sentence and dismiss the appeal.

*Conviction affirmed; Appeal dismissed.*

## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 68 OF 1915.

September 16, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

DHANI BUX—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Penal Code (Act XLV of 1860), s. 84—Insanity—Criminal liability, exemption from—Test.*

Under section 84 of the Indian Penal Code it is not every mental derangement that exempts an accused person from criminal responsibility for his acts, but that derangement must be shown to be one which impairs the cognitive faculties of the accused, *i.e.*, the faculty of understanding the nature of his act in its bearing on the victim or in relation to himself, *i.e.*, his own responsibility for it. [p. 672, col. 1.]

*Queen-Empress* v. *Kader Nasyer Shah*, 23 C. 604, referred to.

Appeal against the decision of the Sessions Judge, Larkana.

Mr. *Gopaldas Ghurbamal*, for the Appellant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The accused made a brutal and sudden attack upon his wife, Khairi. He pursued her out of her house into the road and then cut her down from behind with an axe, causing her death.

These facts are admitted and the defence raised is that of insanity.

As to this the Sessions Judge found that the accused though mad was not entitled to the benefit of the exception under section 84, Indian Penal Code. We are not able to follow the line of reasoning by which the Judge arrives at this conclusion, for we do not understand in what sense he uses the word delirium; but it is quite clear that this conclusion is correct.

The evidence of insanity is that the accused 15 or 20 days before this crime had suffered from fever, that the *Hakim* who treated him was of opinion that his mind was affected by a disease which he called "*mania*" and that after his recovery the accused behaved in an eccentric manner. He used to abuse his friends and would climb trees and sit there until brought down.

These facts are admitted and do indicate mental derangement, but it is not every

mental derangement that exempts an accused person from criminal responsibility for his acts. This was pointed out in the case of *Queen-Empress* v. *Kader Nasyer Shah* (1). It was said there that an affection of the will or emotion subjecting the offender to insane impulses is no excuse and that though there may be a mental derangement of some sort, that derangement must be shown to be a derangement which impairs the cognitive faculties of the accused *i.e.* the faculty of understanding the nature of the act that he has committed.

This is the rule embodied in section 84, Indian Penal Code, which lays down two and only two tests, *viz.*, that (1) by reason of unsoundness of mind the accused is incapable of knowing the nature of the act; (2) or that for the same reason he is incapable of knowing that what he is doing is either wrong or contrary to law. The *first* incapacity refers to the accused's inability to understand the act in its bearing on the victim and the *second* is the inability to understand the act in relation to himself, *i.e.*, his own responsibility for it. It is only when the mental unsoundness leads to this form of incapacity that the accused is entitled to the exception accorded by section 84, Indian Penal Code.

Now as to the *first* incapacity, the accused did understand the nature of the act as it affected the deceased. On this point it is significant that the accused had prior to this crime suspected his wife of ..ity. This delusion had been rankling in his mind prior to the commission of the act and it leads to the inference that he knew what he was doing and that he killed his wife intentionally because he wished to punish her for her infidelity. As to the *second* incapacity it is also clear that accused was aware of his responsibility. After the crime he said "I am *behosh*", and told the Head Constable that he knew nothing about the offence and that the axe was not his. What do these statements indicate except that the accused was conscious that he was to blame? We think, therefore, that although the mind of the accused was deranged, it was not a derangement that affected his cognitive faculties. He intended to kill his wife; he knew that he was killing her and he knew that he was doing something wrong and contrary to law.

We, therefore, confirm the conviction and sentence and dismiss this appeal.

*Appeal dismissed.*

(1) 23 C. 604.

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MADRAS HIGH COURT.

CRIMINAL APPEAL No. 663 OF 1915.

December 7, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.,

*In re* BLAMBOYIL KUTTASHERI AHAMAD—PRISONER—APPELLANT.

*Arms Act (XI of 1878), s. 20—Heavy sentence, propriety of.*

Where an accused was convicted of an offence under section 20 of the Arms Act and sentenced to three years' rigorous imprisonment and no special grounds were mentioned in the judgment for imposing such a heavy sentence:

*Held*, that having regard to the circumstances of the case the sentence was very heavy and ought to be reduced.

Appeal against the order of the Court of Session of the South Malabar Division, in Case No. 71 of the Calendar for 1915.

Mr. *M. H. Hakim*, for the Government.

JUDGMENT.—The gun which is the subject of the charge in this case was found concealed in the house of the accused, when it was being searched by the Police in connection with a case of dacoity. The accused has been convicted under section 20 of the Indian Arms Act, XI of 1878, and the facts show that the offence is made out. He has been sentenced to three years' rigorous imprisonment. No special grounds are mentioned in the judgment for imposing such a heavy sentence. Having regard to the circumstances of the case we reduce the sentence to three months' rigorous imprisonment.

*Appeal allowed; Sentence reduced.*

*In re* KOTA APPADU.

## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 531 OF 1915.
(CRIMINAL REVISION PETITION No. 425 OF 1915.)

November 22, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*In re* KOTA APPADU AND OTHERS—ACCUSED NOS. 1, 2, 4 AND 5—PETITIONERS,

*Penal Code (Act XLV of 1860), s. 379—Theft of crops—Land, actual possession of, by complainant necessary—Order directing complainant to be put in possession, whether sufficient.*

An accused was convicted for having stolen crops growing on a certain land alleged to be the property of the complainant. In a previous case between the parties concerning the same land, an order directing that the complainant be put in possession of the land was passed but it was never executed:

*Held*, that before conviction it must be found who was actually in possession of the land on the date of the offence and that because there was that order in the previous case it could not be presumed as a matter of law that the complainant continued to be in possession and sowed the crops. [p. 673, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Godavari, in Criminal Appeals Nos. 20 and 21 of 1915, preferred against that of the Court of the Sub-Divisional Magistrate of Rajahmundry in Calendar Case No. 167 of 1914.

FACTS.—The complainant and the accused are two tenants claiming under the same landlord. The former held under a lease which had expired and the latter claimed under a new lease. In a previous complaint by the former, the latter was convicted and an order was passed directing that the complainant be put in possession. But no application was made by the complainant to execute the order. The accused again cut the crops on the land. A complaint of theft was made by the complainant against the accused and the Magistrate convicted the latter for the offence of theft, on the ground that an order for possession in favour of the complainant was equivalent to his actual possession. The Sessions Judge, on appeal, confirmed the conviction and the present revision petition is against that judgment.

Mr. *G. Venkataramiah*, for the Petitioners.

The Public Prosecutor, for the Government.

### ORDER.

ABDUR RAHIM, J.—In this case the accused persons have been convicted under sections 143 and 379 and 149, Indian Penal Code, and sentenced to six months' rigorous imprisonment each. Both the Joint Magistrate, who originally tried the case, and the Sessions Judge, who heard the appeal, have not considered the evidence as regards actual possession of the land and the crops with respect to which the offences are alleged to have been committed. They have apparently proceeded on the effect of the order made in a previous case between the parties. In that case, the present accused or some of them were charged by the complainant's party with offences committed in respect of the land and the Sub-Magistrate who heard that case ordered in his judgment that "the land" in dispute "shall be put in possession of prosecution witness No. 1." The Sub-Magistrate was examined in this case and he says in his evidence that he did not take steps to execute the order because there was no written application. The Sessions Judge who heard the appeal seems to be of opinion that because there was that order in the previous case, it must be presumed as a matter of law that the complainant's party continued to be in possession and sowed the crops with respect to which the offence is alleged to have been committed. He is entirely wrong. There is evidence both on the side of the prosecution and the defence as to the actual possession of the land. The complainant's party allege they are in actual possession. On the other hand so does the defence and that was the real point to be considered in the case. Even if the Sub-Magistrate intended to actually put the complainant's party in possession at the time he passed the judgment, it might be that in spite of that order the defence was in possession. Or it might be that the prosecution was actually in possession throughout. The previous order, as suggested by the Public Prosecutor, might merely have meant to be a formal one. I do not express any opinion on the point. There is actual evidence. There is the fact of the order being made and this evidence has to be considered in order to arrive at the finding as to who was actually in possession and who sowed the crops. I should, there-

fore, set aside the order of the Sessions Judge and ask him to restore the appeal to his file and re-hear it in the light of the observations which I have made.

AYLING, J.—I agree.

*Petition allowed.*

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## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION No. 44 OF 1915.

August 30, 1915.

*Present*:—Mr. Saunders, J. C.

NGA SAN CHEIN—

APPLICANT

*versus*

SO OKARAM AND ANOTHER—RESPONDENTS.

*Criminal Procedure Code* (*Act V of* 1898), *ss.* 195, 476, 439—*Sanction to prosecute—Application, if necessary—Duty of Court to exercise due care—Notice to accused, whether necessary—Order under s.* 476—*High Court's power of interference—Civil Procedure Code* (*Act V of* 1908), *s.* 115.

A High Court cannot interfere under section 439 of the Criminal Procedure Code with the proceedings of a Civil Court taken under section 476 of the Code, as section 439 must be read with section 435 and the power of revision is expressly confined to the records of inferior Criminal Courts. [p. 675, col. 2.]

*Har Prasad Das* v. *Emperor*, 19 Ind. Cas. 197; 17 C. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647; 40 C. 477, followed.

An order passed by a District Judge under section 476 of the Criminal Procedure Code can only be interfered with by a High Court in the exercise of its civil jurisdiction under the provisions of section 115 of the Civil Procedure Code. [p. 675, col. 2.]

The Code of Criminal Procedure does not contemplate a Court or public servant giving sanction for prosecution where no application for sanction has been made. [p. 675, col. 1.]

The authority given by section 195 (5) of the Criminal Procedure Code to a Court taking cognizance of a case to frame a charge of any offence referred to in that section, when sanction is given in respect of it, does not relieve the Court of the necessity to exercise due care and consideration before it orders a criminal prosecution. [p. 676, col. 1.]

Sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice; but notice should ordinarily be issued and in a case of non-attendance, where a person may be prevented from attending by illness or any other sufficient cause, it is desirable that notice should issue. [p. 676, col. 1.]

Mr. *Dutt*, for the Applicant.

Mr. *A. C. Mukerjee*, for the Respondents.

JUDGMENT.—The applicant was sued by the respondent in the District Court and a decree for Rs. 2,047-4-0 was obtained against him. The decree took the form of a preliminary mortgage-decree and directed the judgment-debtor to pay the sum mentioned on or before the 24th November 1914, failing which the mortgaged property was to be sold. The mortgaged property apparently consisted of bullocks, buffaloes and ponies. The money was not paid and a notice was served upon the judgment-debtor requiring him to appear before the Court and produce the mortgaged property. The notice was served, but the judgment-debtor did not appear and did not produce the property. On the 26th April 1915, the Judge passed the following order:—"Notice returned duly served on judgment-debtor who has not complied with the orders of this Court, *i.e.*, not produced the mortgaged property. Mr. Mukerjee asked the Court to take necessary action under section 225 (*b*) of the Indian Penal Code; let this be done." A copy of this order was sent to the Eastern Sub-Divisional Magistrate who recorded the following order:—"Case received from District Judge's Court. As the case is under section 225 (*b*), Indian Penal Code, section 476, Criminal Procedure Code, does not apply. Complainant will have to be examined. Summon complainant. I think a clerk of the District Judge's Court who knows the facts of the case can be a complainant." The District Judge's Bench Clerk was then examined as complainant, and the Magistrate passed the following order:—"The case falls under section 174, Indian Penal Code, and sanction is required. Proceedings submitted to the District Judge for orders." Upon this the District Judge passed the following order:—"Under section 195, Code of Criminal Procedure, I sanction the prosecution under section 176 of the Indian Penal Code of Maung San Chein, judgment-debtor in Case No. 161 of 1913 of the Court of the District Judge, Mandalay, in that he refused to obey the lawful order of a public servant, to wit, the District Judge, passed in Civil Execution No. 13 of 1915

that he produced (*sic*) before Court certain property." Upon the receipt of this order, the Magistrate directed the issue of summons to the accused and witnesses. The accused has now come to this Court to revise this order.

The application was first filed as an application in revision upon the criminal side, but it has been amended and treated as a civil miscellaneous application. No Act or section is quoted in the application, but it appears to be intended that it should be treated as an application under section 195 (6) of the Code of Criminal Procedure, this Court being the High Court to which appeals from the District Court, Mandalay, lie within the meaning of section 195 (7) of the Code of Criminal Procedure.

The first objection taken by the respondent is that the order of the District Judge was not a sanction within the meaning of section 195 of the Code of Criminal Procedure. Before recording the order of sanction under section 195 of the Code of Criminal Procedure referred to above, the District Judge recorded an explanation of his action which is not very clear, but in which it would appear that he considered that the complaint by his clerk was not a complaint of a public servant within the meaning of section 195; it was a complaint which required sanction. As was pointed out in *Nga Paw U* v. *Emperor* (1) a sanction implies that some one wishes to prosecute. The Code does not contemplate a Court or public servant giving sanction where no application for sanction has been made. There appears to have been a confusion of ideas. If the clerk was complaining as a private individual, before his complaint was received or entertained by the Magistrate, he should have applied to the District Judge for and obtained sanction. It appears probable that the Judge intended to take action under section 476 of the Code of Criminal Procedure. If this is the case, it is argued for the respondent that the application should be on the criminal side for revision under section 439 of the Code of Criminal Procedure.

(1) U. B. R. (1907), 1 Cr. Pro. p. 1; 6 Cr. L. J. 25.

There has been a considerable diversity of opinion as to the power of a Criminal Court to interfere in revision with the proceedings of a Civil Court which takes action under section 476 of the Code of Criminal Procedure. It was held in *San Gaing* v. *Emperor* (2) that a High Court could not interfere under section 439 of the Code of Criminal Procedure in revision with the proceedings of a Civil Court taken under section 476 of the Code of Criminal Procedure on the ground that section 439 must be read with section 435 of the Code of Criminal Procedure, and that the power of revision is expressly confined to the records of inferior Criminal Courts. The matter has been examined at length in the recent Full Bench case of *Har Prasad Das* v. *Emperor* (3), in which the same view was taken by the Calcutta High Court after an examination of all the Indian authorities. It appears to me that the view there taken is correct, and if the order of the District Judge was an order passed under the provisions of section 476 of the Code of Criminal Procedure, it can only be interfered with by the High Court in the exercise of its civil jurisdiction under the provisions of section 115 of the Code of Civil Procedure. Whether, therefore, the District Judge was acting under section 195 or 476 of the Code of Criminal Procedure, this Court has power to interfere upon the civil side, though, if the District Judge was acting under the provisions of section 476 of the Code of Criminal Procedure, the power of interference is limited by the terms of section 115 of the Code of Civil Procedure.

I think it is clear in the present case that both under section 115 of the Code of Civil Procedure, and under section 195 of the Code of Criminal Procedure, this Court would be justified in interfering to set aside the order of the District Judge. It is clear that in directing action to be taken under section 225 (*b*) of the Indian Penal Code, the District Judge acted without due consideration, since the terms of that section could not possibly be applied to anything which it is alleged or suggested that the judgment-debtor did. Similarly, in ordering or sanctioning the pro-

(2) 4 L. B. R. 339; 9 Cr. L. J. 24.
(3) 19 Ind. Cas. 197; 40 C. 477; 17 C. L. J. 245; 14 Cr. L. J. 197; 17 C. W. N. 647.

secution of the judgment-debtor under section 176 of the Indian Penal Code, I think the District Judge has acted in the exercise of its jurisdiction with material irregularity inasmuch as the provisions of section 176 also obviously do not apply to the offence, if any, which was committed by the judgment-debtor. It is possible that section 174 of the Indian Penal Code applies, and it is also true as has been urged by the respondent, that section 195 5) of the Code of Criminal Procedure authorizes a Court which takes cognizance of a case to frame a charge of any offence referred to in that section when sanction is given in respect of any offence referred to in that section. This authority, however, does not relieve the sanctioning Court of the necessity to exercise due care and consideration before it orders a criminal prosecution. It does not appear that it was the failure of the judgment-debtor to appear in Court in person which the District Judge considered should be punished, but his failure to produce the property that he was ordered to produce and neither section 174 nor section 176 would apply to such failure. It is necessary that the District Judge should have a clear idea in his own mind as to what it is for which he considers the judgment-debtor should be prosecuted, and that he should express that idea in a comprehensible manner. No notice was issued to the judgment-debtor to show cause why he should not be prosecuted. It is true that sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice. But notice should ordinarily be issued, and in a case of non-attendance where a person may be prevented from attending by illness or any other sufficient cause. it appears to be clearly desirable that notice should issue.

The order of the District Judge sanctioning or directing the prosecution of the judgment-debtor is, therefore, set aside.

*Application allowed.*

## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 987 OF 1915.

August 7, 19 5.

*Present*:—Mr. Justice Shadi Lal.

AHMAD BAKHSH—DEFENDANT—APPLICANT

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), ss.* 110, 117 (2), 256—*Defendant in security proceedings, whether entitled to re-call witnesses for cross-examination.*

A person against whom proceedings under section 110 of the Criminal Procedure Code are taken, is not entitled to re-call witnesses, who have given evidence against him, for further cross-examination. [p. 677, col. 1.]

*Chintamon Singh* v *Emperor*, 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J. 146, followed.

Case reported by the Sessions Judge, Ferozepore, with his No. 352-J of June, 1915 for revision on the following

GROUNDS.—In this case under section 110 of the Code of Criminal Procedure applicant reserved his cross-examination of several witnesses for the prosecution, *e.g.*, witnesses Nos. 14, 15, 16 and 17. After the evidence was concluded for the prosecution he applied for the recall of these and other witnesses for the prosecution for cross-examination. The Magistrate refused, by an order dated 3rd November 1914, on the ground that there is no procedure for recalling witnesses for further cross-examination. Four days later another order to the same effect was passed. From this order it appears that the order of 3rd November 1914 was a final one.

The order of the lower Court is obviously contrary to the provisions of section 256, Criminal Procedure Code, and should be set aside, and the Magistrate ordered to proceed according to law.

Mr. *Saunders*, for the Crown.

ORDER.—The point for determination in this case is whether a person against whom proceedings under section 110, Criminal Procedure Code, are taken, is entitled to ask the Court to recall witnesses, who have given evidence against him, for further cross-examination. Now it is beyond dispute that section 256, Criminal Procedure Code, which gives the accused a right of double cross-examination, is confined in its operation

to warrant cases and that it does not apply *proprio vigore* to security proceedings. Section 117 (2) which embodies the law relating to proceedings for conducting enquiries in security cases, however, provides that such enquiry shall be conducted, *as nearly as may be practicable*, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed. The question then arises whether the person proceeded against under section 110 can, in pursuance of the aforesaid provision of law, invoke the aid of section 256.

It will be observed that the rules of procedure for conducting trials and recording evidence in warrant cases are made applicable to bad livelihood cases "as nearly as may be practicable." Now the *rationale* of the principle which finds expression in section 256 is that an accused person in a warrant case is not informed of the exact case he is required to meet until the charge has been framed, and it is, therefore, considered just and right that he should, after the framing of the charge, be allowed to further cross-examine the witnesses for the prosecution. In security cases the order passed by the Magistrate under section 112 is equivalent to a charge in a warrant case and the person against whom the order is made is fully aware of what is alleged against him. The evidence is thereafter recorded in his presence and he has every reasonable opportunity of cross-examining the witnesses. There is consequently no conceivable reason why he should be allowed the right of a second cross-examination and why he should thereby protract the proceedings unnecessarily. The reason which underlies the rule as to double cross-examination in warrant cases is entirely absent here, and the principle of *cessante ratione legis, cessat ipsa lex* is fully applicable.

For these reasons I am clearly of opinion that the petitioner is not entitled to ask the Court to recall witnesses for further cross-examination. This conclusion is in accordance with the general principles referred to above, and the same view has been taken by the Calcutta High Court in *Chintamon Singh* v. *Emperor* (1). I cannot, therefore, accept the recommendation made by the learned Sessions Judge and dismiss this application for revision.

I find that the Pleader for the respondent, thinking that he was entitled to cross-examination under section 256, did not cross-examine at all the witnesses Nos. 14, 15, 16 and 17 and the Court recorded that he had reserved his right of cross-examination. It appears that both the Pleader and the Magistrate were under a misapprehension as to the applicability of the aforesaid section. In these circumstances the Magistrate should, in my opinion, reconsider the question of affording an opportunity to the respondent of cross-examining the four witnesses referred to above.

*Revision rejected.*

(1) 35 C. 242; 7 C. L. J. 177; 7 Cr. L. J. 142; 12 C. W. N. 299.

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## UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 261 OF 1915.

July 6, 1915.

*Present*:—Mr. Saunders, A. J. C.

NGA PO HMI—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Criminal Procedure Code (Act V of 1898), s. 110—Imprisonment for failure to furnish security—Accused, whether can be bound down on suspicion soon after release.*

An order under section 110 of the Criminal Procedure Code cannot be made against an accused person who has been imprisoned for failure to furnish security under that section, until he has had time after his release either to retrieve his character or to show that he has no intention of doing so. [p. 678, col. 1.]

*Junab Ali* v. *Emperor*, 31 C. 783, 8 C. W. N. 909; 1 Cr. L. J. 801; *Emperor* v. *Ranjit*, 28 A. 306; 3 A. L. J. 29; 3 Cr. L. J. 96; 1 M. L. T. 58; A. W. N. (1906) 30, followed.

Mr. *D. Dutt*, for the Applicant.

JUDGMENT.—There was no evidence on the record to justify the order requiring the applicant to furnish security. The material part of the Sub-Divisional Magistrate's order is as follows:—

"It is about eight or nine months since the accused has come out of Jail, and his conduct during his release has not been beyond suspicion. It is generally believed that the

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accused was implicated in the robbery and murder of Ma Pyu which took place quite recently." It would appear that proceedings were really taken against the applicant because he was suspected of complicity in this murder, though there was no evidence to justify his being charged with it. The witnesses repeat one after another, "since the release of the accused from Jail, I have not heard anything against him except the case of Ma Pyu."

It has frequently been laid down that an order under section 110 of the Code of Criminal Procedure cannot be made against an accused person who has been imprisoned for failure to furnish security under that section until he has had time after his release either to retrieve his character or to show that he has no intention of doing so—see, for instance, *Junab Ali* v. *Emperor* (1) and *Emperor* v. *Ranjit* (2). It is obvious that if this were not the case, a person who had once been imprisoned for failure to furnish security might be kept in Jail for the rest of his natural life upon evidence that he bore a bad character before the first order against him was made.

In other respects, moreover, the Magistrate has failed to observe the instructions contained in the rulings of this Court. The evidence of a number of different *Thuggis*, none of them belonging to the applicant's village, was not sufficient alone to justify an order, nor should the irrelevant evidence as to the association of the applicant with bad characters have been admitted.

The statement in the District Magistrate's order that "at this time it is highly desirable that he should be placed on security" is not understood. The law must be observed so long as it is the law. The order for security should not have been restricted to sureties who are inhabitants of one village.

The order is set aside, and the bail bond is cancelled.

*Petition accepted.*

(1) 31 C. 783; 8 C. W. N. 909; 1 Cr. L. J. 801.
(2) 28 A 306; 3 A. L. J. 29; 3 Cr. L. J. 96; 1 M. L. T. 58; A. W. N. (1906) 30.

## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1047 OF 1915.

August 28, 1915.

*Present*:—Mr. Justice Shadi Lal.

FAZALI LLAHI—ACCUSED—APPLICANT

*versus*

EMPEROR, THROUGH NADAR DIN—COMPLAINANT—RESPONDENT.

*Workman's Breach of Contract Act (XIII of 1859), ss. 1, 2, 3—Agreement to pay off advance of money by delivering ballast—Promisor, whether an artificer.*

An agreement to pay off an advance of money by delivering ballast to the lender does not create the relationship of labourer and employer between the parties, and a failure to perform such agreement does not bring the case within the purview of Act XIII of 1859.

Case reported by the Sessions Judge, Rawalpindi, with his No. 742, dated the 22nd June 1915, for revision on the following

GROUNDS.—The applicant has been ordered by E. J. Stephens, Esquire, Extra Assistant Commissioner, exercising the powers of a Magistrate, First Class, under sections 2/3 of Act XIII of 1859, to either work off the balance of Rs. 216-13-6, being the balance of the amount of ballast which he contracted to deliver to the plaintiff or to pay back that sum to the complainant within four months and to enter into a bond of Rs. 300 with one surety for due performance of the order, or in default to undergo one month's rigorous imprisonment.

The record is submitted to the learned Judges of the Chief Court for revision on the following grounds:—

(1) The applicant is not shown to be an "artificer, workman or labourer" within the meaning of the Act.

(2) The contract was apparently one to supply ballast and did not entail the personal labour or service of the applicant. *Pir Bakhsh* v. *Imam Din* (1).

(3) The case is, therefore, one for the Civil Courts, it being an ordinary breach of contract.

I consider, therefore, that the Magistrate's order should be set aside and the complainant left to pursue his remedy in the Civil Courts if so advised.

Mr. *Ralli*, for the Complainant.

ORDER.—The accused received an ad-

(1) 9 Cr. L. J. 107; 28 P. R. 1908 Cr.

vance of money from the complainant and contracted to pay it off by delivering ballast. There was no relationship of labourer and employer of labour between the parties and the provisions of Act XIII of 1859 are inapplicable to the case. The accused is not an artificer, workman or labourer within the purview of section 1 of the Act and the conviction is, therefore, illegal.

I accordingly accept the recommendation and acquit the accused. He shall be discharged from his bail.

*Revision accepted.*

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## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION No. 66 OF 1915.

July 20, 1915,

*Present*:—Mr. Pratt, J. C., and Mr. Boyd, A. J. C.

ALUDOMAL SON OF DASUMAL—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Penal Code (Act XLV of 1860), s. 225-B—"Arrest", meaning of—Arrest, how effected.*

An arrest is a restraint of the liberty of the person and unless there is submission actual contact is necessary to effect it. There must be touch or confinement or else acquiescence. Mere words cannot constitute an arrest. [p. 679, col. 2; p. 680, col. 1.]

*Russen* v. *Lucas*, (1824) 1 Car. & P. 153; R. & M. 26; *Granger* v. *Hill*, (1838) 4 Bing (N. C.) 212; 3 Scott 561; 1 Arn. 42; 7 L. J. C. P. 85; 2 Jur. 235; 132 E. R. 769; *Sandon* v. *Jervis*, (1859) 28 L. J. Ex. 156; 5 Jur. (N. S.) 860; 7 W. R. 290, referred to.

Application for revision of the appellate judgment of the Sessions Judge, Sukkur.

Mr. *Lalchand Hassomal*, for the Applicant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

### JUDGMENT.

BOYD, A. J. C.—The accused has been convicted under section 225-B, Indian Penal Code, for escaping from the lawful custody of a bailiff. It is granted that the bailiff had a right to arrest him. Accused's present defence is that he was never in custody, not having been arrested. The facts found are hat the bailiff met him in the street, showed his staff, told him he was under arrest bu did not touch him. Accused, instead of going with him, walked away and entered a shop. The question is whether he was arrested; for, if not, he cannot be convicted for escaping.

The word "arrest" from its derivation does not necessarily denote a physical act. So it is right to see what meaning is given to it by law or (if there be no law) by general usage.

No particular method of arrest is prescribed by the Code of Civil Procedure. Section 46 (1) of the Criminal Procedure Code is as follows:--

"In making an arrest the Police Officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action".

Here it is not alleged or contended that accused submitted. On the contrary, he walked away.

The trying Magistrate and the Sessions Judge, who heard the appeal, think there should be a different standard for civil arrest and that such may be complete without touch or confinement.

In England the law about civil and criminal arrests is identical (*Cf.* Halsbury's Laws of England, Volume XXV, page 816, paragraph 1418, and Volume IX, page 296, paragraph 607). There must be touch or confinement or else acquiescence. Mere words cannot constitute an arrest. There are a number of decisions on the point, which are old but have never been departed from, this method of arrest having been well recognised for at least 100 years. *Russen* v. *Lucas* (1) was a case similar to this. A Sheriff's officer told a person that he wanted him but did not touch or restrain him. The person made an excuse and departed. It was held that there was no arrest. *Granger* v. *Hill* (2) was an interesting case (different from this) in which the person was under restraint and in the officer's power; but the Judges laid down the same principle, there must be touch or confinement or submission. The same is laid down in *Sandon* v. *Jervis* (3) in which the Judges attached so

(1) (1824) 1 Car & P. 153; R. & M. 26.

(2) (1838, 4 Bing. (N. C.) 212; 3 Scott. 561; 1 Arn. 42; 7 L. J. C. P. 85; 2 Jur. 235; 132 E. R. 769.

(3) (1859) 28 L. J. Ex, 156; 5 Jur. (N. S.) 860; 7 W. R. 290.

much importance to the act of touching that they held an arrest by touch to be a good caption, although the bailiff (being outside a window) had no personal control at that time over the person arrested. And there are other cases.

It would of course be easy to set up a new criterion of validity by saying that an arrest is good if the bailiff has the person under his control, whether he touches him or not. Such a test would favour the prosecution in the present case, in which apparently the bailiff was near enough to touch the accused. But such a test would be more difficult to apply than the time-honoured test which is now recognised in England and (I believe) in India also. So there is no reason to say that the method of a civil arrest should be different from that prescribed by the Criminal Procedure Code.

The learned Public Prosecutor at first suggested that the accused was guilty of resisting apprehension. But that is a separate offence under the same section; and he was never charged with it. Moreover apprehension is a physical act, which the bailiff never tried to perform, and so accused cannot be said to have resisted it.

As no arrest took place, the conviction for escape was illegal. No doubt accused's conduct towards the bailiff was wrong; but, as he has already been punished in a separate case for similar errors in the same transaction, we can interfere in the present case without hesitation.

I would set aside the conviction and sentence, acquit the accused and direct re-payment of the fine, if paid.

PRATT, J. C.—An arrest is a restraint of the liberty of the person. Unless there is submission actual contact is necessary to effect it. This is well settled in England and section 46, Criminal Procedure Code, shows that the Indian Legislature uses the word in the same sense. In fact the section seems to be based on the judgment in *Russen* v. *Lucas* (1), which was an arrest by a Sheriff's officer.

As the bailiff did not touch the accused he was not arrested and was not in custody. I therefore, concur, in the proposed order.

*Conviction and sentence reversed.*

## LOWER BURMA CHIEF COURT.

## FULL BENCH.

CRIMINAL REVISION No. 295-B OF 1915.
CRIMINAL REFERENCE No. 81 OF 1915.
November 29, 1915.
*Present*:—Mr. Justice Twomey.
January 10, 1916.
*Present*:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Robinson and Mr. Justice Parlett.
January 11, 1916.
*Present*:—Mr. Justice Twomey.

EMPEROR—APPLICANT

*versus*

NGA SAING *alias* AH SAING—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 110—"Any person within the local limits of his jurisdiction", meaning of.*

The words "any person within the local limits of his jurisdiction" in section 110, Criminal Procedure Code, apply also to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction. [p. 682, cols. 1 & 2.]

*Emperor* v. *Po Thaw*, 4 L. B. R. 148; 7 Cr. L. J. 447, overruled.

*Queen-Empress* v. *Chi Do Bon*, P. J. L. B. 204; *Emperor* v. *Bapoo Yellappa*, 9 Bom. L. R. 244; 5 Cr. L. J. 247; *In re Kora Rangan*, 17 Ind. Cas. 413; 13 Cr. L. J. 781; 36 M. 96; 23 M. L. J. 535, referred to.

Review of the order of the Sub-Divisional Magistrate of Yandoon, dated the 13th August 1915, passed in Criminal Trial No. 39 of 1915.

FACTS appear from the following Reference made by the Sessions Judge of Maubin Division, in his Criminal Revision No. 188 of 1915, dated the 14th October 1915:—

"Ah Saing was ordered to enter into a bond in Rs. 75 with two sureties for a term of six months under section 3 of the Opium Law Amendment Act and in default sentenced to six months' imprisonment to take effect from the expiry of the sentence which he was undergoing by Maung Po To, First Class Sub-Divisional Magistrate, Yandoon.

The Magistrate fixed no date for his order to take effect and presumably, therefore, the period of which security was to be given dated from the date of the order, August 8th 1915.

The order for imprisonment, therefore, contravenes section 123 of the Criminal Procedure Code, which lays down that, if the person,

ordered to give security is already in prison he shall be detained in prison until the period for which security was ordered expired.

Ah Saing was sentenced to six months' rigorous imprisonment under section 353 of the Indian Penal Code by the Additional Magistrate, Danubyu, in Criminal Case No. 78 on the 22nd July 1915 during the pendency of the security proceedings.

I consider the proceedings under the preventive section should have been closed, when the accused received a sentence of imprisonment in another case."

The present order is entirely opposed to the principles laid down in the cases of *Queen Empress* v. *Chi Do Bon* (1) and *Emperor* v. *Po Thaw* (2).

I recommend that the order to furnish security be quashed."

The reference came up for hearing before Twomey, J., who referred it to a Full Bench by the following

ORDER.—This case hase been submitted for orders in revision by the Sessions Judge, Maubin Division.

A Chinaman, named Ah Saing, was convicted of assaulting an Excise Sub-Inspector and was sentenced by the Additional Magistrate, Danubyu, to rigorous imprisonment for six months under section 353, Indian Penal Code, on the 22nd July 1915.

On the 8th August 1915, the Sub-Divisional Magistrate, Yandoon, passing orders under section 3 of the Burma Opium Law Amendment Act, 1909, read with section 118 of the Code of Criminal Procedure, 1908, required Ah Saing to furnish security for his good behaviour for six months and at the same time directed that as the accused could not furnish security he should be kept in rigorous imprisonment for six months. The warrant which is dated 13th August further directs that the "sentence" should commence to run after the expiry of the sentence passed in the case under section 353, Indian Penal Code.

The learned Sessions Judge recommends that the order to furnish security should be set aside as being entirely opposed to the principles laid down in the cases of *Queen-Empress* v. *Chi Do Bon* (1) and *Emperor* v. *Po Thaw* (2).

I am doubtful whether the principles enunciated in the two cases cited can be reconciled with the provisions of section 120 (1), Code of Criminal Procedure, which certainly appears to contemplate the case of a man who is undergoing a sentence for a substantive offence and who is ordered, while undergoing that sentence, to furnish security that he will be of good behaviour when he is released from Jail. Mr. Justice Irwin thought it obvious that the words of section 110 (and the same words are repeated in section 3 of the Burma Opium Law Amendment Act) "any person within the local limits of his jurisdiction" were not intended to cover the case of persons undergoing imprisonment within the local limits of the Magistrate's jurisdiction. This is not at all obvious to me.

In the present case, for example, I see no good reason why the accused should not be required to furnish security that he will be of good behaviour for six months after the expiration of his sentence of six months' rigorous imprisonment under section 353, Indian Penal Code. It seems to me that the Sub-Divisional Magistrate went wrong only in passing orders under section 123 Criminal Procedure Code, and issuing a warrant of imprisonment while the sentence of six months' rigorous imprisonment under the Penal Code was being served. It is only if the accused fails to furnish security on the expiration of that sentence that action should be taken under section 123 (1).

As the view I take is in conflict with that of the learned Judges in the cases cited above, I refer to a Bench of this Court the question, whether the words "any person within the local limits of his (*i.e.*, the Magistrate's) jurisdiction" in section 110 of the Code of Criminal Procedure apply to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction.

The order of reference came up for hearing before a Full Bench consisting of Fox, C. J., and Robinson and Parlett, JJ., who deilvered the following

(1) P. J. L. B. 204.
(2) 4 L. B. R. 148; 7 Cr. L. J. 447.

EMPEROR *v.* NGA SAING.

OPINION.

FOX, C. J.—The wording of section 120 of the Criminal Procedure Code clearly shows that it was contemplated that an order requiring security for keeping the peace or for maintaining good behaviour may be made against a person sentenced to or undergoing a sentence of imprisonment.

The decision in *Emperor* v. *Po Thaw* (2), in so far as it held that a Magistrate had no jurisdiction to commence proceedings under section 110 against a person undergoing imprisonment in a Jail, appears to me erroneous. Whether a Magistrate should do so is a matter of discretion to be exercised according to the circumstances of each case, it being remembered that the only object of the provisions of Chapter VIII is to ensure, if possible, the keeping of the peace or good behaviour for a limited period. If a person is in Jail under sentence for a long period his keeping of the peace and good behaviour, so far as the outside public is concerned, is assured for such period, but if a person is undergoing only a short sentence it may be that in some cases there may be reason for calling upon him to give security for keeping the peace or for his good behaviour for a period subsequent to the expiration of the sentence on him.

My answer to the question referred is in the affirmative.

ROBINSON, J.—I presume the prisoner ordinarily resided within the local limits of the Magistrate's jurisdiction. The Magistrate could not take action against a man residing outside his jurisdiction,even if he was habitually a thief within the jurisdiction.

Otherwise, I can see no ground for holding that because he was in Jail he ceased to be within the local limits of the Magistrate's jurisdiction.

Section 120 (1) contemplates an order under section 118 being made at a time when the person against whom it is made is in Jail and section 123 does the same.

If a man in Jail was not within the local limits of the jurisdiction of some Magistrate he could not be tried or committed for trial for an offence committed while in Jail.

In *Queen-Empress* v. *Chi Do Bon* (1) it is merely laid down that security should not be demanded and that proceedings already begun can be renewed. That may be and no doubt is a wise course in certain cases, as, for instance, where the sentence being undergone is for a long term but it is not ruled that to do so is illegal.

In *Emperor* v. *Po Thaw* (2) no reasons are given. I would answer the question referred in the affirmative.

PARLETT, J.—I do not think a Magistrate's jurisdiction under section 110 of the Criminal Procedure Code should be limited to persons who ordinarily reside within the local limits of his jurisdiction. An opposite view has been taken in *Emperor* v. *Bapoo Yellappa* (3) and *In re Kora Rangan* (4). I would answer the question referred in the affirmative, without any such proviso.

FINAL ORDER.

TWOMEY, J.—It has now been held by a Bench of this Court overruling the decision in *Emperor* v. *Po Thaw* (2) that the words "any person within the local limits of his jurisdiction" in section 110 of the Criminal Procedure Code apply to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction.

The Sub Divisional Magistrate went wrong only in passing orders under section 123 of the Criminal Procedure Code and issuing a warrant of imprisonment while the substantive sentence of rigorous imprisonment for six months under the Penal Code, section 353, was being served. It is only if the accused Ah Saing fails to furnish security on the expiration of his substantive sentence that action should be taken under section 123 (1). The warrant issued under that section should be withdrawn.

The substantive term of imprisonment expires on 21st January 1916. The accused should be given a reasonable opportunity of furnishing security for his good behaviour for six months from that date. If he fails to furnish security as required, fresh action can be taken under section 123 (1).

The proceedings are returned to the Sessions Court with copies of the order of reference to a Bench and the judgments passed thereon.

*Order accordingly.*

(3) 9 Bom. L. R. 244; 5 Cr. L. J. 247.

(4) 7 Ind. Cas. 413; 23 M. L. J. 535; 13 Cr. L. J. 781; 36 M. 96.

## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 38 OF 1916.

January 28, 1916.

*Present*:—Mr. Justice Chitty and Mr. Justice Walmsley.

PURNA CHANDRA CHAKRAVARTY—PETITIONER

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 109—Sureties, fitness of—Surety's immoveable properties, if to be taken into consideration.*

In deciding as to the stability of sureties for a person bound down under section 109, Criminal Procedure Code, their immoveable properties should be taken into consideration.

FACTS.—In a proceeding under section 109, Criminal Procedure Code, the petitioner was ordered by the Deputy Magistrate of Dacca to enter into a personal recognizance bond of Rs. 2,000 with three sureties of Rs. 2,000 each to be of good behaviour for one year. Thereupon the petitioner's father, his uncle and his brother-in-law offered themselves as sureties but the Deputy Magistrate by his order, dated the 28th November 1915, rejected them as unfit on the ground that their immoveable properties should not be taken into consideration in determining their fitness, but only their moveable properties should be taken into consideration for the purpose, and as these persons had not sufficient moveable properties they were unfit to be sureties. Against this order of the Deputy Magistrate, the petitioner moved the High Court and obtained the present Rule. The Magistrate in showing cause submitted the following explanation :—"The Hon'ble High Court has been pleased to issue a Rule in the present case on the ground that the immoveable properties belonging to the intending sureties should have been taken into consideration in deciding as to the stability of their position. It is no doubt a fact that the consideration of the immoveable properties has been excluded by me in deciding the question of pecuniary fitness of the sureties. But the view I took of the question is no longer tenable in view of the remarks of the Hon'ble Judges of the High Court in an unreported case* [Revision No. 1498 of

*Since reported, see 32 Ind. Cas. 833—*Ed.*



1915, disposed of by Hon'ble Justices Chitty and Walmsley on 17th December 1915, *in the matter of Nasiruddin Karikar* v. *Emperor*]. In this case it has been held that it is not correct to look only to moveable properties of the proposed sureties and that the sufficiency of a surety has to be considered from a general view of his stability and the property which he holds."

Babus *Gobinda Chandra Dey Roy* and *Birendra Kumar De*, for the Petitioner.

JUDGMENT.—In this case we have read the explanation of the Deputy Magistrate. We make the Rule absolute on the ground on which it was granted, namely, that the immoveable properties belonging to the sureties should have been taken into consideration in deciding as to the stability of their position. We set aside the order of the Deputy Magistrate rejecting the sureties and direct that he do further consider the matter in the light of our remarks in Revision Case No. 1498 of 1915* to which he refers. We must, however, notice the suggestion of the Additional Magistrate that the acceptance of the sureties should be made conditional on the deposit by them of a substantial sum in cash or Government securities. We cannot accede to this suggestion, which would practically nullify the effect of our remarks with regard to the general position of sureties. The order for bail will continue until the order regarding the sureties is passed.

*Rule made absolute.*

*See 32 Ind. Cas. 833.—*Ed.*

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## LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 350-B OF 19 5.

January 14, 1916.

*Present*:—Sir Charles Fox, KT., Chief Judge.

J. & F. GRAHAM & CO.—COMPLAINANTS—APPELLANTS

*versus*

H. C. ELSEY OPPOSITE PARTY—RESPONDENTS.

*Criminal Procedure Code (Act V of 1898), s. 417—Acquittal, revision against order of—Local Government refusing to appeal—Jurisdiction of High Court.*

ABDUL SHEIKH v. EMPEROR.

In cases of acquittal of an accused the revisional jurisdiction of a High Court should ordinarily be exercised sparingly and only where it is urgently demanded in the interests of public justice, and a High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it.

*Faujdar Thakur* v. *Kasi Chowdhury*, 27 Ind. Cas. 186; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122; 42 C. 612, followed.

Review of the order of the District Magistrate of Rangoon, dated the 31st July 1915, passed in Criminal Trial No. 13 of 1915

ORDER.—This is an application made by the complainants in a case to have an order of acquittal of the accused considered and set aside, or in the alternative to have certain passages in the Magistrate's judgment, which are alleged to be defamatory of the complainants, expunged from the record.

The Advocate for the complainants has informed me that application was made to the Local Government to order an appeal against the acquittal under section 417 of the Criminal Procedure Code, but the Local Government has refused to do so. It has been urged that nevertheless this Court has power to consider the case in its revisional jurisdiction. This is so, but I entirely agree with Jenkins, C. J., when he said in *Faujdar Thakur* v. *Kasi Chowdhury* (1) that in cases of acquittal the revisional jurisdiction of a High Court should ordinarily be exercised sparingly, and only where it is urgently demanded in the interests of public justice.

It has been urged that the present is a case in which interference is called for urgently in the interests of public justice. I cannot assume that the Local Government has refused to direct an appeal in such a case.

There is no precedent of a High Court entertaining an application by a complainant to revise an acquittal after the Local Government has declined to direct an appeal against it.

The allowance of even an appeal from an acquittal is peculiar to India alone of all His Majesty's Dominions: it is safeguarded by confining the power to direct an appeal to the Local Government. The reasons for this safeguard presumably are that it should not lie with complainants to decide whether an appeal should be made, and that the authority who should decide this should be the highest authority in each Province. It may be presumed also that the Legislature intended that the exceptional power to direct an appeal should not be exercised, except in cases in which the Local Government considered that the interests of public justice called for further consideration of a case by the highest Court in the Province.

When the Local Government has considered a case in that light and has declined to direct an appeal, it would not, in my opinion, be a proper or fitting exercise of the discretion of a Judge of this Court to even entertain an application by a complainant to interfere with the acquittal

I reject the application.

*Application rejected.*

(1) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

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CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 367 OF 1915.

July 9, 1915.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Chapman.

ABDUL SHEIKH—PLAINTIFF—APPELLANT

*versus*

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 297, —Charge to Jury,—Common object of riot, omission to mention, whether vitiates trial—Rioting—Unlawful assembly—Penal Code (Act XLV of 1860), ss. 141, 147—Evidence Act (I of 1872), s. 114.*

In his charge to the Jury a Judge should draw the attention of the Jury to the case set up by the defence and the non-production by the prosecution of witnesses who were present at the time of the alleged occurrence, pointing out to them that the non-production created a presumption under section 114, Indian Evidence Act, which did not help the prosecution case. [p. 685, col. 1.]

In cases of riot it is essentially necessary for a Judge to mention, in his charge to the Jury, what an unlawful assembly is. [p. 685, col. 2]

Where a Judge in his charge to the Jury said: "The offences of rioting, culpable homicide, voluntarily causing grievous hurt and the provisions of sections 34, 149, Indian Penal Code, are explained" and there was nothing to show that the Jury were told that a rioting can only take place when there is an unlawful assembly consisting of at least five men

with one of the common objects mentioned in section 141, Indian Penal Code:

*Held*, that the charge was most inadequate. [p. 685, col. 1.]

*Semble.*—In cases of riot the omission to mention the common object in the charge-sheet does not necessarily vitiate the trial. [p. 685, col. 1.]

*Behari Mahton* v. *Queen-Empress*, 11 C. 106; *Sabir* v. *Queen-Empress*, 22 C. 276; *Poresh Nath Sarcar* v. *Emperor*, 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153, not followed.

Babus *Manmatha Noth Mookerjee* and *Birendra Kumar De*, for the Appellant.

Mr. *Orr* (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.

SHARFUDDIN, J. The case was tried by Jury.

We have heard the learned Vakil appearing for the appellant. He contends that there has been a misdirection in the charge, *first*, because in the charge-sheet the common object has not at all been mentioned and he relies on the cases of *Behari Mahton* v. *Queen-Empress* (1), *Sabir* v. *Queen-Empress* (2) and *Poresh Nath Sircar* v. *Emperor* (3). There are, however, other cases which go to show that the omission to mention the common object in the charge-sheet does not necessarily vitiate the trial. The *second* ground urged by the learned Vakil is that in the charge to the Jury, the learned Sessions Judge has not drawn their attention to the case set up by the defence and that some of the witnesses who were present at the time of the alleged occurrence were not examined in the trial.

The learned Deputy Legal Remembrancer admits that the charge is inadequate.

The learned Sessions Judge should have drawn the attention of the Jury to those facts, pointing out to them that non-production of those witnesses created a presumption under section 114 of the Evidence Act which did not help the case for the prosecution.

Apart from these objections, I am of opinion that the charge to the Jury is most inadequate. In his charge the learned Judge says: "The offences of rioting, culpable homicide, voluntarily causing grievous hurt and the provisions of sections 34 and 149, Indian Penal Code, are explained." There is nothing to show that the Jury were told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in section 141, Indian Penal Code. I am of opinion that in cases of riot it is essentially necessary to mention what an unlawful assembly is. The Jury are not experts in law. They might not be able to distinguish between a collection of five or more men without a common object and a collection of the same number of men with a common object.

In these circumstances, I think, the case should go back for re-trial. The conviction and sentence are set aside and a fresh trial is ordered.

I would like to point out that in the fresh trial it is desirable that the common object of the assembly, the case set up by the accused, the evidence, if any, either in cross examination of the witnesses for the prosecution or in the examination-in-chief of any defence witness, if examined and any statement corroborating the allegation of the accused, should be distinctly placed before the Jury.

The re-trial of the accused will be only under section 147, Indian Penal Code, inasmuch as he has not been found guilty of any other offence.

Let the accused be admitted to bail to the satisfaction of the District Magistrate.

CHAPMAN, J.—I agree.

*Re-trial ordered.*

(1) 11 C. 106.
(2) 22 C. 276.
(3) 33 C. 295; 2 C. L. J. 516; 3 Cr. L. J. 153.

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ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 798 OF 1915.

January 4, 1916.

*Present*:—Justice Sir George Knox, KT.

IQBAL HUSAIN—APPELLANT

*versus*

WILAYAT HUSAIN—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Contradictory statements—Discretion, exercise of.*

An application for sanction when made under section 195, Criminal Procedure Code, must be care

fully considered before the sanction is given, especially when the application is on behalf of an old offender in Jail and is directed against a Sub-Inspector of Police.

A sanction given on account of the contradictory statements made by a person without giving him an opportunity to explain those contradictory statements is not a sanction given with due consideration.

Criminal appeal against an order made by the Sessions Judge of Moradabad.

Mr. *Wallach*, for the Appellant.

Mr. *J. M. Banerjee*, for the Respondent.

JUDGMENT.—The learned Sessions Judge of Moradabad had before him a paper purporting to be a petition from one Wilayat Husain, prisoner in Jail. It was apparently presented through Mr. Kedar Nath, Barrister-at-Law. It purported to be an application asking for sanction to prosecute Sub-Inspector of Police by name Iqbal Husain for offences said to have been committed under sections 193, 211, 465, 471, etc., Indian Penal Code. It must have been known to the learned Judge that Wilayat Husain was a man at the time in Jail and a person who had several times been previously prosecuted and convicted of offences against the Indian Penal Code. The person aimed at in the application was a Sub-Inspector of Police. If ever there was a case in which the discretionary power to give sanction should have been most carefully considered, this was such a case. This Court has on several occasions pointed out that an application for sanction when made under section 195, Criminal Procedure Code, must be carefully considered before the sanction is given. See *Kishan Lall* v. v. *Sheo Dial* (1); *Empress* v. *Mahadeo Singh* (2) and many other cases. Applications asking for sanction stand on quite a different footing from action taken under section 476, Criminal Procedure Code, and what I now say refers in particular to applications for sanction made under section 195 and not to action taken under section 476, Criminal Procedure Code. If I had been satisfied that proper care had been taken before the sanction was granted under section 195 I should have felt it difficult to interfere; but after carefully considering the matters on record and the arguments addressed to me by the learned Counsel, I am not satisfied that such care was exercised by the Court below. In the *first* place, the sanction has been given upon what were considered by the Court below to be contradictory statements. That Court in its judgment says that in the case of Iqbal Husain some of the statements quoted in the application are no doubt false; but it has been shown to me that as regards one of the statements so characterised the learned Judge has misunderstood or misinterpreted the statement made before the Committing Magistrate. In the second place I cannot find that an opportunity was given, as it should always be given to the person supposed to have made contradictory statements, to give on oath his explanation of the statements which he made. It appears to me that the statements which were read over to me are not so impossible of explanation that I must be forced to consider one of them to be false. I do not think it was a wise discretion to grant an application said to have been presented by a person like Wilayat Husain against an officer holding a responsible post of Sub-Inspector of Police without much more care than appears to have been exercised. Had the matter been before me in the first instance, I should have hesitated long as to whether sanction in such a case should be granted at all without further opportunity being given to the Sub-Inspector to explain the statements fully and to state the circumstances under which they came to be made. A person holding the office of Sub-Inspector of Police is entitled to be guarded against reckless statements made by a convict. For these reasons I revoke the sanction granted by the lower Court.

*Sanction revoked.*

(1) A. W. N. (1893) 104.
(2) A. W. N. (1887) 142.

## CALCUTTA HIGH COURT.

CRIMINAL REVISION PETITION No. 610 OF 1914.

June 4, 1914.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

ROMESH CHANDRA DUTTA CHOUDHURY AND OTHERS—PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of* 1898), *ss.* 109, 118, 122—*Sureties, fitness of.*

In a bad livelihood case when several sureties are required it is not necessary that each one of them should live in the immediate neighbourhood of the accused.

Rule against the decision of the District Magistrate of Dacca.

Messrs. *J. N. Roy* and *B. C. Chatterjee* and Babu *Birendra Kumar De*, for the Petitioners.

Mr. *Orr* (Deputy Legal Remembrancer, Bengal), for the Crown.

JUDGMENT.—In this case the petitioners were required to execute bonds with three sureties each in the sum of Rs. 1,000 to be of good behaviour for one year. They offered certain sureties and under the provisions of section 122, Criminal Procedure Code, these sureties were rejected as being unfit persons. Thereupon the petitioners obtained from this Court the present Rule calling upon the District Magistrate of Dacca to show cause why the sureties offered should not be accepted. The learned District Magistrate has submitted a very fair explanation and after reviewing the evidence expressed his opinion that in the case of the petitioner Suresh Chandra Banerji three of the sureties offered, namely, Basanta Kumar Banerjee, Kali Kumar Banerji and Rash Mohun Banerji are fit persons to be accepted as sureties. In the case of Suresh Chandra Banerji we direct that the three persons above named be accepted.

In case of Romesh Chandra Dutta Chaudhuri, of the five persons offered he finds that No. 3, Khitish Chandra Dutta Chowdhuri, has been rejected on insufficient grounds. With regard to the 1st and 2nd he says that the 1st is the elder brother and the second the younger brother of the petitioner and that they themselves are looked upon with some suspicion. With regard to the 4th and 5th he says that



they are residents of Mymensingh town, a place at a considerable distance from Bajitpur where the petitioner lives. Considering that three sureties are required we do not think it necessary that each one of the three should live in the immediate neighbourhood of the accused. With regard to Suresh Chandra Dutta Chowdhuri, the elder brother, it does not appear that the suspicions against him have been substantiated. We, therefore, direct that in the case of Romesh Chandra Dutta Chowdhuri the following three persons, Sures Chandra Dutta Chowdhuri, Khitish Chandra Dutta Chowdhuri and Hemendra Mohun Dass, be accepted as sureties.

The Rule is made absolute in these terms.

*Rule made absolute.*

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## MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 642 OF 1915.

CRIMINAL REVISION PETITION No. 515 OF 1915.

December 21, 1915.

*Present*:—Mr. Justice Srinivasa Aiyangar.

*In re* POTHURI VENKATARAMAYYA AND OTHERS—ACCUSED NOS. 1 TO 12—PETITIONERS.

*Criminal Procedure Code (Act V of* 1898), *s.* 437—*Order of discharge—Acquittal—Further inquiry, order for, if competent.*

A Sessions Judge has no jurisdiction to order further enquiry, under section 437 of the Code of Criminal Procedure, in a case in which an order of discharge amounting in effect to one of acquittal was passed.

*Tunguturi Sriramulu* v. *Nalam Krishna Row*, 25 Ind. Cas. 1001; (1914) M. W. N. 646; 16 M. L. T. 303; 38 M. 585; 15 Cr. L. J. 673; 27 M. L. J. 589, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sessions Court of Kistna at Masulipatam, in Criminal Revision Petition No. 20 of 1915, preferred against the judgment of the Deputy First Class Magistrate of Gudivada, in Calendar Case No. 44 of 1914.

FACTS.—The complaint was at first received by one Magistrate. He took the evidence of prosecution witnesses and a charge was framed against the accused. That Magistrate was transferred and another was appointed in his place. A *de novo* trial being claimed, he took evidence afresh and passed

an order of discharge. A revision petition was filed against that order to the Sessions Court and he directed further enquiry under section 437 of the Code of Criminal Procedure. The present petition is against that order.

Mr. *V. Ramadoss*, for the Petitioners.

Mr. *M. H. Hakim*, for the Government.

ORDER.—In this case the Sessions Judge had no jurisdiction to order any further enquiry as the so called discharge by the First Class Magistrate was in effect an acquittal. See *Tanguturi Sriramulu* v. *Nalam Krishna Row* (1). I, therefore, set aside the order of the Sessions udge ordering further enquiry, the result of which will be that the accused in this case will have an acquittal entered in his favour.

*Petition allowed; Order set aside.*

(1) 25 Ind. Cas. 1001: 27 M. L. J 589; (19.4) M. W. N. 646; 16 M. L. T. 303; 38 M. 585; 15 Cr. L. J. 673.

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## SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 97 OF 1915.

August 26, 1915.

*Present*:—Mr. Pratt, J C., and Mr. Boyd, A. J. C.

RATANSI DAYA—APPLICANT

*versus*

EMPEROR—OPPONENT.

*Penal Code (Act XLV of 1860), s. 193—Perjury, prosecution for, maintainability of—Statement charged not literally false, effect of.*

To support a prosecution for giving false evidence it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced.

Mr. *Dipchand T. Ojha*, for the Applicant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application for revision of an order made by the First Class Magistrate, Karachi, under section 476, Criminal Procedure Code, directing the prosecution of the applicant for an offence under section 211, Indian Penal Code.

The applicant was examined as a witness for the defence in a defamation case and said in evidence "Bhimji Valji had not given me a chit guaranteeing me to pay my claim in the Small Cause Court."

The Magistrate came to the conclusion that this statement was false and, therefore, directed prosecution of the applicant under section 211, Indian Penal Code. This section has no application at all, for the applicant never made a false charge or complaint against anybody. The Magistrate evidently intended to direct the prosecution of the applicant under section 193, Indian Penal Code.

The question that arises is whether the applicant gave false evidence.

The applicant had filed a suit in the Court of Small Causes, Karachi, against Bhim i Valji and this suit was dismissed or withdrawn on the ground that the contract was a wagering one. This plea of wager was really for the benefit of Ramji Manji, who had been prosecuted for defaming gunny bag merchants by alleging that their business was illegal and consisted of wagering contracts, etc. The Magistrate believed that the withdrawal of the suit was collusive and that Bhimji Valji had agreed to pay the applicant Ratansi's claim and that Bhimji gave to Ramji Manji a chit promising to do so. This is what Bhimji has said in his evidence. But even if this be so and even if Bhimji's evidence is believed, the fact remains that th chit was given not to the applicant but to Ramji Manji. Therefore, the applicant's evidence that he was given no chit is literally true. To support a prosecution for giving false evidence it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced. Here the applicant's denial that he received no chit from Bhimji Valji is literally true and does not amount to an offence under section 193, Indian Penal Code.

We accordingly quash the order of the Magistrate under section 476, Criminal Procedure Code.

*Order quashed.*

MIR HUSSEIN BUX *v.* KANDO.

## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24 OF 1913.

September 19, 1915.

*Present*:- Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MIR HUSSEIN BUX—PLAINTIFF—APPELLANT

*versus*

KANDO AND OTHERS - DEFENDANTS—RESPONDENTS.

*Specific Relief Act (I of 1877). s. 42—Declaratory decree, right to, without asking for available consequential relief—Symbolical possession.*

A *jagirdar* sued to obtain a declaration that he was the owner of the land in possession of the defendants whom he alleged to be his tenants. The defendants denied the tenancy:

*Held*, that the plaintiff was not entitled to a declaratory decree, inasmuch as he being entitled to further relief by way of symbolical possession had failed to ask for it.

*Rathnasabapathi Pillai* v. *Ramaswami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T 311; 20 M. L. J. 301, followed.

*Farasram* v. *Bhimbhai*, 5 Bom. L. R. 195, dissented from.

Appeal against the decree of the First Class Subordinate Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Tejumal Hassamal*, for Respondents Nos. 1 to 6, 8, 10 and 12.

JUDGMENT.- The plaintiffs, who are *jagirdars* of certain lands, filed this suit to obtain a declaration that they are the owners of the lands, and that the defendants are in possession as their tenants. The defendants denied the tenancy and, therefore, the suit became an ejectment suit and the lower Court required the plaintiffs to amend the plaint accordingly.

The plaintiffs made a pretence of amending the plaint, but the amended plaint still sought no further relief than a declaration of title. The lower Court then dismissed the suit.

The plaintiffs now appeal and Mr. Rupchand cites the case of *Farasram* v. *Bhimbhai* (1), where it was held that a plaintiff seeking possession of land held by defendants through tenants may sue for a declaration of title coupled with an injunction to prevent the defendants from interfering with the collection of these rents.

(1) 5 Bom. L. R. 195.

We do not concur in the decision, for it overlooks the fact that an injunction is an equitable relief and cannot be granted unless common law remedies failed. An injunction can only be granted on the conditions set forth in section 54 of the Specific Relief Act, while section 56 (1) prohibits to grant an injunction when equally efficacious relief can be obtained by any other usual mode or procedure. Further, the facts in the case of *Farasram* v. *Bhimbhai* (1) are different. Here it is the defendants whom plaintiffs allege to be in physical possession as tenants.

If on their denial of the lease the plaintiff wishes to determine the tenancy that operates as a forfeiture and the plaintiff's suit is a suit for ejectment.

Mr. Rupchand argues that he does not wish to determine the lease and seeks a declaration of his landlord's right. But the right to recover rent is itself capable of possession. The procedure of giving possession of such a right is indicated in Order XXI, rule 96, Civil Procedure Code. It was pointed out in *Rathnasabapathi Pillai* v. *Ramaswami Aiyar* (2) that a declaratory suit will not lie when the plaintiff is entitled to further relief by way of symbolical possession.

Mr. Rupchand complains that the suit should not have been dismissed merely because of this defect. But the lower Court gave him an opportunity to amend the plaint and to pray for further relief, but he did not avail himself of that opportunity. It makes no difference that some other defendants admitted plaintiff's title because the admission of the title did not correct the error in the form of the suit.

We confirm the decree of the lower Court and dismiss this appeal with costs.

*Appeal dismissed.*

(2) 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N 112; 7 M. L. T. 311; 20 M. L. J. 301.

GHASITU *v.* SODHAN SINGH.

## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1477 OF 1914.

January 19, 1916.

*Present*:—Mr. Justice Walsh.

GHASITU AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

SODHAN SINGH—PLAINTIFF—RESPONDENT.

*Injunction—Co-sharers—Wrongful user by one co-sharer of joint property—Necessity of proving substantial injury.*

In a suit for injunction against a co-sharer for wrongful use of a joint land, it is not necessary to prove that the plaintiff is suffering or is likely to suffer substantial injury by such user. [p. 691, col. 1.]

*Najju Khan* v. *Imtiaz-ud-din*, 18 A. 115; A. W. N. (1895) 243, followed.

*Paras Ram* v. *Sherjit*, 9 A. 661; A. W. N. (1887) 253, not followed.

Second appeal from the decision of the Additional Judge of Saharanpur, dated the 30th May 1914.

The Hon'ble Mr. *Abdul Raoof*, for the Appellants.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—This case has raised a very interesting discussion. The point argued before me affects only one portion of the property in dispute. But inasmuch as I find myself unable to interfere with the decision of the Court below, it is not necessary for me to go in detail into all the questions in the case. Mr. Abdul Raoof, on behalf of the appellants, in a very clear and interesting argument, raised one distinct point namely, whether it is necessary for one of several co-sharers who objects to the use by the other co-sharers of the joint property, and seeks to restrain them by injunction from making a wrongful use of such joint property, to show not only that he objects, but also that he is suffering or is likely to suffer substantial injury by the user of which he complains. There is no dispute about the general principle, which has been affirmed over and over again, that one joint owner has no right to deal with the joint property otherwise than with the consent of the other joint owners. There is also no dispute that if the injury is substantial, a joint owner is entitled to the ordinary remedy by way of injunction to have the property restored to its former condition. There is further no dispute that he does not lose this right so long as he comes to the Court, or takes steps to prevent the wrongful user, in good time.

The question is, whether even if he comes in good time and shows his want of consent, he may not lose his remedy unless he proves some substantial injury. Put into other language the argument comes to this, that inasmuch as there is a machinery by which joint property may be partitioned, the plaintiff is to be deprived of his remedy for the wrong and thus forced to seek partition which he does not wish to do. I confess that I do not like the proposition. It seems to me dangerous and to open a very wide field for discussion as to what is or is not a substantial injury to a joint owner's holding. I doubt very much whether in a great many cases a Court is in a position to decide that question. An owner of property in most cases is the best judge of what is good or not for his own property, and he has an absolute right to deal with his own legal rights as and when he pleases. But Mr. Abdul Raoof has satisfied me that there are instances certainly in Calcutta in cases decided by two Judges in which it has been clearly held that a joint owner, in order to justify a claim, must show substantial injury to himself, and he has pressed upon me the decision of Mr. Justice Mahmood in this Court in *Paras Ram* v. *Sherjit* (1). Had it not been for the Calcutta decisions which he was clearly following, I should have come to the conclusion that Mr. Justice Mahmood did not intend to lay down quite so narrow a principle as that which is contained in the head-note, because at the end of his judgment he directs an issue of fact as to whether the plaintiff has stood by or had been quick in asserting his right. That issue, of course, was quite immaterial to the ruling to which he came in his judgment. I think, however, that so far as I am concerned, this question is placed beyond controversy by a decision by which I am bound, namely, the decision of the Chief Justice and Mr. Justice Burkitt in *Najju Khan* v. *Imtiaz-ud-din* (2). That case was referred to two Judges by my brother Banerji on the very ground that the decision of Mr. Justice Mahmood has been questioned. For some reason or another no reference

(1) 9 A. 661; A. W. N. (1887) 253.
(2) 18 A. 115; A. W. N. (1895) 243.

is made in the judgment of the Court, or in the head-note, to Mr. Justice Mahmood's decision. In my opinion the decision of Mr. Justice Mahmood must be taken to have been definitely overruled by the decision in *Najju Khan* v. *Imtiaz-ud-din* (2). It would appear to follow from this that the law upon this not unimportant point is one thing in Bengal and another thing in these provinces.

It is, however, sufficient for me that I am compelled by authority binding on me to dismiss this appeal with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 375 OF 1912.

September 24, 1915.

*Present*:—Mr. Justice Srinivasa Aiyangar.

T. NARAYANASWAMI NAIDU GARU—PLAINTIFF—PETITIONER

*versus*

KROVIDI GANTAYYA AND ANOTHER—DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

*Execution—Application returned for amendment but not re-presented—Step-in-aid of execution.*

An execution application which is presented but returned for amendment and is not re-presented within the time limited, is sufficient to save limitation so far as a subsequent application is concerned.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Bezwada, in Execution Petition No. 78 of 1911 in Small Cause Suit No. 516 of 1903.

Mr. *P. M. Srinivasa Aiyangar* for Mr. *P. Nagabushanam*, for the Petitioner.

JUDGMENT.—The decisions of this Court in *Ramanadan Chetti* v. *Periatambi Shervai* (1) and *Gurrala Seshayya* v. *Yedida Venkatasubbiah* (2) are clear authorities for the position that an execution application which is presented but returned for amendment and not re-presented within the time limited, is sufficient to save limitation so far as a subsequent execution application is concerned. The District Munsif is, therefore, wrong in dismissing this execution application on the ground that it was barred by limitation. I reverse his order and remand the petition to be disposed of according to law. The costs will abide the result.

*Order reversed.*

(1) 6 M. 250.

(2) 29 Ind. Cas. 16; 28 M. L. J. 494; 2 L. W. 540



MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 90 OF 1915.

September 16, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

KAKI VENKATARAJU—DEFENDANT—APPELLANT

*versus*

THE OFFICIAL RECEIVER, GODAVERI AT RAJAHMUNDRY—PLAINTIFF—RESPONDENT.

*Receiver—Mortgagee in possession—Mortgagor becoming insolvent—Receiver, when appointed.*

Ordinarily the position of a mortgagee in possession should not be disturbed by the appointment of a Receiver, and further good grounds must be shown to justify a Court in interfering with such possession.

Where one of the mortgagors was managing the mill mortgaged by them on behalf of the mortgagee in accordance with the terms of an agreement and the mortgagors became insolvents:

*Held*, that inasmuch as the mortgagee was not in possession a Receiver might be appointed at the instance of the Official Receiver.

Appeal against the order of the District Court of Godaveri at Rajahmundry, in I. A. No. 194 of 1915, in Original Suit No. 15 of 1915.

Mr. *T. Prakasam*, for the Appellant.

Messrs. *J. L. Rosario and P. Somasundaram*, for the Respondent.

JUDGMENT.—In this case, the District Judge has appointed a Receiver for a mill mortgaged to defendant by two insolvents who are now represented by the Official Receiver, plaintiff. In the plaint the Official Receiver alleges that the mortgage was only for 5 years, and that he tendered what he considered due to the mortgagee according to the terms of the mortgage, but the tender was not accepted. It would appear that the terms of the mortgage are onerous and now the Official Receiver has obtained an order for a Receiver on the ground that it is for the benefit of the insolvent's estate. For appellant (defendant) it is urged that the possession of a mortgagee in possession should not be disturbed by the appointment of a Receiver. This is, no doubt, ordinarily true and very good grounds must be shown to justify the Court in interfering with such possession; but in this case we think that such grounds do exist; accepting as we do the statements in the plaint an application for a Receiver is correct, for they are unrebutted. One of the insolvents has been managing the mill all

along on behalf of the mortgagee in accordance with the terms of the agreement, and it appears that the Receiver is now in possession of the mill. The mortgagee has not, therefore, had physical possession, and defendant's right to possession will not be affected by the appointment of a Receiver who merely represents the party entitled to possession, nor does it appear that defendant will suffer any loss by the appointment of a Receiver.

In these circumstances we will not interfere with the discretion of the District Judge.

The appeal is dismissed with costs.

*Appeal dismissed.*

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LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION NO. 141 OF 1915.

December 17, 1915.

*Present*:—Mr. Justice Robinson.

THE PAZUNDAUNG BAZAR CO., LTD.,—PLAINTIFFS—APPLICANTS

*versus*

T. GWAN CHWAN—DEFENDANT—RESPONDENT.

*Transfer of Property Act (IV of 1882), ss. 103, 107—Lease for 3 years unregistered—Specific performance, suit for, maintainability of—Presumption.*

If a lease required to be registered under section 107 of the Transfer of Property Act is not so registered within proper time a suit for specific performance by registration is maintainable against the defaulting party. [p. 692, col. 2]

The presumption under section 106 of the Transfer of Property Act does not arise if there is a contract to the contrary. [p. 693, col. 1.]

*Bibi Jawahir Kumari* v. *Chatterpal Singh*, 2 C. L. J. 343; *Ittappan* v. *Parangodan Nayar*, 21 M. 291; 8 M. L. J. 137, referred to

Mr. *Cowasji*, for the Applicant.

Mr. *Higinbotham*, for the Respondent.

JUDGMENT.—Plaintiffs admittedly leased a certain building to defendant for one year from 16th October 1911 with an option to renew for a further term of one year. It is also admitted that later on the parties entered into a contract to lease these premises for a term of three years from the 15th August 1912, and that on the 15th August 1913 a lease in accordance with this agreement was drawn up and executed by both parties. The rent throughout was fixed at Rs. 125 per mensem.

The document was after execution returned by defendant to plaintiffs but they did not register it. Defendant paid the rent.

On 1st December 1914, plaintiffs wrote to defendant alleging that he had broken the terms of the document of lease and had thereby put an end to the lease. They requested him to quit within a week's time. In his written statement defendant alleges that they realized that they had no grounds for their allegation, waived their notice, and requested him to pay the rent due up to the end of January 1915, which he did. These allegations were admitted. On the 11th February 1915 plaintiffs served defendant with a notice to quit by the end of that month. They said they had discovered that the document of lease was not registered and must be regarded as of no effect. Defendant did not vacate the premises and plaintiffs now sue for rent for the month of February and for the damages for use and occupation at Rs. 200 a month up to 8th June 1915.

It is urged that section 107 of the Transfer of Property Act renders a registered document compulsory to create a lease for a term of three years, and that there being no registered lease, the presumption created by section 106 of that Act arises and that defendant must, therefore, be deemed to be a monthly tenant. If that is so, the notice to quit is adequate.

It is, I consider, proved and it is admitted that the parties came to an agreement that a lease for three years certain should be given and accepted at a monthly rental of Rs. 125. This was carried out in so far that defendant was left in possession, and plaintiffs received and accepted the agreed rent. Plaintiffs should have registered the document but did not, and they now seek to take advantage of their wrongful neglect to do so. It is true that defendant could have called upon them to do so and he can now bring a suit for specific performance. It is said that the grant of this relief is purely discretionary and that defendant has so delayed that it would never be granted, but I am not prepared to agree with this suggestion.

As to section 106 no presumption arises if there is a contract to the contrary and there is one here: *Bibi Jawahir Kumari* v. *Chatterpal Singh* (1).

(1) 2 C. L. J. 343.

MUSTAFA BEGAM *v.* SIRAJ-UL-NISSA.

The same authority disposes of the argument that the provisions of section 107 of the Act would be rendered nugatory if this view be not taken.

The position then is that defendant continued in possession in the expectation that the lease executed by the parties would be duly registered, and that he had, and still has, a right to compel plaintiffs to execute and register a lease as required by section 107. As between plaintiffs and defendant their position is that of landlord and tenant under the terms and conditions of the original agreement, and as if the lease had been duly registered. To hold otherwise would be to permit plaintiffs to take advantage of their own fraud or wrongful neglect to force defendant to pay a higher rent.

This is the view taken in the case cited above. Reference may also be made to *Ittappan* v. *Tarangodan Nayar* (2).

The petition is dismissed with costs. Advocate's fees five gold *mohurs*.

*Petition dismissed.*

(2) 21 M. 291; 8 M. L. J. 137.

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## ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL NO. 229 OF 1915.

January 17, 1916.

*Present*:—Justice Sir P. C. Banerji, KT.

MUSTAFA BEGAM AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

*versus*

*Musammat* SIRAJ-UL-NISSA AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

*Compromise—Instalments—Decree—Default in payment of instalments—Decree-holder, remedy of—Execution of decree.*

A compromise arrived at in a suit for partition provided that the amount due under the compromise decree should be paid by instalments but made no mention as to what would happen on default being made:

*Held*, that on default being made the decree-holder's remedy was not to bring a separate suit but to recover the amount decreed by executing the decree for each instalment falling due.

Execution first appeal from the decision of the Subordinate Judge, Mainpuri, dated the 10th July 1915.

Mr. *Benode Behari*, for the Appellants.

The Hon'ble Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—This appeal is wholly without merit. In a suit brought for partition the parties entered into a compromise and a decree was made in accordance with the compromise. One of the terms of the compromise, which according to the decretal order formed part of the decree, was that Rs. 1,500 should be paid in four years in instalments of Rs. 200 every half year, namely, at the time of the *rabi* harvest and at the time of the *kharif* harvest. Instalments not having been paid the present application for execution was made. The judgment-debtors contend that the remedy of the decree-holders was to bring a separate suit and not to execute the decree. As I have already said, the decree embodies the terms of the compromise and the compromise provides that the judgment-debtors should pay Rs. 1,500 by instalments as stated above. Therefore, under the terms of the decree the decree-holders are entitled to recover the amount decreed by executing the decree. It is next urged that as the decree and the compromise do not say what would happen in the event of any default being made in the payment of any instalment, therefore, the decree could only be executed when all the instalments became due. This is a wholly untenable contention. As there is no specific provision in the decree in respect of the result of non-payment of instalments, each instalment is recoverable by execution as soon as it falls due. The decree-holders have applied for realization of the amounts of the instalments which are overdue. The last contention is that the instalment of *rabi* 1322 had not fallen due on the date on which the application for execution was made. As, however, it had become due when the Court made its order for execution, this objection is without force. The decision of the Court below is, in my opinion, right. I dismiss the appeal with costs including fees on the higher scale.

*Appeal dismissed.*

MA THIN *v.* YASSIM.

## LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 16 OF 1915.

November 15, 1915.

*Present*:—Mr. Justice Parlett.

MA THIN—PLAINTIFF—APPELLANT

*versus*

H. M. YASSIM AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Registration Act* (*XVI of* 1908), *s.* 17 (1) (*b*)—*Sale and re-sale—Immoveable property—Agreement creating right of redemption, if requires registration.*

Where the effect of an agreement set up is, to create a right of redemption of immoveable property worth over Rs. 100, whether absolutely or for a time, the writing falls within the meaning of section 17 (1) (*b*) of the Registration Act and, therefore, requires registration.

*Mutha Venkatachelapathi* v. *Pyanda Venkatachelapati*, 27 M. 348; *Suraj Pershad* v. *Phul Singh*, A. W. N. (1906) 180, referred to.

Mr. *Villa*, for the Appellant.

Mr. *Ginwalla*, for the Respondents.

JUDGMENT.—On the 24th September 1912 appellant sold a house and site to one Babu for Rs. 1,500 by registered deed. On the same or the following day, Babu gave appellant a promise in writing to the effect that he agreed to sell to her the same house and ground, provided she at any time paid him Rs. 1,500. Babu died and on 27th July 1911 his widow Ma Cho sold the property to the respondents. Appellant then sued the respondents for specific performance of Babu's promise to sell the property to her, and obtained a decree that they should convey the property to her within one month on payment of Rs. 1,500. On appeal this decree was reversed and the suit was dismissed on the ground that Babu's agreement was inadmissible in evidence for want of registration. Plaintiff now appeals. It is argued that as a contract for the sale of immoveable property does not create any interest in such property, such contract, if in writing, is not compulsorily registrable under section 17. Looking, however, at the substance of the matter it appears to me that the effect of the agreement set up would be to create a right of redemption of the property for Rs. 1,500, in favour of the appellant, whether absolutely, as the agreement in its terms implies, or for a term of ten years, as appellant alleges was subsequently agreed between them orally. In either case I consider the writing falls within the meaning of section 17 (1) (*b*) of the Registration Act, and, therefore, required registration. The case appears to me to be similar to *Mutha Venkatachelapati* v. *Pyanda Venkatachelapati* (1) and *Suraj Pershad* v. *Phul Singh* (2). On other grounds, moreover, I am of opinion that the suit must fail. Appellant alleges that about two months before the sale to respondents she borrowed Rs. 1,200 and took it to Ma Cho and offered to buy the property. There is no evidence whatever of this fact except appellant's bare word, but even she admits that upon Ma Cho advising her not purchase with money borrowed at interest, she did not insist, but let the matter rest. Nothing more was done until respondents had bought the property. In my opinion, therefore, it cannot be said that there has ever been an acceptance of Babu's proposal to sell the property to appellant for Rs. 1,500. "An engagement to keep an offer open for a given time does not * * * bind the person making the offer, but it operates as an intimation to the party addressed that no acceptance will be received after the lapse of the time named." Cunningham & Shephard's Contract Act, 8th Edition, page 25. "An offer, for instance, to sell goods at a price named with a promise to keep it open to a certain day is *nudum pactum*, and can at any time before acceptance be recalled. Such promise does not prevent the person, who has made the offer, selling the goods meanwhile to a third person, unless by a distinct contract, founded on a distinct consideration, he has engaged not to do so. Thus where defendant offered to plaintiff certain wool for sale with three days' grace to make up his mind, and within three days plaintiff on going to accept the offer was told that the wool was sold to another, it was held there was no contract, because when the plaintiff signified his acceptance, the defendant did not agree". Cunningham & Shephard's Contract Act, 8th Edition, pages 22 and 23.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 27 M. 348.
(2) A. W. N. (1906) 180.

PEARY MANDER *v.* ANAND RAM.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1763 OF 1914.

December 16, 1915.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Chapman.

PEARY MANDER—DEFENDANT 1ST PARTY—APPELLANT

*versus*

*Babu* ANAND RAM—PLAINTIFF—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), s. 153—Conflicting claims to landlord's right, decision of—Second appeal, maintainability of.*

In a suit for rent, the plaintiff who had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree, added as parties defendants, the successors of the previous landlord, who contested the suit on the ground that the plaintiff had not obtained possession of the landlord's right:

*Held*, that a second appeal lay to the High Court inasmuch as the plaintiff's title was assailed by the successors of the previous landlord and there were conflicting claims to landlord's right which were decided by the Court below. [p. 695, col. 2.]

Appeal against the decree of the Subordinate Judge, first Court, Bhagalpore, dated the 3rd December 1913, reversing that of the Munsif, 1st Court at that place, dated the 30th November 1913.

Babu *Guru Das Sinha*, for the Appellant.

Babu *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for rent. The plaintiff had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree. He made the successors of the previous holder of the landlord's right, parties to the suit. The main question which was determined by the lower Courts was the question whether the plaintiff had obtained possession of the landlord's right or not. The suit was contested upon this ground both by the tenant and by the successors of the previous holder of the landlord's right. The first Court held that the plaintiff had failed to prove that he obtained possession. The Court of first appeal set aside this decision, held that the plaintiff had obtained possession and decreed the suit. The successors of the previous owner of the landlord's right and the tenant both appeal to this Court.

An objection has been made by the respondent that no appeal lies.

The plaintiff's title was, however, assailed by the successors of the previous owner and there were conflicting claims which were decided by the Court below. An appeal, therefore, lies.

The first ground taken in appeal is that it is not open to the Civil Court to go into the question of the plaintiff's title inasmuch as that has been determined under section 40 of the Bengal Tenancy Act.

It appears that the tenant had applied under that section for the commutation of his rent. A copy of the decision has been filed in this case and from that decision it appears that both the plaintiff and the defendants 2nd party, the successors of the previous owner, were parties to that decision. But it does not appear that any question between the plaintiff and the previous owner was decided. The case of *Lala Saligram Singh* v. *Mohunt Ramgir* (1) has been relied on. But in that case the decision under section 40 was directly attacked and it was held that it is not open to the Civil Court to enter into a question which involves the validity of a decision under section 40 of the Bengal Tenancy Act.

In the present case there was no decision of the question in the case under section 40, nor is the validity of the proceeding under section 40 involved in the present case. We are of opinion that the judgment in the case under section 40 does not operate as a bar in the present suit.

It was then contended that the plaintiff is not entitled to succeed inasmuch as his name had not been recorded in the land register. There is nothing, however, to show that the name was not so recorded and no objection on behalf of the tenant was made that the plaintiff was not recorded in the land register.

Then it is contended that the Court of appeal below was not justified in coming to the finding that it did in the absence of evidence, but we find that there was evidence to support the finding, namely to the effect that possession had been delivered to the plaintiff by the Court after his purchase at the execution sale, and that in the case under section 40, the tenant had made the plaintiff a party.

(1) 3 C. W. N. 311.

It is further contended that inasmuch as the tenant had sold his *jote* to one Tapashia Tewari, a third party, he had thereby got rid of the liability to pay rent. The defendant, however, did not allege that there was any custom entitling him to transfer his tenancy nor was there any evidence that he had put an end to his liability to pay rent to the landlord.

It has finally been somewhat faintly contended that in a rent suit, the Court should not have gone into the question of title. But in order to determine the claim for rent, it was necessary to go into the question in this case. Moreover, after all it was a question of possession and not title.

The appeal is dismissed with costs.

*Appeal dismissed.*

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LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL NO. 363 OF 1914.

November 16, 1915.

*Present*:- Sir Charles Fox, KT., Chief Judge.

SHWE BON—PLAINTIFF—APPELLANT

*versus*

MI U THA NYO, BY HER AGENT SAN DO AUNG—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XX, r. 12—Mesne profits, claim for, subsequent to suit for possession, if barred.*

Though one may possibly be bound to include in a suit for possession of immoveable property mesne profits up to the date of suit, there is nothing which obliges one to include a claim for mesne profits which might accrue after the date of suit. [p. 696, col. 2]

*Ma Nyein* v. *Ma Kon*, 3 L. B. R. 56, referred to.

*Dubash Kader* v. *Fakir Meera*, 8 Ind. Cas. 445; 3 B. L. T. 56, referred to.

Mr. *S. M. Bose*, for the Appellant.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT.—On the 13th February 1911, which corresponds with the 15th Waxing Tabodwe 1272, Burmese Era, the plaintiff instituted a suit, against the defendant who is her brother-in-law for possession, as heir of her deceased husband, of a half share of certain lands and moveable properties inherited by the two brothers from their father. She obtained a decree for half of certain properties on the 31st July 1912.

On the 4th June 1914, the plaintiff instituted another suit against the defendant for mesne profits of the portions of the lands allotted to her for the years 1272 and 1273.

Objection was and is taken that her claim for mesne profits for these years is barred under Order II, rule 2, of the Civil Procedure Code, because it was not included in the plaintiff's first suit. That suit was virtually a suit for a share of inherited property and portion. Even if it could be regarded as merely a suit for recovery of immoveable property from a person who wrongfully was in possession of it, the plaintiff's present suit would not be barred by the rule above quoted, because her claim is in respect of years subsequent to that in which the plaintiff's first suit was brought.

She might possibly have included a claim for mesne profits in her first suit, and under rule 12 of Order XX the Court might in its decree have made provision for mesne profits accruing after the institution of the suit, but although she may have been bound according to the ruling in *Ma Nyein* v. *Ma Kon* (1) to include in her first suit a claim to mesne profits up to the date on which that suit was instituted, there is no rule which obliged her to include a claim for any mesne profits which might accrue after that date. According to *Dubash Kader* v. *Fakeer Meera* (2) she was not bound in any case to include a claim for mesne profits in her first suit. The learned Judge who decided that case considered that the present Code had altered the law as declared in *Ma Nyein* v. *Ma Kon* (1). Without expressing any definite opinion on the question I think his view is open to doubt. The Bench ruling, however, does not apply to the present case, the claim in it being for mesne profits which accrued after the institution of the first suit.

Another objection taken to the plaintiff's claim is that her agent accepted a sum

(1) 3 L. B. R. 56.

(2) 8 Ind. Cas. 445; 3 Bur. L. T. 56.

of money from the defendant in full satisfaction of all her claims in respect of the rents and profits of the properties received by the defendant. This question depends upon verbal evidence which is not altogether clear: moreover, there is nothing to show that the plaintiff's agent was authorized to accept less than what was actually due.

I agree with the District Judge in thinking that the plaintiff's claim was not barred on this ground.

The appeal is dismissed with costs.

*Appeal dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 593 OF 1914.

January 31, 1916.

*Present:*—Mr. Justice Holmwood and Mr. Justice Imam.

JAMIR FAKIR—JUDGMENT-DEBTOR—APPELLANT

*versus*

RAM LAL GHOSE CHOWDHURY—DECREE-HOLDER—RESPONDENT.

*Contract Act (IX of 1872), s. 74—Compromise decree—Stipulation to pay whole amount on default of payment of any instalment—Interest, excessive, provision for—Penalty.*

An executing Court can go behind the terms of a compromise decree. [p. 697, col. 2.]

A compromise decree provided that the defendant do pay a less amount than originally claimed according to certain instalments stated therein and that in default of payment of any instalment the whole amount do become payable at once together with interest at the rate of 36 per cent. per annum:

*Held*, that the liability to pay the whole amount in default of payment of any instalment was not a penalty but that the provision for the payment of interest at the rate of 36 per cent. per annum upon the whole amount was in the nature of penalty within the purview of section 74 of the Contract Act. [p. 697, col. 2.]

Appeal against the order of the Subordinate Judge, Khulna, dated the 20th November 1914, reversing that of the Munsif, Bagerhat, dated the 30th March 1914.

Babu *Tarak Chandra Chakrabarty*, for the Appellant.

JUDGMENT.—The question which arises in this appeal is whether the compromise decree contained a contract involving a penalty within the meaning of section 74 of the Contract Act. The learned Judge in the Court below held that he was unable to go behind the terms of the decree in which he appears to be in error. He also held that there was nothing unlawful or in the nature of penalty in the stipulations of the contract which was embodied in the decree.

The terms of the decree, as stated in the judgment, which are admitted to be contract by the appellant, are as follows:—"It is ordered that out of the amount claimed and costs, a decree be passed for Rs. 400 after deducting Rs. 50, remitted by the plaintiff, and that the defendant do pay the said sum according to the instalments stated below. In default of payment of any instalment, the whole amount shall become payable at once together with the sum remitted." So far, in our opinion, there is no penalty whatever. The case is precisely an ordinary one of discount for prompt payment, the debt due being Rs. 90S and Rs. 50S being remitted with a stipulation that Rs. 400 should be paid in eight instalments of Rs. 50 each without any interest, thus relieving the debtor of the exorbitant interest of 36 per cent. per annum, which was stipulated for in the original loan. But we find that in addition to this stipulation, which is one merely restoring the original principal if the conditions of remittance are not fulfilled, there is a further provision that interest shall be paid on the whole amount at the rate of half anna per rupee per mensem, that is, 36 per cent. per annum. Now this strictly speaking does come within the purview of section 74 of the Indian Contract Act, and we may say that having regard to the unconscionable nature of the original bargain we do not think it necessary to assess any compensation in lieu of this interest which will be entirely expunged from the decree. But notwithstanding the view we take of the unconscionable nature of the original bargain we must hold that it is not within our competence to treat the restoration of the admitted debt to its original amount upon default under very easy terms of payment, which were given to the judgment-debtor in consideration of

this large discount, as a penalty. To do so would be to work injustice in many other cases.

The appeal having been partially successful the appellant is entitled to his costs from the other side, who has not appeared, in proportion to the amount which will have to be deducted from the decree. We assess the hearing fee at three gold *mohurs*.

*Appeal partly allowed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 275 AND 276 OF 1914.

December 14, 1915.

*Present*:—Mr. Justice Phillips.

P. R. AIYANA CHARIAR AND OTHERS—PETITIONERS IN BOTH

*versus*

IN C. R. P. NO. 275 OF 1914

VATHIAR RAMANUJA AYYANGAR AND OTHERS—RESPONDENTS

IN C. R. P. NO. 276 OF 1914

PULIYUR NARAYANA AYYANGAR AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 32—Decree granting permanent injunction—Power of Court to enforce obedience by punishment--Detention in prison after removal of obstruction, whether lawful.*

Order XXI, rule 32, of the Code of Civil Procedure empowers a Court to secure the future enforcement of a decree granting a permanent injunction, by the punishment of the person disobeying the decree, either by imprisonment or attachment of his property. [p. 699, col. 1.]

*Kochappa* v. *Sachi Devi*, 26 M. 494, distinguished.

*Venkatachallam Chetty* v. *Veerappa Pillai*, 29 M. 314; *Durga Das Nandi* v. *Dewraj Agarwala*, 33 C. 306, 10 C. W. N. 297; 3 C. L. J. 112, followed.

Where in spite of an injunction being passed against the members of a particular sect prohibiting them from interfering with the processions of a rival sect, the progress of such a procession was, on account of interference by the first sect, delayed for three hours, after which it was allowed to proceed:

*Held*, that the subsequent withdrawal of obstruction did not repair the breach of the injunction, although it might amount to a purging of the contempt of Court, and that the people causing the obstruction were liable to punishment. [p. 699, col. 1.]

Petitions, under sections 115 and 151 of Act V of 1908 and section 15 of the Letters Patent, praying the High Court to revise the order of the District Court of Trichinopoly, in Appeal Suits Nos. 273 and 120 of 1913, (Execution Petition No. 625 of 1912 in Original Suit No. 366 of 1909, on the file of the Court of the District Munsif of Srirangam.)

Mr. *C. Padmanabha Aiyangar*, for the Petitioners.

Messrs. *R. Shadagopachariar* and *T. Rajagopala Aiyangar*, for the Respondents.

JUDGMENT.—In this case a decree had been obtained by petitioners whereby respondents were restrained from interfering in certain processions of the Vadagalai community, and it has been found by the District Munsif that on 15th October 1912 respondents did interfere with such a procession and delayed it for three hours, after which it was allowed to proceed. Petitioners applied under Order XXI, rule 32, Civil Procedure Code, for an order to enforce the decree by the imprisonment of respondents. The District Munsif ordered respondents to execute a security bond for obedience of the injunction order, an order for which there is no provision in Order XXI, rule 32. In appeal the District Judge, accepting the facts as found, set aside the District Munsif's order as illegal and dismissed the petition on the ground that the decree had been enforced when the procession was allowed to proceed and that the application to enforce it had been subsequently put in, *i.e.*, after its enforcement and that the only Court which can punish a contempt of Court is the High Court. It is now contended for the petitioners that Order XXI, rule 32, empowers a Court to secure the future enforcement of a decree granting a permanent injunction by the punishment of the person disobeying the decree either by imprisonment or by attachment of his property. The reported cases of this Court do not appear to have decided this question. *Kochappa* v. *Sachi Devi* (1) only decides that in cases of breach of a temporary injunction a Court other than the High Court can only take action on the motion of a party and not *suo motu*. In *Venkatachallam Chetty* v. *Veerappa Pillai* (2), however, where persons had entered a certain jungle in defiance of a decree forbidding such entry, this Court, after deciding the question of limitation which

(1) 26 M. 494.
(2) 29 M. 314.

was the only question raised in second appeal, remitted the petition for disposal under section 260 of the old Code (corresponding to Order XXI, rule 32), thus implying that the Court had power to take action under that section. Similarly in *Durgà Das Nandi* v. *Dewraj Agarwala* (3) it is clear from the judgment of Mookerjee, J., (pages 312-314) that he was of opinion that a breach of an injunction could be dealt with under Order XXI, rule 32.

For the respondents it is urged, that a decree such as the present one cannot be enforced by imprisonment or attachment, and that imprisonment or attachment can only be ordered in cases, where such imprisonment or attachment can be continued until the decree has been executed, and not in cases where the injunction restrains persons from doing certain acts in perpetuity. In this case the decree must necessarily be in force so long as there are representatives of the Tengalai community surviving in Srirangam. However, the decree has been disobeyed and petitioners have lost and can never recover the full decretal rights which they sought to enforce during a period of three hours on 15th October 1912. The subsequent withdrawal of obstruction does not repair the breach of the injunction, for it can never be repaired so far as those three hours are concerned but may be a purging of the contempt of Court. The sole question for determination, therefore, is whether a decree can be enforced by punishment and I think it can, for otherwise the principle that where a right to make an order is conferred, there is also conferred a right to enforce that order, would be violated. A punishment is awarded not only as a penalty for a particular offence, but also in order to deter the commission of similar offences in future. Detention in prison of a person guilty of a breach of an injunction not only enforces the decree so long as the offender is detained in prison, but also contributes to its enforcement in future by putting the offenders and others in fear that in case of a future breach, they will be again punished. In this manner, detention in prison or attachment of goods can be said to enforce a decree even when a breach of the decretal injunction may occur, after such detention or attachment has ceased. Order XXI, rule 32, can, therefore, be applied in a case like the present and I must hold that the District Judge's order was not in accordance with law. Taking the view of the law that he did, the District Judge did not consider the merits of the case, but on a perusal of the record it does not appear to me that there was such a grave breach of the injunction as to merit punishment at this stage of the proceedings. Respondents purged their contempt by the withdrawal of obstruction, and consequently I do not think it necessary to make any order under Order XXI, rule 32. The order dismissing the petitions is, therefore, confirmed, and the respondents will pay the costs of these revision petitions.

*Petition dismissed.*

(3) 33 C, 306; 10 C. W. N. 297; 3 C. L. J. 112.

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CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 115 OF 1914.

January 5, 1916.

*Present*:—Mr. Justice Chapman and Mr. Justice Mallick.

*Tikait* KRISHNA PROSAD SINGH—JUDGMENT-DEBTOR—APPELLANT

*versus*

*Babu* MATI CHAND—DECREE-HOLDER—RESPONDENT.

*Execution—Sale in execution set aside—Re-sale—Part of decree barred, if realizable—Limitation.*

The execution of a decree cannot be barred by limitation in part. [p. 700, col. 2.]

In execution of a decree for money, only a portion of the decretal amount was realised by the sale of the judgment-debtor's property. But on the sale having been subsequently set aside, the decree-holder applied for the re-sale of the property:

*Held*, that he could by the re-sale realise not only the sum which was the price obtained at the sale which was set aside, but also the balance of his decree, though an application to execute it for the balance would have been barred by limitation. [p. 701, col. 1.]

*Raghunandan Pershad* v. *Bhugoo Lal*, 17 C. 268, distinguished.

Appeal against the order of the Deputy Commissioner and Subordinate Judge of Hazaribagh, dated the 28th of February 1914.

Babus *Provash Chandra Mitter* and *Anilendra Nath Roy Chowdhary*, for the Appellant.

Babus *Dwarka Nath Chakraburtty*, *Bepin Bihary Ghosh*, *Karunamoy Bose* and *Panchanon Ghose*, for the Respondent.

KRISHNA PROSAD SINGH *v.* MATI CHAND.

JUDGMENT.—This appeal is against an order, overruling an objection on the ground of limitation, made by a judgment-debtor to the execution of a portion of a decree. The decree was obtained in the Court of the Subordinate Judge of Benares on the 27th November 1900 for Rs. 6,599-9-6. The decree was transmitted for execution to the Court of the Subordinate Judge of Hazaribagh. An application was made to the latter Court for the attachment and sale of a certain property, named Gadi Gandey, in execution of the decree. This application was made on the 19th of May 1903. The property was accordingly attached and brought to sale on the 2nd of January 1904. It was purchased by the decree-holder for Rs. 2,020. The judgment debtor then applied to have the sale set aside and, upon his application, the sale was set aside on the 16th February 1906. The decree-holder appealed to this Court. The order setting aside the sale was reversed and the sale confirmed on the 18th May 1908. The judgment-debtor thereupon appealed to the Privy Council and, on the 6th March 1913, their Lordships of the Privy Council reversed the judgment of this Court and set aside the sale. Upon the sale being set aside, the decree-holder had the right to apply to the Subordinate Judge of Hazaribagh for a re-sale of the property. He accordingly applied on the 1st December 1913 that the property, namely, the estate Gadi Gandey, which had been already attached and sold in the execution proceedings commenced by the decree-holder in May 1903, should be re-sold. To this application the judgment-debtor objected that the decree-holder was not entitled to realise more than the sum of Rs. 2,020, which was the price obtained at the sale which was set aside by the Privy Council. The contention was that having realised that sum by the sale in January 1904 there had been nothing to prevent the decree-holder from proceeding to realize the balance of his decree, and that the subsequent proceedings leading to the setting aside of the sale did not in any way prevent the decree-holder from realising the said balance, and that more than three years having expired his right to realise the balance was barred by limitation. We note that the judgment-debtor conceded that the property might be re-sold if, on taking an account upon the basis that only Rs. 2,020 was due to the decree-holder, and after giving credit to the judgment-debtor for any sum due to him, it was found that any balance was due to the decree-holder.

The judgment-debtor, therefore, admitted that the application of the decree-holder, that the property might be re-sold, was an application for the revival of the previous proceeding. We have, therefore, not to consider that point. What we have to consider is whether, having regard to the fact that it was open to the decree-holder to proceed to execute his decree for the balance of the money due to him after realising Rs. 2,020 by the sale of the 2nd January 1904, he is now, the period of limitation having expired, debarred from realising the whole of the decretal amount including the balance. The learned Subordinate Judge overruled the objection of the judgment-debtor holding that assuming, as was probable, that the decree-holder was satisfied with the property that he had purchased at the sale in execution, there was no reason in equity why the decree-holder should not now, that the sale had been set aside, realize the whole of the amount of his decree. The judgment-debtor appeals to this Court.

We can find no authority for saying that the execution of the decree can be barred by limitation in part. The learned Vakil for the appellant has relied upon the case of *Raghunandan Pershad* v. *Bhugoo Lal* (1) in support of his contention; but in that case, it was not held that the execution of a portion only of the decree was barred. What was held was this that, upon the facts of that case, the application for execution, under consideration was a fresh application and not a continuation of the previous application for execution, and was entirely barred for that reason. In the present case, it was conceded by the form of the objection made by the judgment-debtor that the application was, in fact, a continuation of the previous application. In the case referred to an entire property had been attached and subsequently, as the result of a separate suit, 2/3rd of the property was released from attachment. The decree-holder thereupon applied for the attachment

(1) 17 C. 268.

of the remaining $\frac{1}{3}$rd and it was held that the application for the attachment of the remaining $\frac{1}{3}$rd was not a continuation of the previous application for the attachment of the entire property. In the present case there can be no doubt that the application that the property might be re-sold was not a fresh application. It was an application in continuation or for the revival of the previous application for the sale of the identical property. We are satisfied that the objection of the judgment-debtor has been properly overruled. The appeal is accordingly dismissed with costs. We assess the hearing fee at three gold *mohurs*.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 48 OF 1914.

June 4, 1915.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

MUHAMMAD BUKTH MAJUMDAR—DEFENDANT NO. 1—APPELLANT

*versus*

*Dewan* AJMON RAJA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Mussalman Wakf Validating Act (VI of 1913), s. 3, operation of—Retrospective effect—Previous decision in another capacity, if conclusive in subsequent suit*—Res judicata.

The operation of the Mussalman Wakf Validating Act of 1913 is not retrospective. [p. 702, col. 2.]

A previous adjudication of a High Court as to the invalidity of a *wakf* between the same parties but suing in an another capacity is conclusive, though not on the ground of *res judicata*, in a subsequent suit respecting the same property, and is not affected by the provisions of the Mussalman Wakf Validating Act subsequently passed. [p. 702, cols. 1 & 2.]

Letters Patent appeal from the following judgment of Mr. Justice Teunon, dated the 5th January, 1914.

"In the case out of which this appeal arises, the plaintiffs as heirs to one Johura Khatun claimed a certain share in certain lands originally the property of Johura Khatun's father.

The defence was that by a deed, dated 31st December 1869, the father of Johura Khatun, and father-in-law of Defendant No. 1, one Dewan Nasrat Raja Saheb, had made the properties *wakf*, and that by an *ekrarnama*, dated 17th *Jyaistha* 1307, Johura Khatun had acknowledged the validity of the *wakf* and of a *solenama* or compromise made between the defendant No. 1 and his mother-in-law in a certain suit on the 7th *Baisakh* 1306, and by so doing and by accepting from the defendant the allowance mentioned in the *wakfnama*, Johura Khatun and her heirs are estopped from questioning its validity.

The plaintiff put the defendant to proof of his statements and further asserted that in Suit No. 425 of 1901, the alleged *wakfnama* had been held by the Court to be invalid and that the question was, therefore, *res judicata*.

Plaintiff's suit having been decreed in both the Courts below, defendant No. 1 now appeals.

His contentions before me are—(1) that the validity of the *wakf* is not in fact *res judicata* as between the parties to the present suit, (2) that the *wakf* should have been held to be a valid *wakf*, and (3) that he should have been given a further opportunity of producing evidence, that is to say, of examining himself in support of the alleged *solenama* and *ekrarnama*.

It is admitted that in Suit No. 425 of 1901, the *wakf* was held to be invalid, but in that case plaintiff sued as a creditor or representative of the wife of the original owner, while he is now suing as an heir of the daughter. If the decision had been in favour of the validity of the *wakf*, a fresh suit would have been open to the daughter and her heirs and it cannot, therefore, be contended that in the present suit it was not open to the defendant to re-agitate the question.

But in fact no evidence of the mention of the alleged *wakfnama* has been given and the document itself has been removed from the record by the applicant, and is not produced at the hearing of this appeal. It is, therefore, impossible for me to say that it has been proved or is valid.

With regard to the 3rd and last contention, it may be observed that on the 20th September 1910, the suit was peremptorily

fixed for final hearing on 7th November or 9th November. The defendant-appellant applied for a further adjournment and for his examination on commission, and filed with the application a certificate from an Indian medical practitioner, dated 3rd October, to the effect that he had been treating the defendant for "chronic rheumatic affections." Now from the order-sheet it appears that on the 22nd August, a prior application by the defendant for his examination on commission had been opposed by the plaintiff, and was very properly rejected. Under the circumstances, I cannot hold that the second application not made before the 5th November, though supported by a certificate dated 31st October, was improperly rejected by the Courts below.

In the result this appeal fails and is dismissed with costs."

Babus *Sib Chandra Palit* and *Birendra Chandra Das*, for the Appellant.

JUDGMENT.

JENKINS, C. J. (*May* 3, 1915).—This is an appeal from a judgment of Mr. Justice Teunon, by whom it has been held that the lower Courts have erroneously regarded certain judgments and decrees as constituting *res judicata*. At the same time he felt that he must affirm the decree of the lower Appellate Court, on the ground that the *wakfnama* to which the decree related, was not before him and that he had no means to form an opinion as to whether or not it was a void and invalid *wakf* as the Court had decided in a previous litigation.

We are in the same predicament. But there is another aspect of the case by which we are influenced and it is this. From the judgment of the Munsif, it appears that the validity or invalidity of the *wakf* was a matter that came before the High Court and was a subject of adjudication in the High Court. We have been told in the course of the argument that the invalidity of the *wakf* was affirmed on legal grounds. The result then is that there is an adjudication by the High Court on the invalidity of the *wakf* which is based on legal grounds, and ordinarily we should feel bound, not on the principle of *res judicata* but out of the deference which is due to a previous decision of the High Court, to follow that authority. Before finally deciding the case on that ground, we give the appellant before us an opportunity of producing the judgment of the High Court before us within a month from this date. If he fails to do so, this appeal will stand dismissed, but without any order as to costs.

FINAL JUDGMENT.

JENKINS, C. J.—We must affirm the judgment of Mr. Justice Teunon, though possibly not precisely on the ground which commended itself to him.

We are of opinion that the former adjudication as to the invalidity of the *wakf* is, in the peculiar circumstances of this case, conclusive for the purpose of the present litigation.

We have, however, been invited to take a different view of the matter out of deference to the Mussalman Wakf Validating Act of 1913. It has been contended that the remedial operation of that Act relates to the past as well as to the present and future and that it was intended to be a declaration that the Privy Council pronouncement as to the law of *wakf* was erroneous. I do not wish to express any opinion as to the limits of the Indian Legislature's powers. But I am doubtful whether the Governor-General in Council would make a legislative pronouncement that the repeated decisions of the Privy Council were erroneous, though from its knowledge of the requirements of the country the Legislature may think that in future the law should be otherwise administered. That I think is what has happened in this case. The preamble may perhaps give some colour to the argument that the operation of the Act is retrospective as well as prospective. On the other hand the title of the Act seems, if anything, to have an opposite tendency. But both are of ambiguous value. At the same time the terms of section 3 clearly point to futurity. And this, I think, is most likely to have been in accordance with the intention of the Legislature on general consideration as also on the particular considerations to which I have alluded. This is my view of the Act and I hold on the special circumstances of this case that the previous conclusive decision on which the respondent is entitled to rely has not been affected by the provisions of the Act. I have the satisfaction of knowing that this

is in accordance with the view of Mr. Justice Chaudhuri [*Rahimunissa Bibi* v. *Shaikh Manik Jan* (1)], which gives me greater confidence in the probability of this being the true view of the intention of the Legislature.

The result is that the appeal is dismissed. As there is no appearance on the part of the respondent, we dismiss the appeal without costs.

N. R. CHATTERJEA, J. —I agree.

*Appeal dismissed.*

(1) 27 Ind. Cas. 96; 19 C. W. N. 76.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 196 OF 1915.

December 15, 1915.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

THE MAHARAJA OF BOBBILI—PLAINTIFF—APPELLANT

*versus*

RANKU APPALA NAIDU—DEFENDANT—RESPONDENT.

*Evidence Act (I of 1872), s. 92—Contract to pay rent at fixed rate—Oral evidence, whether admissible to prove variation of contract—Payment for long time of smaller sum, whether entitles tenant to pay that rate always—Agreement to accept lower rate for particular period, effect of.*

Where the rent payable by a tenant is fixed by a *muchilika* properly executed, it is not open to the tenant to let in oral evidence to prove that the contract has been varied.

Payment for a long time of a smaller rent than that agreed upon does not give the tenant a right for all time to come, to compel the landlord to receive only that rent.

A communication from the landlord to the tenant to the effect that the reduction hitherto made in the rent will not be granted after the date of that letter is a mere agreement to discharge the tenant from liability to pay the contract rate for a particular period and to accept in lieu thereof a smaller sum. No consideration is necessary for this remission; and it does not offend against section 92 of the Evidence Act.

*Kattika Bapanamma* v. *Kattika Kristnamma*, 30 M. 231; 17 M. L. J. 30, followed.

Second appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 49 of 1914, preferred against that of the Honorary Deputy Collector of Vizagapatam, in Original Suit No. 246 of 1913.



The Hon'ble Mr. *B. N. Sarma*, for the Appellant.

Mr. *V. Ramesam*, for the Respondent.

JUDGMENT.—The claim is for rent for three *Faslis* ending with the 30th June 1912. The *muchilika*, Exhibit A, fixes the rent payable by the defendant, and it is not open to him to let in oral evidence to prove that the contract has been varied. The lower Courts are, therefore, wrong in holding that by the long payment of a smaller rent, the defendant has acquired a right for all time to come, to compel the plaintiff to receive only that rent.

Mr. Ramesam has, however, drawn our attention to Exhibit VI, which is a communication to his client from the *zamin* official in which it is stated that the reduction hitherto made in the rent will not be granted after the date of that letter, namely, April 1913. We regard this letter as agreeing to discharge the defendant from liability to pay the contract rate for a particular period and to accept in lieu thereof a smaller sum. No consideration is necessary for this remission and as pointed out in *Kattika Bapanamma* v. *Kattika Kristnamma* (1), this plea will not offend against section 92 of the Indian Evidence Act. The result is that the plaintiff is entitled to rent at the rate at which he has been receiving it till the end of *Fasli* 1321. As the plaintiff has been given a decree for the rent paid as usual by the Courts below, this second appeal fails and is dismissed. Each party will bear his own costs.

*Appeal dismissed.*

(1) 30 M. 231; 17 M. L. J. 30.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3456 OF 1913.

January 19, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

SADULLA MRIDHA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

JOYNABUNNESSA BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Tenants, unrecorded, if*

SADULLA MRIDHA v. JOYNABUNNESSA BIBI.

*represented by recorded tenants—Rent, suit for, against recorded tenant, effect of, on unrecorded tenants—Symbolical possession, when affects persons not parties to suit or execution proceedings—Suit for possession by execution purchaser of holding—Limitation.*

Three brothers, defendants Nos. 1, 2 and 3, inherited a non-transferable occupancy holding jointly and sold a portion of it to defendants Nos. 12 and 13 and settled a sub-tenant, defendant No. 6, on another portion. But the name of defendant No. 7 alone was recorded in the *sherista* of the landlord, who in execution of a decree obtained in a suit for rent against defendant No. 1 alone purchased the holding himself and settled with the plaintiff. The latter within 12 years from the date of symbolical possession, but more than 12 years from the date of the execution-sale, instituted a suit against all the defendants for possession of the holding:

*Held*, that the suit was not barred as against defendants Nos. 2 and 3, for they having elected to be represented in their relations to the landlord by their brother, defendant No. 1, were parties to the suit in the name of their brother and could not be heard to say that they were strangers to the suit; and that, therefore, against them the symbolical possession gave start to a fresh period of limitation; [p. 705, col. 2.]

that as defendants Nos. 6, 12 and 13 were strangers to the suit, the delivery of symbolical possession did not affect their possession, and that the suit as against them was barred by limitation; [p. 706, col. 1.]

that defendants Nos 12 and 13 being unrecognised purchasers of a portion of the holding, were bound by the result of the rent suit and were liable to be turned out by a separate suit brought for the purpose within 12 years from the date of the execution sale. [p. 706, col. 1.]

*Mir Waziruddin* v. *Lala Deoki Nandan*, 6 C. L. J. 472, explained and applied.

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 8th July 1913, confirming that of the Munsif, Jamalpore, dated the 23rd May 1912.

FACTS.—The plaintiffs instituted the suit for the possession of an occupancy holding which was not transferable without the consent of the landlord. The allegations in the plaint were that this holding was inherited by Golam Mridha, defendant No. 1, and his two brothers, who jointly sold portions of the holding to defendants Nos. 12 and 13 and settled under-*raiyats* upon other portions. The landlord brought a rent-suit against Golam Mridha alone and in execution of the rent-decree put up the holding to sale and purchased it himself. He then settled the holding with the plaintiffs. More than 12 years after the date of the execution sale, but within 12 years from the date of the writ of delivery of possession, the plaintiffs' suit was brought. The defence *inter alia* was that the suit was barred against all the defendants except Golam Mridha. The suit was decreed by the Munsif and the decree was confirmed by the Subordinate Judge in appeal; thereupon the defendants preferred a second appeal to the High Court.

Mr. *A. K. Fazlul Haq*, for the Appellants.—In execution of the rent-decree, actual delivery of possession did not take place, only symbolical possession was taken; this symbolical possession could not affect the possession of any one of the defendants, except Golam Mridha against whom alone the rent suit was brought and who alone was a party to the execution proceedings. The brothers of Golam Mridha as well as the other defendants were strangers to the suit, they were in possession before the suit and their possession was not in any way disturbed by the symbolical possession. So as against them, the symbolical possession did not give a fresh start to limitation. Referred to *Mir Waziruddin* v. *Lala Deoki Nandan*(1), *Hari Mohan Shaha* v. *Baburali*(2), the Full Bench decision reported as *Mahadev Sakharam Parkar* v. *Janu Namji Hatley* (3) and *Narain Das* v. *Lalta Prasad* (4).

There were sub-tenants upon the land in suit, they could not be turned out by the plaintiffs in this suit. These sub-tenancies did not fall to the ground by the mere sale of the holding in execution of the rent-decree. Again, the defendants Nos. 12 and 13 have been in possession for more than 12 years after the sale, and they have acquired a right by adverse possession as against the plaintiffs.

Babu *Debendra Nath Mandal*, for the Respondents.—The defendants Nos 2 and 3 were not strangers to the suit. They were represented by defendant No. 1, Golam Mridha, in the landlord's *sherista*. These defendants had no dealings with the landlord and they held out defendant No. 1 as their representative in connection with the holding in their dealings with the landlord. The decree against the defendant No. 1 will be binding against them. It was their duty to have their names registered in the landlord's *sherista*.

(1) 6 C. L. J. 472.
(2) 21 C. 715.
(3) 14 Ind. Cas. 447; 14 Bom. L. R. 115; 36 B. 373.
(4) 21 A. 269; A. W. N. (1899) 56.

As regards the other defendants, they were not recognised by the landlord and the landlord was not bound to bring and could not bring any suit for rent against them.

The suit for rent might be regarded as a suit against the holding as represented by the defendant No. 1, who alone was the recorded tenant in the landlord's *sherist i*. So all the defendants were bound by the result of the suit and the execution proceedings.

Mr. *A. K. Fazlul Haq*, in reply.—Merely because the name of defendant No. 1 was recorded and the names of the defendants Nos. 2 and 3 were not recorded, does not prove that the latter were represented by the former.

The defendants Nos. 2 and 3 lived separate from defendant No. 1 and were in separate possession of portions of the holding.

JUDGMENT.

D. CHATTERJEE, J.—An occupancy holding not transferable by the custom of the locality was inherited by three brothers, defendants Nos. 1, 2 and 3. They jointly sold a portion of the *jote* to defendants Nos. 12 and 13 and established sub-*ryots* of whom defendant No. 6 is one. The name of defendant No. 1 alone, however, was recorded in the *sherista* of the landlord, who brought suits against defendant No. 1 alone and obtained decrees some of which were satisfied by all the brothers, while in execution of the last of such decrees he sold the *jote* and purchased it himself and after obtaining delivery in execution settled the *jote* with the plaintiff, who brings this suit for possession. The Courts below have decreed the suit and hence this appeal by defendants Nos. 2, 3, 6, 12 and 13, principally on the ground that as against them the suit should have been held as barred by limitation in that the landlord had obtained only symbolical possession which was of no avail against them as they were no parties to the suit.

It has been found that defendants Nos. 2 and 3 were represented by defendant No. 1 so far as the landlord was concerned. It has also been found that the suit was within time from the date of the symbolical possession. The appellants contend that they are strangers to the suit and are not bound by this symbolical possession and as they have been in possession for more than twelve years, the suit is barred by limitation as against them and their possession cannot be interfered with. Reliance is placed in support of this contention on the case of *Mir Wazir-ud-din* v. *Lala Deokinandan* (1). It was held in this case that symbolical possession does not in any way affect the possession of, or give start to a fresh period of limitation against, persons who are not parties to the suit or execution proceedings, notwithstanding that such persons may be bound by the result of the litigation terminating in the delivery of formal possession. The *ratio decidendi* in this case and the cases therein relied on was that the person who is a party to the proceeding must be considered as having been present at the delivery. Another reason relied on by the learned Judges in this case was that under-leases and encumbrances are not avoided *ipso facto* by the sale but must be got rid of by a further suit or proceeding. Now let us see how these principles apply to the present case.

Defendants Nos. 2 and 3 are the unregistered co-sharers of the registered tenant, defendant No. 1. The Courts below have held that they elected to be represented in their relations to the landlord by their brother, defendant No. 1. This is equivalent to saying that defendant No. 1 stood in the place of all the brothers including himself in the rent suit and all further proceedings including the delivery of possession. Their interest would cease *ipso facto* by the sale and no further suit or proceeding would be required to get rid of them. They are neither encumbrancers nor under-lessees. They are to my mind parties in the name of their elder brother and cannot be heard to say that they are strangers. It is true that they plead a separation from their brother and separate possession on their own behalf, but they allowed their elder brother to represent them in all matters connected with their landlord in relation to the lease-hold property. It would, I think, be unjust to allow them to resile from the position in which by their conduct they have placed themselves apart, of course,

from any question of fraud or collusion which has not been raised in this case.

Then comes the case of defendant No. 6. Paragraph 5 of the plaint states that defendant No. 6 has his house on *dag* No. 11 and paragraph 6 that he is not a *bona fide* tenant but a trespasser. This defendant did not appear in the first Court, but the plaintiff gave no evidence to prove that he was not a *bona fide* tenant but a trespasser who had been falsely set up as a tenant. On the other hand the plaint admits that he has his house on one of the plots and that he set up a sub-tenancy. I think, therefore, he must be taken as an under-tenant who can plead his possession as a stranger to the suit. The case of *Mir Wazir-ud-din* v. *Lala Deokinandan* (1), therefore, comes to his rescue and the plaintiff's suit to turn him out is barred.

As regards defendants Nos. 12 and 13 they are purchasers of portions of the holding long before the suit. The landlord did not recognise them and was not bound to recognise them: he was entitled to treat them as trespassers and has treated them as such in the plaint. They are, therefore, admittedly strangers and although they would be bound by the result of the suit and liable to be turned out, that must be by a separate suit within 12 years from at least the sale when the title of the purchaser began and when at least he would be entitled to evict any trespasser. The suit was filed just in time from the date of the writ of delivery of possession and, therefore, beyond 12 years from the sale and the suit is, therefore, barred against defendants Nos. 12 and 13 and the plaintiff cannot turn them out.

The appeal of defendants Nos. 2 and 3 must, therefore, be dismissed and the appeal of defendants Nos. 6, 12 and 13 decreed with costs: as all the appellants appeared by one *vakalatnamah*, defendants Nos. 6, 12 and 13 will get 3/5ths of the hearing fee and defendants Nos. 2 and 3 will pay 2/5ths of the hearing fee to the respondents.

BEACHCROFT, J.—I agree.

*Appeal partly allowed.*

Adv[illegible]

Ja[illegible]

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1699, 1700 AND 1701 OF 1913.

December 8, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

IN S. A. No. 1699 OF 1913

TALAGAPU TAVUDU—DEFENDANT—APPELLANT

IN S. A. No. 1700 OF 1913

VAKALAPURI KANNIAH—DEFENDANT—APPELLANT

IN S. A. No. 1701 OF 1913

PONDARI PEDDA EASWARUDU—DEFENDANT—APPELLANT

*versus*

THE ZAMINDAR OF TARLA—PLAINTIFF—RESPONDENT IN ALL.

*Madras Estates Land Act* (*I of* 1908), *ss.* 74, 75—*Nature of proceedings—Finding of Collector as to payment of rent, whether has effect of decree—Subsequent suit for determination of rent, whether barred*—Res judicata.

The proceedings under sections 74 and 75 of the Madras Estates Land Act are more or less of a summary character. There is nothing in section 75 to show that the finding of the Collector on the question, whether the rent was payable by division or appraisement, would have the effect of a decree and operate as *res judicata* so as to bar a subsequent suit for the determination of that question. [p. 707, col. 1.]

Second appeals against the decrees of the District Court of Ganjam, in Appeal Suits Nos. 470, 471 and 472 of 1912, respectively, preferred against those of the Court of the Divisional Officer of Chicacole, in Summary Suits Nos. 1203, 1204 and 1.05 of 1911, respectively.

Mr. *P. Nagabhushanam*, for the Appellants.

The Hon'ble Mr. *B. N. Sarma*, for the Respondent.

JUDGMENT.

IN S. A. No. 1699 OF 1913.

The really important question in this appeal is whether the order of the Deputy Collector in Civil Miscellaneous Petition No. 38 of 1909 operated as *res judicata* on the question whether rent was payable in kind or in cash. That order was passed on an application made to the Deputy Collector under section 74 of the Madras Estates Land Act; that is, an application for appraisement, division or determination of the crops where rent is taken by such means. The Revenue Inspector was appointed as provided under section 74 to make an award. An objection was taken on

behalf of the tenants before the Collector that the rent was not payable by division or appraisement. The Collector went into the matter and upheld that objection.

It is contended before us that that finding of the Collector operated as *res judicata* and bars the present suit. We think the learned District Judge is right in holding that it has no such effect. Under section 75 of the Act what the officer deputed by the Collector could do was to make an award embodying the result of his enquiry on the question of division or appraisement of the crops. That is to say, his award should consist of a finding as to how much of the crops was payable to the landlord as rent or how much money he was entitled to upon his share of the crops by appraisement of such crops. If the Collector found that rent was payable by division or appraisement of the crops it was open to him to confirm or modify the award, as it ought to be done. Then the award so confirmed or modified would, as provided in section 75, have the effect of a decree for arrears of rent. There is nothing in the section 75 to show that if the Collector found on objection made by the tenants that the rent was not payable by division or appraisement, that finding would have the effect of a decree and we can well understand that the Legislature did not intend to make any such provision. The proceedings under sections 74 and 75 are more or less of a summary character. No appeal is provided. It would be difficult to conceive that when the Legislature in this very Act has laid down a procedure for the institution of a regular suit before the Revenue Officer for determining the question of rent, it should have, in sections 74 and 75 of the Act, provided another and more summary remedy for a determination of the same question. If a suit is filed, a regular appeal is allowed. But there would be no such appeal, though the subject-matter of the decision would be the same, in matters coming under sections 74 and 75 of the Act. Section 75 does not say anywhere that the finding of the Collector that rent was payable in cash, not in kind, would have the effect of a decree.

It has also been argued before us that the Deputy Collector ought to have granted an adjournment to enable certain witnesses of the defendant to attend Court, because summonses were taken out and that they did not attend as cholera was prevailing in the place. The Divisional Officer did consider the question and held that, as a matter of fact, the defendant had sufficient opportunity to produce his witnesses and there was no ground shown for granting further adjournment. The second appeal will be dismissed with costs.

Second Appeals Nos. 1700 and 1701 follow our judgment in Second Appeal No. 1699 of 1913, for the reasons mentioned therein and will be dismissed but without costs.

*Appeals dismissed.*

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 834 OF 1914.

January 14, 1916.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

IMAM ALI PATWARI—PLAINTIFF—APPELLANT

*versus*

*Srimati* ARFATUNNESSA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Divorce*—Kabinnama, *condition in, that wife could divorce husband if he does not reside in her father's house, legality of—Restitution of conjugal rights, claim for, by husband having other wives, maintainability.*

The condition in a *kabinnama* that the husband should live with the wife in her father's dwelling house and on the breach of this condition she would be entitled to divorce him is void under the Muhammadan Law. [p. 708, col. 1.]

Where in an appeal against the dismissal of a suit by the plaintiff for restitution of conjugal rights, on the grounds that the plaintiff had not paid the prompt dower and that the defendant (the wife) could not be compelled to live in the plaintiff's house with the other co-wives, it was represented to the Appellate Court that the plaintiff had deposited the amount of the prompt dower in the lower Court and that he had set apart a separate hut within his compound for the residence of the defendant:

*Held*, that under the circumstances there was no reason why the plaintiff should not be given a decree for restitution of conjugal rights. [p. 708, col: 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 3rd January 1914, reversing that of the Munsif, Lakshmipur, dated the 24th of January 1913.

Babu *Romesh Chandra Sen*, for the Appellant.

Babu *Gunada Charan Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights brought by the plaintiff, who is a Muhammadan, against his wife.

The defence was that at the time of the marriage it was agreed by a *kabinnama* that the husband would reside with the wife in her parent's house and that in case he did not act according to the agreement, she would have the power to divorce him. Now, the condition in the *kabinnama* that the husband should live with the wife in her father's dwelling house and if he broke this condition she would be entitled to divorce him, is void under the Muhammadan Law. It was so held by this Court in the suit brought by the respondent against the appellant for a declaration that a divorce made by her was valid, and for recovery of the dower money. [See the case of *Imam Ali Patwari* v. *Arfatunnessa* (1).] It is contended that that case merely decided that the condition as to divorce is illegal; but that decision was based upon the ground that the condition that the wife shall be at liberty to live with her parents is void. We may also refer to Macnaghten's Principles and Precedents of Muhammadan Law, in which it is laid down that "according to the Muhammadan Law such an agreement is illegal and, therefore, it is not incumbent on the husband to abide by it, and he has full power to carry his wife to his own house provided he shall have paid the amount of her dower, but in the event of his not having done so, she is at liberty to object until the amount is paid." In Wilson's Digest of Anglo-Muhammadan Law, section 56, the law is stated thus:—"A condition that the wife shall, though adult, be at liberty to live in the house of her parents, is void, and the husband is entitled notwithstanding it to insist on the wife residing with him in his own house, provided he has paid the dower, or the prompt portion of it". That being the law the defendant is bound to reside with her husband.

The learned District Judge, however, has dismissed the suit on two grounds, the *first* being that the plaintiff has not paid the prompt dower, and *secondly* that the defendant cannot be compelled to live in the same house with the other co-wives.

It is represented to us on behalf of the appellant that he has already deposited the amount of the prompt dower in the Court in which execution of the decree (obtained by the defendant) was pending; and it is also stated that he has set apart a separate hut within his compound for the residence of the defendant. Under these circumstances, we do not see any reason why the plaintiff should not be given a decree for restitution of conjugal rights.

It is next contended on behalf of the defendant that although according to Muhammadan Law the wife may be bound to reside in her husband's house, the Court may, on a proper case being made out, select a proper place of residence for the wife other than her husband's house. We are pressed to exercise our discretion in the matter of residence of the defendant and to direct that she be allowed to reside in her father's house and not in the house of her husband where he is living with his two other wives. It appears, however, that before the institution of this suit she had for some time lived with her husband, the plaintiff, in his house with another co-wife without any objection. The plaintiff, we are informed, is her third husband; and having regard to the fact that she did once reside with her husband in his house with another co-wife, we are unable to hold that the plaintiff's house is not a proper and fit place of residence for her.

The decree of the lower Appellate Court is, therefore, set aside and a decree is passed against defendant No. 1 for restitution of conjugal rights. Before, however, the plaintiff is allowed to execute the decree he must satisfy the Court of first instance that he has paid the amount of the prompt dower

(1) 21 Ind. Cas. 87; 18 C. W. N. 693.

into Court, and that he has also set apart a suitable house for separate residence of defendant within the compound of the plaintiff's own house.

We order that each party must bear its own costs in all the Courts.

*Appeal allowed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 75 OF 1914.

December 22, 1915.

*Present*:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

BAVA'S WIFE, BEVI UMMA—DEFENDANT No. 1—APPELLANT

*versus*

THEKKINIYEDATH ALLATH SHAMU MENON AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Lease—Contract for one year—Tenant holding over—Contract, tacit renovation of—Tenant, if trespasser—Tenancy, determination of.*

If there is a lease for a year and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement which was to hold for a year. [p. 709, col. 2.]

*Dixon* v. *Bradford and District Railway Servants' Coal Supply Co. Ltd.*, (1904) 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159; *Lewis* v. *Baker*, (1906) 2 K. B. 599; 75 L. J. K. B. 848; 59 L. T. 10; 22 T. L. R. 680; 54 W. R. 146; *Dougal* v. *McCarthy*, (1893) 1 Q. B. 736; 62 L. J. Q. B. 462; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597; *Right* v. *Darby*, 1 Term. Rep. 159; 1 R. R. 169; 99 E. R. 1029, followed.

Where, therefore, a contract of lease is for one year certain and provides for payment of rent annually and for its termination on demand without specifying any particular date for making such demand, the tenant holding over is not a mere trespasser but a tenant from year to year whose tenancy must be determined by demand made before the new term commences. [p. 710, col. 1.]

*Soames* v. *Nicholson*, (1902) 1 K. B. 157; 71 L. J. K. B. 24; 85 L. T. 614; 50 W. R. 169; *Pope* v. *Garland*, 4 Y. & C. 394; 10 L. J. Ex. Eq. 13; 54 R. R. 492, followed.

*Kelu* v. *Ammad Kutty*, 8 Ind. Cas. 362; (1910) M. W. N. 794; 9 M. L. T. 198, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat, in Appeal Suit No. 549 of 1913, preferred against that of the District Munsif, Palghat, in Original Suit No. 332 of 1912.

Mr. *P. S. Narayanaswamy Aiyar*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The lower Appellate Court regarded the defendant as a trespasser and held that he was not entitled to a notice to quit. We are unable to agree with this conclusion. Exhibit I, which is dated the 14th of May 1910, stipulates for a year certain and provides for yearly payments in case the lessee continued to hold on. We think that on the expiry of the first year of tenancy, the defendant was continuing as a tenant from year to year under the provision to hold on. The observation of Lord Alverstone, C. J., in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Co. Ltd.* (1), clearly supports this position. See also *Lewis* v. *Baker* (2) and Woodfall's Landlord and Tenant, page 254. In *Dougal* v. *McCarthy* (3), Lord Esher, M. R., states the law thus: "I take it that the doctrine laid down by Lord Mansfield in *Right* v. *Darby* (4) is correct. He there said: 'If there be a lease for a year, and, by consent of both parties, the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year.'" We think this principle is applicable to the present case. Mr. Madhavan Nair relied upon *Soames* v. *Nicholson* (5) and argued that there was a contract to the contrary to the effect that the tenant should deliver possession on demand. But the contract does not say when the demand should be made. In the absence of such a stipulation, the presumption is that the demand must be to terminate the tenancy at the end of the term for which the tenant holds. The provision for payment of the rent is to pay it annually and it cannot be split

(1) (1904) 1 K. B. 444; 73 L. J. K. B. 136; 90 L. T. 122; 20 T. L. R. 159.

(2) (1906) 2 K. B. 599; 75 L. J. K. B. 848; 95 L. T. 10; 22 T. L. R. 680; 54 W. R. 146.

(3) (1893) 1 Q. B. 736; 62 L. J. Q. B. 462; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597.

(4) 1 Term. Rep. 159; 1 R. R. 169; 99 E. R. 1029.

(5) (1902) 1 K. B. 157; 71 L. J. K. B. 24; 85 L. T. 614; 50 W. R. 169.

up. Even granting that at the expiry of the first year, the defendant was a tenant-at-will, as pointed out by Baron Alderson in *Pope* v. *Garland* (6), such a tenant holds from year to year. The decision in *Soames* v. *Nicholson* (5) turns upon the special term in the contract that the tenancy can be put an end to *at any time*. There is no such stipulation in Exhibit I; consequently there is no contract to the contrary regarding the period when the tenancy should be determined. The decision in *Kelu* v. *Ammad Kully* (7), to which the learned Counsel for the respondents drew our attention, does not consider the question whether the demand should not be to quit and deliver before a new term commences.

We think that the plaintiff is bound to make the demand on the defendant to deliver up possession before the next year of tenancy commences and as that has not been done in this case, he is not entitled to recover possession. We reverse the decrees of the Courts below and dismiss the suit with costs throughout.

*Appeal allowed; Suit dismissed.*

(6) 4 Y. & C. 394; 10 L. J. Ex. Eq. 13; 54 R. R. 492.
(7) 8 Ind. Cas. 362; (1910) M. W. N. 794; 9 M. L. T. 198.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2863 OF 1913.

January 27, 1916.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

ABDUL HAMID—PLAINTIFF—APPELLANT

*versus*

ABDUL MIJI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 67—Interest payable, when* kabulyat *prior to Act fixing rate of interest is varied by* solehnamah *after passing of Act—Tenancy, if newly created—Construction of document.*

An original *kabulyat* creating a tenancy executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 6¼ per cent. per mensem on overdue instalments, but after the passing of the Act there was a *solehnamah* between the landlord and the tenants by which a sum of Rs. 38 was agreed to be the rent after deducting the *abwab* Rs. 4-9-0 from the original rent of Rs. 42-9-0 (including the *abwab*) fixed by the *kabulyat*, and a deduction was also made in the rent in respect of a portion of the land which was in the possession of the landlord. The *solehnamah*, so far as the question of interest was concerned, expressly stated that in case of default of payment of any instalment, the tenants shall pay interest at the rate stipulated in the *kabulyat* and that all other stipulations made in the *kabulyat* except those in respect of *abwab* shall remain in force:

*Held*, that by the *solehnamah* there was only a variation of some of the terms of the old *kabulyat* but that no new contract of tenancy was created; and that, therefore, the tenants remained liable to pay interest at the rate stipulated in the *kabulyat*. [p. 711, col. 1.]

*Held*, also, that if the *solehnamah* had created any new contract of tenancy, the tenants would not have been liable to pay interest at more than the rate mentioned in section 67 of the Bengal Tenancy Act. [p. 710, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 30th April 1913, modifying that of the Munsif, Lakhipur, dated the 11th April 1912.

Babu *Romesh Chandra Sen*, for the Appellant.

Babu *Ram Dayal Dey*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for rent and the only question involved in this appeal is, what is the rate of interest which the plaintiff is, entitled to get upon overdue instalments of rent from the defendants who are tenants under the plaintiff.

The original *kabulyat* by which the tenancy was created is of the year 1879 and it provided for interest at the rate of 6¼ per cent. per mensem. There was, however, a *solehnamah* between the parties in the year 1907, and the lower Appellate Court, differing from the Court of first instance, has held that the *solehnamah* created a new contract of tenancy. If there was any contract after the passing of the Bengal Tenancy Act the defendants are not liable to pay interest at more than the rate mentioned in section 67 of the Bengal Tenancy Act. So the question is whether

by the *solehnamah* the parties entered into a new contract of tenancy. We think, upon a consideration of the terms of the compromise, that there was only a variation of some of the terms of the tenancy. The original rent was Rs. 42-9-0, which included certain *abwabs* amounting to Rs. 4-9-0; by the compromise, the parties agreed that Rs. 38 was to be the rent for the holding (after deducting Rs. 4-9, the *abwabs*) and a deduction was made in the rent in respect of a portion of the land which was in the possession of the landlord by virtue of purchase and another portion of which the landlord was in possession from before in *osat raiyati* right. There was thus a distribution of the rent in respect of the lands in possession of the landlord and of the tenants, respectively. The learned District Judge has held that the landlord could not put the tenants in possession of the land. No such case, however, was set up in the pleadings, nor is there any evidence on the record to justify the finding. The statements contained in the petition of compromise in respect of the lands in the possession of the plaintiff do not show that the landlord had dispossessed the tenants or could not put them in possession of any lands in *raiyati* right, but only relates to lands held in *osat raiyati* right. The compromise petition, so far as the question of interest is concerned, expressly stated that in case of default of payment of any instalment, they, the tenants, shall pay interest at $6\frac{1}{4}$ per cent. per mensem in accordance with the *kabulyat* and in a subsequent part of the compromise petition it is stated that all other stipulations made in the *kabulyat*, dated the 21st *Falgoon* 1286, except those in respect of *abwabs* shall remain in force. We are of opinion upon a consideration of all the terms that there was only a variation of some of the terms of the old *kabulyat* and that with respect to the other terms including the rate of interest, there was no new contract.

That being so, the decree of the lower Appellate Court is modified in so far as the question of the rate of interest is concerned and the plaintiff will get interest at the rate of $6\frac{1}{4}$ per cent. per mensem as decreed by the Court of first instance.

We make no order as to the costs of this appeal.

*Decree modified.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2469 OF 1914.

December 21, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Moore.

MANCHALA NARAYANA MURTHY—DEFENDANT No. 2—APPELLANT

*versus*

PENUMETCHA VENKATAPATIRAJU AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Secondary evidence of document given at trial—Appellate Court, whether can admit document itself.*

Where a document material to the plaintiff's case could not be found at the time of the trial and the plaintiff gave secondary evidence of its contents, but produced it in the Appellate Court alleging that it had been found in the meantime:

*Held*, that since the genuineness of the document was unimpeachable, the lower Appellate Court could admit it as it filled up a *lacuna* in the plaintiff's case. [p. 711, col. 1.]

*Kessowji Issur* v. *Great Indian Peninsula Railway Company*, 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 I. A. 115 (P. C.); 2 M. L. T. 435, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 199 of 1912, preferred against that of the Additional District Munsif of Tanuku, in Original Suit No. 817 of 1910.

Mr. *V. Ramesam*, for the Appellant.

Mr. *P. Narayanamurthy*, for the Respondents.

JUDGMENT.—I do not think we can interfere in this case. The learned Subordinate Judge in appeal admitted in evidence a lease, Exhibit H, on which the permissive nature of the defendant's possession was based by the plaintiffs. That document was not produced at the original hearing; but the plaintiff went into the witness-box and gave what, from reading the judgment of the District Munsif, I have no doubt, was in effect secondary evidence of that document which then could not be found. The learned District Munsif did not

accept that evidence. But on appeal an application was put in by the plaintiffs to be allowed to produce the original document which it is alleged had in the meantime been found. It is not open to Mr. Ramesam in second appeal to argue that the document, contrary to the opinion of the Subordinate Judge, is a forgery, and, therefore, he is forced to contend that in law it could not be admitted. In our opinion this was, within the meaning of the ruling in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), a filling up of a *lacuna* in the plaintiffs' case caused by their inability to find the document and under Order XLI, rule 27, of the Civil Procedure Code the Judge rightly admitted it. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 721; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 I. A. 115 (P. C.); 2 M. L. T. 435.

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## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 101 OF 1912.

CIVIL REVISION PETITION NO. 1030 OF 1912.

October 26, 1915.

*Present:*—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

SAMI RAO APPA AND ANOTHER—PETITIONERS—APPELLANTS IN BOTH

*versus*

VYRAVAN CHETTIAR AND OTHERS—RESPONDENTS IN BOTH.

*Civil Procedure Code (Act V of 1908), s. 102, scope of—Sale in execution of Small Cause Court decree—Suit to set aside sale dismissed by ordinary Court—Second appeal, whether lies.*

Section 102 of the Code of Civil Procedure is wide enough in its terms to cover the case of suits of the nature cognizable by Courts of Small Causes, whether they are tried by the Court of Small Causes or Courts in their ordinary original jurisdiction. No second appeal, therefore, lies against an order passed by a Court of ordinary jurisdiction refusing to set aside a sale in execution of a decree of a Court of Small Causes. [p. 712, col. 2.]

*Aithala* v. *Subbanna*, 12 M. 116; *Narayan Parmanand* v. *Nagindas Bhaidas*, 30 B. 113; 7 Bom. L. R. 641, followed.

Appeal against the decree of the District Court, Tanjore, in Civil Miscellaneous Appeal No. 13 of 1911, preferred against that of the Court of the District Munsif of Tiruturaipundi in Extraordinary Appeal No. 424 of 1910, in Small Cause Suit No. 2632 of 1899, on the file of the Court of the Subordinate Judge of Kumbakonam.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the above said decree of the District Court of Tanjore, in the said Civil Miscellaneous Appeal No. 13 of 1911.

Mr. *G. S. Ramachandra Aiyar*, for the Petitioners-Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—We think the preliminary objection taken that there is no second appeal is a good one. Section 102 of the Civil Procedure Code, 1908, is wide enough in its terms to cover the case of suits of the nature cognizable by Courts of Small Causes whether they are tried by the Courts of Small Causes or by Courts in their ordinary original jurisdiction.

This is a view which has been held practically by all the High Courts. We need only refer to the decisions in *Aithala* v. *Subbanna* (1) and *Narayan Parmanand* v. *Nagindas Bhaidas* (2).

Mr. Rama Chandra Aiyar next asks us to set aside the order of the Appellate Court in exercise of our jurisdiction under section 115. This is not, however, a case in which we should be justified in interfering. The application was to set aside the sale on the ground of fraud; and both the lower Courts, the District Munsif as well as the District Judge in appeal, have held that the application was barred. The District Judge, unfortunately, has not written a full judgment. But he was not bound, by law, in a case of this nature to write such a judgment. He refers to the two paragraphs in the judgment of the District Munsif as carefully dealing with the question of limitation and he says that he agrees with that conclusion. Mr. Rama Chandra Aiyar contends that he has not considered the other portions of the judgment of the District Munsif. There is

(1) 12 M. 116.
(2) 30 B. 113; 7 Bom. L. R. 641.

nothing to show that he confined his attention only to paragraphs 23 and 24 of the District Munsif's judgment. The evidence was placed before him, and there is no reason to think that the whole matter was not fully argued before him and considered by him. The result is that both the appeal and the revision petition are dismissed with costs in both.

*Appeal and petition dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 93 OF 1914-15 OF JAUNPUR DISTRICT.

June 14, 1915.

*Present*:—Mr. Holms, S. M.

*Babu* MOTI CHAND AND OTHERS—PLAINTIFFS —APPLICANTS

*versus*

*Musammat* SULTAN BEGAM—DEFENDANT —RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 28—Lease for definite period—Female tenant in her own right—Death of tenant—Lease, effect on.*

If a female ex-proprietary or occupancy tenant, having full rights in her own right and not having merely a life-interest in the tenancy, grants a *bona fide* lease for a definite period and if her interest comes to an end before the expiry of the lease, the lease is binding upon the landholder under section 28 of the Tenancy Act. [p. 714, col. 1.]

Application for revision of the order of the Additional Commissioner, Benares Division, dated the 11th November 1914, confirming that of the Assistant Collector, Jaunpur, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 14th*, 1915.)—The facts of the case are not disputed. A female ex-proprietary tenant in her own right gave a sub-lease of her land for twenty years in 1904. She died in 1913 when she was about 55 or 60 years of age. The landholder now wishes to eject the sub-tenant, who pleads the privilege of section 28. The Pleader for the appellant urges that under section 25 (4), a female ex-proprietary tenant even if she has full ex-proprietary rights cannot give a sub-lease which would be binding under section 28 on the landholder after her death. He points out that to hold otherwise would result in many inconvenient consequences; *e.g.*, it would follow that a female ex-proprietary tenant in her own right could on her death-bed give a sub-lease for 100 years which would be binding and enforcible between the landholder and the sub-tenant. The result might be even more inconvenient than this for under section 25 (3), a female non-occupancy tenant who held the land herself for the first time might give a similar sub-lease. He points out that the removal of the restrictions of the sub-letting in the case of a female as well as other persons mentioned in section 25 (4) is a personal privilege, and, so far as the other persons mentioned are concerned, it ceases when they cease to hold the status mentioned in that sub-section, that is to say, when a soldier leaves military service, a minor becomes of age, and a lunatic or idiot becomes sane, they have no longer these privileges. On this analogy he urges that the duration of the privilege given to a female cannot be extended after her death by reason of section 28.

On the other side, it is argued that this restriction of the privilege given to a female ex-proprietary tenant might result in certain difficulties, one of these difficulties being that she would not find it easy to get *nazrana* on giving a sub-lease, or would not be able to raise a loan so readily by giving a sub-lease. The answer to this seems simple,—that the sub-section was not intended to facilitate the raising of loans by females, minors and other such people, but to make it easy for them to arrange for the cultivation of land which they were unable to cultivate themselves. Another difficulty is raised, that if a female ex-proprietary tenant were to give a sub-lease for five years and die in the middle of it, a sub-tenant would be worse off than if he had five years' lease from a male ex-proprietary tenant. This is certainly so, but this is quite a minor matter.

I will look into the proceedings of the Select Committee and other correspondence which led to the enactment of these sections, and pass orders later on.

FINAL ORDER.—The proceedings of the Select Committee on the present Tenancy Act and the other papers which I have seen do not throw any light on the subject. Before a decision is come to, it seems desirable to state the facts in the present case more fully,

so that some conclusion may be come to as to whether the sub-lease for 20 years was a genuine arrangement for management of the holding or not. The sub lease was given, as I have noted before, in 1904 when the lady was roughly 45 to 50 years of age, and the sub-lessee was in possession for the 7 years which followed up to 1911, partly by reason of her own cultivation and partly by receipt of rent from sub-tenants under her. In 1911 *Musammat* Kamarunissa, the ex-proprietary tenant in her own right, relinquished her holding and died two years later. It looks as if the landholder had got her to relinquish her holding so that the sub-tenant's rights might be extinguished. The landholder then took possession of the holding, and the sub-tenant, the respondent in the present case, sued him under section 79 for recovery of possession and got a decree on the 1st of July 1912. On these facts it appears that the sub-lease was a genuine arrangement for the management of the holding. This being so, I am not prepared to hold that when a female ex-proprietary tenant in her own right gives a *bona fide* sub-lease of her holding for a term of years, the sub-tenant has no right after her death.

I dismiss the application for revision with costs.

It must be understood that this decision only governs cases in which a female is an ex-proprietary or an occupancy tenant in her own right and has more than a life-interest, and further does not apply to perpetual leases.

*Appeal dismissed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 475 OF 1914.

November 16, 1915.

*Present:* Mr. Justice Srinivasa Aiyangar.

B. M. VENKATAPPA NAYANUM VARU —PLAINTIFF—PETITIONER

*versus*

PADI RAMAKRISHNAPPA CHETTY AND OTHERS—DEFENDANTS NOS. 2 TO 7 —RESPONDENTS

*Civil Procedure Code (Act V of 1908), O. IX, r. 4. O. XVII, rr. 2, 3—Non-appearance of parties at adjourned hearing—Dismissal of suit—Restoration.*

Where a suit was adjourned for want of time and was subsequently dismissed on the date of re-hearing on account of the failure of the parties to attend, though their Pleaders were present; on an application by the plaintiff for the restoration of the suit:

*Held*, (1) that the dismissal of the suit was not under Order XVII, rule 3, of the Civil Procedure Code, 1908, for no time was given to the plaintiff to do any of the acts specified in the rule; [p. 715, col. 1.]

(2) that there was a default of appearance by the parties within the meaning of Order IX, rule 4, Civil Procedure Code, 1908. [p. 715, col. 2.]

*Gopala Row* v. *Maria Susaya Pillai*, 30 M. 274; 17 M. L J. 225, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of North Arcot, in Miscellaneous Application No. 20 of 1913, preferred against that of the Court of the District Munsif of Sholinghur, in I. A. No. 247 of 1913, in Original Suit No. 164 of 1912.

Mr. *L. A. Govindaraghava Aiyar*, for the Petitioner.

Mr. *N. S. Rangasamy Aiyangar*, for Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—This is an application by the plaintiff in Original Suit No. 164 of 1912 to revise an appellate order of the District Judge of North Arcot. The suit was originally posted for final hearing to the 4th December 1912 and was adjourned to the 20th February 1913 by the Court for want of time. On the 20th of February the leaders for the plaintiff and the defendants were present, but neither of the parties were present. The plaintiff had taken out summonses for his witnesses on the 12th February for the hearing on the 20th, but they did not attend. It appears that one of them was served and the other was not. What happened on that day is stated by the Trial Judge in his original order, which is as follows:—

"Plaintiff's Pleader stated that his witnesses have not come. He applied for summons late and the summons issued has not yet been returned for want of time. Plaintiff must take the consequence. Plaintiff does not appear. Defendants, too, do not appear. Their Pleaders say that the parties did not go to them. I see no good ground to grant any more adjournment. The suit is, therefore, dismissed Parties to bear their own costs."

RAZA HUSAIN *v.* AMAR CHAND PAL.

The plaintiff applied for the restoration of the suit under Order IX, rule 4, treating the order passed on the 20th February as one made under Order XVII, rule 2. The first Court rejected the application holding that the dismissal of the suit was not for default of appearance, but was a dismissal on the merits for want of evidence. On appeal the District Judge rejected the appeal on the same ground. He also held that the previous disposal was under Order XVII, rule 3. The present petition is to revise the above order and the question is, whether the dismissal of the suit on the 20th February was for default of appearance of the plaintiff or a dismissal on the merits for want of evidence. I may say at once that the Appeal Judge was in error in holding that the disposal was under Order XVII, rule 3, for in this case time was not given to the plaintiff to do any of the acts specified in rule 3, the adjournment of the suit was to suit the convenience of the Court and was merely a re-posting of the suit; but this does not necessarily determine the question, for a Court may have power to determine the suit on the merits under Orders XVII and XX if the parties appear either personally or through their Pleaders duly instructed on their behalf, even though no time may have been given to any of the parties to do the acts specified in Order XVII, rule 3. The question, therefore, in this case is whether there was a default of appearance on the part of the plaintiff. If there was, the Court can only dispose of the suit under Order XVII, rule 2 [*Chandramathi Ammal* v. *Narayanasami Iyer* (1)]. In *Gopala Row* v. *Maria Susaya Pillai* (2), it was held in circumstances substantially similar to the present case that there was no appearance of the plaintiff. In that case the Pleader for the plaintiff who asked for an adjournment of the suit, which was refused, is said to have stated to the Court that he was unwilling to proceed with the case. In this case it is said the plaintiff's Pleader did not say that he had no instructions to proceed. I do not think this makes any difference. Without going so far as to say that in no case there can be an appearance by a plaintiff through his Pleader if the Pleader is unable to proceed with the case without an adjournment, I hold on the facts of this case, following the decision in *Gopala Row* v. *Maria Susaya Pillai* (2), that there was no appearance of the plaintiff after the adjournment was refused. The learned Pleader for the petitioner laid some stress on the use of the word 'order' and also on the fact that no separate decree was drawn up. I do not attach much importance to this though I do not ignore it; if a decree had been drawn up, the plaintiff might conveniently have preferred an appeal, which it is said is the only course open to him. I note, however, that the Trial Judge appears to have held that one of the parties at any rate, *viz.*, the defendants, did not appear although their Pleaders were present; for I find he has not given any costs to the defendants. As both the lower Courts have held that the application of the plaintiff was incompetent I set aside the order of the lower Appellate Court and direct that the appeal be heard on the merits. The respondents must pay the costs of the petitioner in this Court.

*Petition allowed; Order set aside.*

(1) 5 Ind. Cas. 23; 19 M. L. J. 760; 33 M. 241; 7 M. L. T. 369.

(2) 30 M. 274; 17 M. L. J. 225.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 6 OF 1915.

April 21, 1915.

*Present*:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

RAZA HUSAIN AND OTHERS—OBJECTORS—APPELLANTS

*versus*

AMAR CHAND PAL—DECREE-HOLDER—RESPONDENT.

*Mortgage-decree—Marshalling of securities, question as to, not raised and decided—Execution proceedings—Joinder of parties, plea as to, non-maintainability of.*

Where in a mortgage suit the question as to the right of having the securities marshalled was not raised and decided, the representatives of the party who could have raised that question and got i

decided, cannot urge their joinder as parties to the execution proceedings, if they are not so joined, for the purpose of raising that question and getting it decided at that stage.

Appeal against the order of the Subordinate Judge, Lucknow, dated the 19th November 1914.

Appellant in person.

Pandit *Gokaran Nath Misra* and Babu *Jitan Krishna Banerji*, for the Respondent.

JUDGMENT.—This is an appeal against an order of Pandit Suraj Narain Bahadur, Subordinate Judge of Lucknow, refusing to bring the names of Raza Husain and others, representatives-in-interest of Husaini Begam, on to the record in the execution proceedings under a decree. On the 7th July 1896 a certain Muhammad Husain executed a deed of mortgage in favour of Amar Chand Pal. This mortgage secured amongst other properties the assignment of land revenue of village Gaurbhit held by Muhammad Husain. On the 30th March 1897 Muhammad Husain executed a deed of mortgage in favour of Khurshed Laka Begam and Husaini Begam, by which he secured amongst other properties the same right of assignment of land revenue in the village of Gaurbhit.

In the present appeal we are only concerned with that assignment of land revenue which we find was mortgaged both by the deed of 7th July 1896 and by the deed of 30th March 1897. The position of Amar Chand Pal was that of a prior mortgagee and the position of Khurshed Laka Begam and Husaini Begam was that of puisne mortgagees with regard to that property. On the 23rd August 1899 Khurshed Laka Begam and Husaini Begam brought a suit on the foot of the deed of mortgage of 30th March 1897, and obtained a decree on the 19th February 1900. To this decree Amar Chand Pal was not a party. On the 22nd April 1901, Amar Chand Pal brought a suit on the foot of the deed of mortgage dated 7th July 1896 and obtained a decree on the 25th February 1902. To this decree Khurshed Laka Begam and Husaini Begam were both parties. It appears that in the course of the execution of the decree obtained by Amar Chand Pal on 25th February 1902 Husaini Begam died. The decree-holder did not consider it necessary to join her descendants as parties to the execution proceedings. They applied to the Court to join them as parties. The Court considered that at that stage it was unnecessary to do so. It is against this refusal to join them as parties that the present appeal is filed.

One of the appellants Raza Husain has argued the appeal in person. He was asked what he stood to gain by being joined as a party, and what he stood to lose by being not joined as a party. He replied that the decree obtained by Amar Chand Pal was not only against the assignment of revenue in Gaurbhit but against other properties, and that if the appellants had been joined as parties to the execution proceedings, they might have asked the Court to direct Amar Chand Pal to execute this decree against the other properties and not against the assignment of revenue in Gaurbhit. He suggested nothing else that they could put forward if joined. It is clear that, if such an application had been made to the Court, the Court would not have been right if it had accepted it. The appellants as subsequent mortgagees wish to have the securities marshalled as between themselves and the prior mortgagee. But as the puisne mortgagees, one of whom is now represented by the appellants, were parties to the suit for sale brought by the prior mortgagee, the question of the right to marshal should have been raised and decided in the suit. The question was not raised, and the decree as it stands gave the prior mortgagee the right to bring the entire mortgaged property to sale. The rights of the parties are now settled by the decree and the right to have the securities marshalled not having been raised in the suit cannot now be raised in the execution proceedings. We see no reason why the appellants should be joined as parties. The execution is as against the mortgaged property and is primarily a matter between the prior mortgagee and the judgment-debtor. It is open to the appellants as puisne mortgagees to redeem the property, whether they are joined as parties or not.

We dismiss this appeal accordingly. The appellants will pay their own costs and those of the respondent.

*Appeal dismissed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1686 OF 1912.

February 11, 1916.

*Present:*—Mr. Justice Chaudhuri and Mr. Justice Newbould.

PROTAB CHANDRA MONDAL AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

MOHENDRA LAL MONDAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), s. 3—Tenant's status, tests for determining—Construction of document.*

In determining the status of a tenant under the Bengal Tenancy Act, if the inception of the tenancy is clear and the document creating the tenancy shows what it is, subsequent conduct or dealings of the tenant need not be considered. It is only when no clear conclusion can be arrived at from the document that subsequent conduct or dealings are necessary to consider. [p. 718, col. 1.]

An entire village comprising about 500 *bighas*, where persons were residing, was let out to a tenant and the document creating the tenancy did not clearly show whether the tenancy was a *raiyati* holding or a tenure:

*Held*, that under the circumstances the tenancy was an under-tenure. [p. 718, col. 2.]

Appeal against the decree of the District Judge, Birbhoom, dated the 8th March 1912, reversing that of the Subordinate Judge, Birbhoom, dated the 31st January, 1911.

Babus *Dwarka Nath Chakrabartty* and *Mohini Mohan Chakrabartty*, for the Appellants.

Babus *Broja Lal Chakrabartty* and *Harendra Nath Ganguly*, for the Respondents.

JUDGMENT.—Plaintiffs Nos. 1 to 3 are purchasers from one Piru Manjhi and plaintiff No. 4 is a purchaser from the other plaintiffs. The purchase of the former was on the 21st *Falgoon*, 1305. Defendants Nos. 1 to 3 are purchasers from one Indra Dass. The other defendants are settlement-holders. They are in possession. The defendants' purchase was on the 28th *Aswin*, 1302. Indra Dass was admittedly a tenure-holder directly under the proprietors. The whole question involved depends upon the ascertainment of Piru Manjhi's right. If he was a tenure-holder, the plaintiffs should succeed. If he was an under-*raiyat* or even an occupancy *raiyat* the suit should fail.

Piru's title-deed, Exhibit D, is a *kabuliat* of 1292 executed in favour of Indra Dass. It appears from the *kabuliat* that the whole of Mauza Ranjannagore was let out to Piru excepting the *jote* of Bakranata Bagdi. The area appears to be about 500 *bighas*. The learned Subordinate Judge found that there were some Santhal and Bhuia residents at Ranjannagore before Piru took settlement and Piru was himself a resident of Ranjannagore when he executed the *kabuliat*. The document is headed as *korfa jami jamar kabuliat patra*. It is clear from the document that the interest whatever it was was to be heritable. There is not a word in the whole of the document that the land was let out for purposes of cultivation. There is a passage in the document which has been translated thus—"I shall attend to the several duties appertaining to the Police." It appears that Bakranata long prior to the date of this document had obtained a lease from the proprietors, then represented by the Court of Wards, which accounts for the exclusion of his *jote*. The learned Subordinate Judge came to the conclusion that Piru's right under the deed was that of an under-tenure-holder. The learned District Judge has held in appeal that Piru's tenancy was a *raiyati* holding and not a tenure on the following grounds: That the word "*korfa*" although it means "under" or "subordinate" the settlement created was not the interest of a tenure-holder, because (1) the plaint alleged that the word "*korfa*" had been used in the *pattah* erroneously, advantage having been taken of Piru's ignorance who was not in fact a "*korfadar*." (2) In Piru's sale-deed to the plaintiffs Nos. 1 to 3, Indra Dass' interest is described as "*madhya satwa*", intermediate interest or tenure, but that Indra Dass' interest was certainly not intermediate or a middleman's interest. (3) That in various subsequent documents Piru's interest has been recited as "*prajai satwa*" and that in particular plaintiff No. 1 in a deposition so late as the 24th May 1904 stated that Piru's interest was a transferable occupancy right. He, therefore, infers that the plaintiffs have purchased only an occupancy holding. In discussing the question as to what the tenancy was at its inception, he says he has arrived at the above conclusion, that

was a *raiyati* tenancy, by a process of exclusion from the documents above mentioned. He further says that "by consideration of the positive side of the question", he arrives at the same conclusion. He finds that the object of taking the land was to bring it under cultivation not by establishing tenants on it, but by members of his family and that Piru "was a man of the cultivating class and that the persons who were sought to be proved as tenants were all his relations, and the inference was more in favour of his having taken their assistance as members of a family in bringing the land under cultivation than of his having settled them as tenants within the meaning of the Bengal Tenancy Act." It is not disputed that the law relating to the matter as it stands at present, is that if the inception of the tenancy is clear, and the document creating the tenancy shows what it is, subsequent conduct or dealings need not be considered. It is only when no clear conclusions can be arrived at from the document that subsequent conduct or dealings are necessary to consider. The learned Vakil who has very ably supported the judgment of the District Judge, submits that although there is nothing in the document expressly stating that the settlement was for the purpose of cultivation, yet such an inference is to be drawn from the fact that Piru's occupation is described in it as that of a cultivator. The expression, however, in the document is that his occupation was "*chash adi*" cultivation, etc. He next submits that although an inference may be drawn from the document that the settlement is heritable, yet there are no express words making it heritable. *Thirdly*, that the clause about the Police service has not been happily translated as according to him, it really means that he is to assist the *zemindar* in rendering Police service.

Then he relies upon the following clause in the document, arguing that it cannot refer to a permanent tenure: "If there be any increase in the '*bira* and *kadar*' I shall add the amount over the rent and pay accordingly." He translates the expression "*bira*" as succession of crops and "*kadar*" as rates. The appellants have translated it as meaning area and rates. The clause appears to mean "if there is improvement and the value of the land increases, I will pay more," but this clause does not in our view affect the general import and intendment of the document, namely, that it created a heritable under-tenure.

It appears that the learned Judge has wholly overlooked the fact found by the Subordinate Judge that there were Santhal and Bhuia residents in the *mauza* before Piru took settlement and that Piru himself was a resident. He does not say he was a cultivator, but a man of the cultivating class. He established *bustees* and tenants, and tenants were there before him. The document according to us shows that an under-tenure was created. If it was merely a *raiyati* settlement, as now argued, there would be no meaning in the expression "*korfa*." The learned Vakil says that it is to be understood in the sense that the tenant was "under or subordinate" to the grantor, as he was to pay rent to him. This seems to us to be a misapplication of the word. It is not used ordinarily in that sense. The tenure is clearly heritable and the clause about the Police service supports the conclusion that a permanent under-tenure was created. The presumption arising out of the area settled is no doubt rebuttable, but we do not see that it has been rebutted. An entire village where persons were residing was settled. Subsequent admissions or statements made by Piru or the plaintiffs do not in our view affect the question. We know that transferable occupancy rights are often more highly valued by the tenants than under-tenures. We, therefore, confirm the decision of the learned Subordinate Judge and decree this appeal with costs.

*Appeal decreed.*

NATHU MAL *v.* TILOKA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2711 OF 1914.

January 7, 1916.

*Present*:- Mr. Justice Shah Din.

NATHU MAL—PLAINTIFF - APPELLANT

*versus*

TILOKA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of* 1908), *O. II, r.* 2—*Mortgage—Mortgagee entitled to profits—Right to possession on non-payment—Suit for profits—Subsequent suit for possession, maintainability of.*

A mortgage-deed provided that the mortgagee was entitled to receive a certain amount annually by way of profits from the mortgagors who were to remain in possession of the land mortgaged; and in the event of non-payment of the amount of profits agreed upon he was entitled to sue for recovery of the profits or to obtain possession of the land in lieu of the principal mortgage-money and the profits due. A default having been made, the mortgagee sued for profits only as the land was in possession of third parties. Subsequently the mortgagors came into possession of the land and the mortgagee sued for possession:

*Held*, that the suit was not barred by Order II, rule 2, of the Civil Procedure Code, 1908, inasmuch as at the time of the previous suit the mortgagee was precluded from suing for possession under the terms of the mortgage-deed.

*Ganga Ram* v. *Abdul Rahman*, 28 P. R. 1907; *Brij Lal* v. *Ram Rattan*, 17 Ind. Cas. 581; 268 P. W. R. 1912, distinguished.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 10th August 1914, reversing that of the Subordinate Judge, Hoshiarpur, dated the 21st October 1913, decreeing plaintiff's claim.

Bakshi *Tek Chand*, for the Appellant.

Mr. *Sunder Das*, for the Respondent.

JUDGMENT.—The plaintiff-appellant brought a suit for possession as mortgagee of 35 *kanals* 1 *marla* of land against the defendants-respondents, who are mortgagors, under a deed of mortgage, dated the 23rd February 1894. According to the terms of the mortgage-deed, the plaintiff was entitled to receive a certain amount annually by way of profits from the mortgagors who were to remain in possession of the land mortgaged; and in the event of non-payment of the amount of profits agreed upon he was entitled to sue for recovery of the profits or to obtain possession of the land in lieu of the principal mortgage-money and the profits due.

In 1908 the plaintiff sued and obtained a decree for Rs. 168 as profits due under the mortgage. In June 1913, he brought the present suit for possession of the land; but the suit has been dismissed by the District Judge on the ground that it is barred by Order II, rule 2 of the Civil Procedure Code. The District Judge has cited *Ganga Ram* v. *Abdul Rahman* (1) and an unpublished decision of this Court, *Brij Lal* v. *Ram Rattan* (2), in support of his view.

The facts of this case are, however, different from those of the cases just mentioned, and in my opinion Order II, rule 2, Civil Procedure Code, could not be pleaded as a bar to the present suit. It was admitted by Dulo, one of the mortgagors, in the statement made by him as a witness for the plaintiff on the 14th October 1913 that at the time when the plaintiff brought his suit for recovery of profits in 1908 the mortgagors were not in possession of the land in suit, which forms part of a large *khata* in which other proprietors are also co-sharers, and that the whole of this joint *khata* was then in the possession of the third parties as mortgagees under a separate deed of mortgage for a consideration of Rs. 12,000. This fact sufficiently distinguishes the present case from those relied on by the District Judge, inasmuch as it is clear that the possession of the land being with third parties, and not with the mortgagors, the plaintiff was precluded in 1908 from bringing a suit for possession of it against the mortgagors under the terms of the mortgage-deed; and he was also clearly precluded from suing the mortgagees of the whole joint *khata* to redeem the mortgaged area covered by his own mortgage-deed, as partial redemption of the mortgage was out of the question.

For the reasons given above, I hold that Order II, rule 2, Civil Procedure Code, does not apply to the present case; and I accordingly accept this appeal and setting aside the decree of the District Judge send the case back for decision on the merits.

*Appeal accepted*; *Case remanded.*

(1) 28 P. R. 1907.

(2) 17 Ind. Cas. 581; 268 P. W. R. 1912.

## SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 43 OF 1913.

August 5, 1915.

*Present*:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

FIRM OF RUTTONJI BURJORJI—DEFENDANTS—APPELLANTS

*versus*

FIRM OF MOTUMAL BHAGCHAND—PLAINTIFFS—RESPONDENTS.

*Contract Act (IX of 1872), ss. 37, 38 (3)—Delivery of goods—Vendor, duty of—Vendee, right of, to refuse to accept, after drawing samples.*

A vendor is (apart from special contract) under no obligation to see that the purchaser takes delivery within time; all that he has to do is to offer delivery within time and give all customary assistance to the purchaser in taking delivery. [p. 721, col. 2.]

Where it is necessary for the vendee before accepting delivery to take samples and analyse the same, to satisfy himself that the goods tendered are according to the contract, the vendor should tender goods for delivery sometime before the date specified in the contract, so as to give the vendee reasonable opportunity for doing these acts. [p. 721, col. 1.]

A vendee after accepting the tender of goods for delivery and drawing samples cannot refuse to accept delivery on the ground that the goods were not tendered for delivery in time. [p. 721, col. 1.]

Appeal against the decision of Mr. Hayward, A. J. C., reported in 24 Ind. Cas. 883.

Mr. *E. Raymond*, for the Appellants.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Respondents.

### JUDGMENT.

CROUCH, A. J. C.—The facts as found by the lower Court, as far as they are required to be stated for purposes of this appeal, are that plaintiffs Motumal Bhagchand had between the 29th December 1911 and 1st February 1912 contracted to sell to the defendants Messrs. Ruttonji Burjorji & Co. 500 tons of rape-seed at rates varying from Rs. 43 to Rs. 45 per candy. Delivery was to be by Sunday, the 25th February 1912, and plaintiffs had been directed to deliver 475 tons to Messrs. Ralli Brothers and 25 tons to Messrs. E. D. Sassoon & Co. Before a vendor can give delivery on behalf of his purchaser to a European firm, it is necessary for the purchaser either to make a contract for the sale of goods to the European firm or to otherwise arrange that they shall take delivery on his behalf and to hand the vendor a delivery order requesting the firm to accept the goods against such and such contract on his behalf. The delivery orders in this case were not received by the plaintiffs until 5 P. M. on Friday the 23rd February. They had recently delivered to E. D. Sassoon & Co. 25 tons and to Ralli Brothers 125 tons, and they instructed the two firms to appropriate the goods to defendants' contracts. Messrs. Ralli Brothers did as requested, but Messrs. E. D. Sassoon & Co. refused to appropriate, on the ground that the defendants had not sold the goods to them or made any arrangement for their acceptance. On Saturday morning plaintiffs collected the dealers from whom they had in turn purchased the rape-seed and arranged with Messrs. Ralli Brothers for samples to be drawn. They were drawn sometime during the morning. Nothing was done on Sunday. On Monday Messrs. Ralli Brothers took out the analysis and would have taken delivery but defendants directed them not to do so. Between the contract dates and the 25th February the market rate of rape-seed had fallen heavily. The lower Court has found that defendants were to blame for the contracts not being completed and has awarded the plaintiffs damages which represent the difference between the contract rates and the rates on due date.

Defendants now appeal, and Mr Raymond on their behalf contends that plaintiffs did not, as a matter of fact, tender 350 tons on the 24th February, that as Sunday was a "*dies non*" delivery had to be completed on 24th, and that as delivery was not completed on that day and time was of the essence of the contract, Messrs. Ruttonji Burjorji were fully entitled to refuse delivery on Monday.

Dayaram (Exhibit 6), manager of plaintiffs' firm, swears that on Saturday, the 24th, Messrs. Ralli Brothers' godown keeper drew samples from the lots amounting to about 5,000 bags (500 tons), that on Monday all the samples but two had been analysed by 3 P. M. Sampling orders for this quantity of goods have not been produced but we have on record a very large number of sampling orders and several statements of samples drawn, and the lower Court was of opinion that this somewhat intricate record has afforded strong corro-

boration of the allegation that samples for 475 tons were actually drawn on Saturday the 24th by Messrs. Ralli Brothers. In arguments Mr. Harchandrai for respondents has altogether failed to show how the 350 tons were made up; on the other hand appellants have equally failed to show that the learned Judge's inference from the Exhibit was not justified. We are, however, quite satisfied that plaintiffs had the goods available for tender against the contracts, for immediately on defendants refusing to take delivery of the goods, on Monday the 26th plaintiffs forthwith made a fresh contract with Messrs. Ralli Brothers for the sale to them of 1,279 candies, say 376 tons "Ready Delivery". As the market rate on due date was Rs. 39-8-0 plaintiffs had the strongest reason for fulfilling their contract and there are no grounds whatever, for supposing that they were not willing and able to do so.

Mr. Raymond's contention that as plaintiffs did not, as a matter of fact complete delivery by the 24th, defendants were entitled to rescind, is based on a misconstruction of the law. Plaintiffs are entitled to their damages if they can show that they offered to perform their contract and defendants refused acceptance (section 37, Contract Act). That offer had to be made at the time which would give the purchaser a reasonable opportunity to take samples, analyse, weigh and take delivery. But the goods were offered for sampling, that is, they were offered for delivery in fulfilment of the contract, as soon as was practicable after receipt of the delivery orders. Arrangements could not have been made for drawing samples after 5 P. M. on Friday, except at the cost of exceptional exertions and great inconvenience to a large number of people. Further, Messrs. Ralli Brothers, by actually drawing samples on behalf of defendants for whom they were to take delivery, accepted the offer of delivery as a good one. It is the case of both sides that delivery of the goods could have been completed by Saturday evening, if Messrs. Ralli Brothers had chosen to use expedition.

The whole process of offering and taking delivery of transferring ownership and possession under a contract for the sale of a produce in Karachi, is a complex one which includes several processes, *viz*:—

1. Tender of the goods, *i.e.*, offer of delivery. 2. Drawing samples. 3. Analysis of the samples. 4. Agreement to the analysis by both parties. 5. Weighing of goods. 6. Removing the goods to the purchaser's godown, *i.e.*, taking of delivery.

Now, the vendor is (apart from special contract) under no obligation to see that the purchaser takes delivery within time; all that he has to do is to offer delivery within time, and give all customary assistance to the purchaser in taking delivery. The process of drawing samples, analysis, weighing and removal (it is admitted that delivery was to be in vendor's godown) are processes of which the performance rests with the purchaser, and where, as in this case, taking of delivery was delayed owing to purchaser's agent postponing analysis until the day after due date, it is little less than absurd to seek to hold the vendor guilty of the breach. The vendor does not contract to complete the analysis by a certain time; he gives merely an implied warranty that he will do nothing to hinder the process, and that he will raise no unreasonable objection to the analysis as declared. I have no doubt whatever, that the purchasers were responsible for the failure to take delivery of the 350 tons by due date. Had they requested Messrs. Ralli Brothers to expedite the taking of delivery, it would no doubt have done; they deliberately allowed them to suppose that there was no special occasion for using expedition.

There has been no serious attempt to show that the finding of the lower Court that the failure to give delivery of the 25 tons to Messrs. E. D. Sassoon & Co., was due to the fact that defendants had not made arrangements with that firm for acceptance of the goods. It was defendants who failed to carry out their contract.

No objection has been taken to rates allowed.

I would dismiss the appeal with costs and dismiss the cross-objections.

PRATT, J. C.—I concur. The drawings of samples and analysis are acts to be performed by the buyer, in order to satisfy himself that the goods tendered for delivery are according

to the contract. Section 38 (3) requires that the buyer shall have this facility and, therefore, the tender of delivery must be made sometime before the date specified in the contract.

Here the buyer applied for delivery (as he was bound to do under section 93) when he sent the delivery orders on Friday evening. The seller then tendered delivery on Saturday morning when Rallis proceeded to draw samples. If this tender had been made too late to afford Rallis a reasonable opportunity of examining the goods, Rallis might have refused to accept the tender. But Rallis accepted the tender and were in process of drawing and testing samples. That is, they accepted the tender subject to analysis, and after that they could only refuse to accept delivery on the ground that the goods were not of the contract quality. This objection was not taken and the buyer had no right to intervene because Rallis' analysis extended beyond the contract date. That point was concluded when Rallis accepted the tender on Saturday morning.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

APPEALS AGAINST ORDERS NOS. 8 TO 12 OF 1913.

December 9, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

*Sri Raja* VARADARAJA APPA RAO BAHADUR ZAMINDAR GARU

—PLAINTIFF—APPELLANT IN ALL

*versus*

IN A. A. O. NO. 8 OF 1913

KATNANI KURUVANNA AND OTHERS—

DEFENDANTS—RESPONDENTS

IN A. A. O. NO. 9 OF 1913

UDDAGIRI BHUSHAYYA—DEFENDANT—RESPONDENT

IN A. A. O. NO. 10 OF 1913

PRABHALA SUBBIAH AND OTHERS—

DEFENDANTS—RESPONDENTS

IN A. A. O. NO. 11 OF 1913

MODHUMANTALA SUBBADU AND OTHERS

—DEFENDANTS—RESPONDENTS

IN A. A. O. NO. 12 OF 1913

KUNUMALU KUTUMBAYYA AND OTHERS

—DEFENDANTS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), ss. 3, cl. 2 (d), 8 — Estate — Grantee owning* kudivaram *— Village, if estate—Occupancy rights, absence of, in tenants—Presumption of* kudivaram *being in landlord, if justifiable—Exception to s. 8, scope of.*

A village will not cease to be an 'estate' within the meaning of clause 2 (*d*) of section 3 of Madras Estates Land Act, 1908, merely because the grantee owned the *kudivaram* in certain lands included therein. To remove a village from the definition, it is necessary that the grantee should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation. [p. 723, col. 1.]

Though the fact that the tenants had no occupancy rights in the suit lands may give rise to a presumption that the landlord owned the *kudivaram* in those lands, that is insufficient to remove the case from the definition in section 3 (*z*) (*d*) of the Madras Estates Land Act. [p. 723, col. 2.]

The exception to section 8 of the Madras Estates Land Act, I of 1908, does not apply to cases where at any time before the passing of the Act, the *kudivaram* was held by a person who subsequently became, as *inamdar*, possessed of the land revenue. It has reference only to cases in which a person who is already *inamdar* acquires the *kudivaram* right. [p. 723, col. 2.]

Appeals against the decrees of the District Court of Kistna at Masulipatam, in Appeal Suits Nos. 84 to 88 of 1912, preferred against those of the District Munsif of Bezwada, in Original Suits Nos. 504 to 508 of 1910, respectively.

These appeals coming on for hearing and having stood over for consideration till the 16th April 1914, the Court (Ayling and Oldfield, JJ.) delivered the following

723 JUDGMENT.—The only question for disposal by us is one of jurisdiction—whether these suits are cognizable by the Civil or Revenue Courts. This, in its turn, depends on whether the lands to which they relate form part of an 'estate' within the definition given in section 3 of the Madras Estates Land Act.

According to defendants (respondents) they fall within either clause (*d*) or clause (*e*) of the definition—section 3 (2) of the Act. The District Judge holds that clause (*e*) is applicable and that the suits are not cognizable by a Civil Court.

Herein we must hold him to be wrong. The present case cannot be distinguished from that of *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (1), which was disposed of after the District Judge's decision and which we must follow. This is clear authority for holding clause (*e*) of the definition to be inapplicable to the present case.

(1) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.

Respondents, however, rely on clause (*d*), the applicability of which was considered but not decided by the District Judge and also on the exception to section 8 of the same Act.

As regards clause (*d*) we may say at once that there appears to have been a grant 200 years ago of the land revenue of the village to the *agraharamdars* (to whose rights plaintiff-appellant has succeeded); and this grant was confirmed and recognized by the British Government by enfranchisement at the time of the Inam Settlement. So far the definition applies. But, to make it entirely applicable, it is necessary that the grant should have been of the land revenue alone "to a person not owning the *kudivaram* thereof." It is in connection with the last words that the chief difficulty arises, though it is argued on behalf of appellant in the alternative that the grant may have included both *varams*. What does "thereof" mean? This has been the subject of consideration in more than one recent case in this Court—notably in *Adusumulli Suryanarayana* v. *Acchutta Potanna* (2) and *Ponnuswamy Padayachi* v. *Karupudayan* (3), and most recent of all in a case, as yet unreported, decided by Sadasiva Aiyar and Seshagiri Aiyar, JJ. [*Upadrasata Venkata Sastrulu* v. *Deri Sitaramudu* (4).] These cases, however, turned mainly on the existence of waste or unoccupied land in the village at the time of the grant and the question of the *kudivaram* or occupancy right in such land. With this difficulty we are not now concerned. But we are clearly of opinion that to remove a village from the definition, it is necessary that the grantee should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation. In other words, a village will not cease to come under clause (*d*) merely because the grantee owned the *kudivaram* in certain lands included therein—not even in so far as those lands are concerned. As Seshagiri Aiyar, J., puts it in the latest case, "what the Legislature meant to lay down was that no *kudivaram* rights should have been granted in the lands which were under the occupancy of tenants; any other construction will lead to difficulties."

Now, in the present case, appellant contends that at the time of the grant, the *agraharamdars* held the *kudivaram* of all the cultivable lands of the village. But the finding of the District Judge (which so far as it goes is not impugned) is merely to the effect that at the time of suit, the tenants (respondents) had no occupancy rights in the suit lands. This may be taken as tantamount to saying that the appellant owned the *kudivaram* in those lands. But this, as pointed out above, is insufficient to remove the case outside the definition of clause (*d*).

It remains to consider the exception to section 8, on which appellant relies in the alternative. This provides that where the *kudivaram* interest in any land comprised in an estate falling within clause (*d*) of section 3 (2) is acquired by the *inamdar*, such land shall cease to be part of the estate. Appellant claims the benefit of this proviso for the suit lands, in case it is held that the *inam* village falls within clause (*d*). Mr. Govindaraghava Aiyar argues that it would apply even to cases where at any time before the passing of the Act, the *kudivaram* was held by a person who subsequently became, as *inamdar*, possessed of the land revenue. We do not think the wording can bear this interpretation. It appears to have reference only to cases in which a person who is already *inamdar* acquires the *kudivaram* right. He lays more stress, however, in the argument that as the *kudivaram* is now found to vest in the *inamdar*, it follows that he either owned it at the time of the grant or acquired it since. In the former case he relies on clause (*d*), in the latter on the exception to section 8. In support of his argument he quotes the observations of Miller, J., in *Ponnusamy Padayachi* v. *Karupudayan* (3).

If, however, our interpretation of these provisions of law is correct, it does not follow that one or other of them must necessarily apply. It is conceivable that the *inamdar* held the *kudivaram* of the suit lands at the time of the grant, but did not hold the *kudivaram* of other cultivated lands in the village. In that case neither would apply

(2) 22 Ind. Cas. 339; 26 M. L. J. 99; 15 M. L. T. 268; 38 M 608.

(3) 24 Ind. Cas. 217; 26 M. L. J. 285; 15 M. L. T. 299; 38 M. 843; 1 L. W. 218.

(4) 24 Ind. Cas. 224; 26 M. L. J. 585; 38 M. 891.

With all deference to the weighty remarks of Miller, J., this contingency does nct appear to have been presented to him and it may very well be that it did not arise in the circumstances of the case he was considering.

Mr. Govindaraghava Aiyar argues that our interpretation of the Act leads to the apparent anomaly that an *inamdar*, who, at the time of grant, owned the *kudivaram* of certain lands in the village, will be worse off as regards power to evict with respect to such lands than with respect to other lands of which he may subsequently acquire the *kudivaram*. Assuming this to be so, we do not think the anomaly is such as to justify us in straining the language of the Act beyond its natural meaning in order to avoid it. As the facts found are insufficient to enable us to determine the question of jurisdiction, we must call for a finding on the following issues : —

(1) "Did the original grant include the *kudivaram* of the village ?"

(2) "Did the grantees enjoy the *kudivaram* rights in all cultivated lands in the village, at the time of the original grant ?"

(3) "Did they or their legal representatives acquire *kudivaram* rights in the plaint lands subsequent to the original grant and if so, when and how ?"

Fresh evidence may be adduced on both sides.

The finding will be submitted within 31st of July 1914 and seven days are allowed for filing objections.

In accordance with the order contained in the above judgment, the District Judge of Kistna at Masulipatam submitted the following

FINDINGS.—These appeals have been remanded by the High Court for findings on the following issues :—

1. Did the original grant include the *kudivaram* of the village ?

2. Did the grantees enjoy the *kudivaram* rights in all the cultivated lands of the village at the time of the original grant ?

3. Did they or their legal representatives acquire *kudivaram* rights in the plaint lands subsequently to the original grant and, if so, when and how ?

2. No title-deeds are available to set forth the grant and, therefore, issues 1 and 2 must be decided on inferences from subsequent facts. Exhibit M, a certified copy of the extract from the Inam Fair Register of the village of Nagavarapupad *agraharam*, dated 21st May 1860, shows that the village was granted in A.D. 1708 (*Fasli* 1117) and that the original grantees were Seetapalli Sidhanti and others—the tenure being *chaturbhagam*, *i. e.*, one-fourth of the produce to be given to the *zemindar*, the grant being made by Pedda Narasimha Appa Rao from out of his Nuzvid Estate. The grant was hereditary and in 1860 it is shown as held in five equal shares.

Though the tenure prescribed quarter share for the *zemindar*, this was in respect of Zonna and eradam rain-fed crops, garden crops such as tobacco, chillies, &c., being subject to a special rate per *kunta*. This grant is mentioned in a Register of *Fasli* 1207 (A.D. 1798). It is noted in Exhibit M. that from *Fasli* 1255 to 1260 (A.D. 1846-1851), the *zemindar* and *agraharamdars* agreed that Rs. 175 a year should be paid by the latter to the former in lieu of the quarter share and that from *Fasli* 1268 (A. D 1859) a five years' lease for Rs. 125 took the place of this agreement. It was then stipulated that the *agraharamdars* should manage with the sub-*ryots* as best they could.

Subsequently, at varying periods some of the *inam* lands were granted absolutely by the *agraharamdars* to the *zemindar*, the present appellant (plaintiff), in lieu of the quarter share (*chaturbhagam*) due to him under the original tenure on the whole holding of the several *agraharamdars* who so relinquished part of their holding to free the remainder.

3. Although this Court has to record a finding on issues 1 and 2, yet it appears to me that the burden of proving that the original grant was only of the *melvaram* of the village and that the grantees did not enjoy the *kudivaram* right in all the cultivated lands of the village at the time of the grant lies on the respondents (defendants), who seek to oust the jurisdiction of the Civil Courts in which the suit was brought, by setting up the plea that the suit lands form part of an estate, and that under the

Estates Land Act the jurisdiction lies with the Revenue Courts in the first instance.

In support of this view, I rely on the decision in Civil Revision Petition No. 223 of 1913 reported as *Ramala Venkataswami* v. *Kanumalla Narasimhayya* (5) following *Srimath Kidambi Jagannatha Charyulu* v. *Pidipiti Kutumbarayadu* (6) and *Ravulapati Papi Reddi* v. *Nanduru Peda Venkatacharyalu* (7).

4. I will, therefore, deal with the respondents' contentions in respect of these issues first.

5. They contend that the grant was one of *melvaram* only and that *chaturbhagam* is half *melvaram* and is equal to a quarter of the produce as the *melvaram* and *kudivaram* shares would be equal, that is to say, it was a grant of a share of revenue only and not a grant of land subject to a charge of a quarter of a produce thereof.

6. They contend that the grantee was a newcomer and it would not be likely that he was granted 20 *kattis* of waste land whereas the grant of a share in the revenue was not unlikely.

7. They point out that in Exhibit N and Exhibit VI, there are *kattubadi inams* and rent-free *inams* styled *sarvadumbala* and that these *inams* would have been granted by the *zemindar* before the *inam* now in question was granted to the astrologer. Otherwise what would have become of the *zemindar's* quarter share, if rent-free *inams* were granted by the *agraharamdars* (*inamdars*), as appellant contends was the case?

8. Then they contend that the *agraharamdars* were not residents as Exhibit M shows that sharers Nos. 2, 3 and 4 belonged to other villages than Nagavarapupad and there is no room to believe that they belonged originally to that village when the grant was made.

9. Their other contentions are to be regarded as replies to the contentions of the appellant and will be dealt with later.

10. Now with regard to the question whether *chaturbhagam* was one-fourth of the produce of land cultivated by the grantees of land, or one-fourth of the produce of land cultivated by tenants who had to pay half of the produce by way of *melvaram*, so that the *inam* would consist in a grant of half the *melvaram* only, *i.e.*, a grant of revenue and not of land, it appears to me that the presumptions to be drawn in this case are all in favour of the *inam* being a grant of land subject to payment of one-fourth share of the produce, and not a grant of half the revenue due by way of *melvaram*, on a holding of, which the *kudivaram* of the cultivated lands had already been granted to others.

11. In Exhibit M, which is an extract from the Inam Fair Register, 21st May 1860, we see that, as already observed in paragraph 2 of this finding, there was a special rate for garden crops, such as tobacco and chillies, and instead of the one-fourth share of the produce (*chaturbhagam*) a rate per *kunta* was imposed. Such a tenure presupposes a grant of land and is hardly compatible with a grant of revenue, in which case one would expect a grant of *melvaram* only on a portion thereof and not a grant of produce which varies according to the crop, *i.e.*, one would expect the grant to be in terms of the *melvaram*, and not in terms of the total produce. Then as the *inamdar* would have to collect the *melvaram* if the grant were one of half the *melvaram* only, he would not get a very substantial share for his trouble in the case of a village of which, as seen from Exhibit M, the average extent of cultivation in *Faslis* 1261 to 1267, 150 years after the grant, was only $9\frac{3}{4}$ *kattis* out of 20.

12. Then with regard to the contention that a newcomer could not get a grant of 20 *kattis* of waste land but would be more likely to get a share of revenue, we must consider whether there was likely to have been such cultivation that a share of revenue would have been an attraction. From the large amount of uncultivated land 150 years later, it is clear that when the grant was made, there could not have been much if any cultivation, and to my mind, a grant of waste land, which could not have been in any great demand on a tenure of one-fourth of the produce of such land as was cultivated, would only just provide the necessary attraction to induce

(5) 26 Ind. Cas. 357; 16 M. L. T. 596.
(6) 25 Ind. Cas. 891; 27 M. L. J. 233.
(7) 26 Ind. Cas. 67; 27 M. L. J. 567; 16 M. L. T. 247; (1914) M. W. N. 794

the astrologer and his family to settle down. Any land and doubtless much of better quality, could be had on the ordinary *melvaram kudivaram* tenure of sharing the produce equally, and the grant to the astrologer would have opened up a source of revenue to the *zemindar* in addition to providing him with the services of a *Brahman* astrologer.

13. Then with regard to the fact that in the village there are *kattubadi* service and rent-free *inams*, I cannot agree with the respondents' contention that this pre-supposes a pre-existing grant by the *zemindar* before the suit *inam* was granted. The appellant contends that these *inams* were granted by the *agraharamdars*. This view is reasonable. It appears that the worthy astrologer had five sons and if he and his sons settled down they would have formed the nucleus of a little *Brahman* settlement, and as the village grew up, village servants and a *purohit* would be necessary, and it is quite likely that any lands granted to these individuals who play a recognised part in village life, would be granted by the *inamdars* free of payment, or excluded by the *zemindar* himself from the operation of the *chaturbhagam* tenure. The condition existing at the time of these grants too is lost in the mists of antiquity and if any inferences are to be drawn, I incline to the appellant's view.

14. Then with regard to the fact that Exhibit M shows that sharers 2 to 4 are not residents of the village, I can only say that it appears probable that the original grantee Seethapalli Vissanna who had five sons as per Exhibit V, genealogical tree filed by respondents themselves, would have settled down and cultivated the lands through his sons. The grant was to Sidhanti (astrologer) *and others*. Others may well have been his sons. Then when he died his sons would have the *inam* in five shares and hence probably the origin of the five equal shares shown in Exhibit M as still existing. Thereafter the migration of some of the sons to neighbouring villages is not unlikely. The land was at that time rain-fed and probably most, if not all, waste; and so some of the sons while retaining a share in the title-deed might easily move off elsewhere.

15. So far, the respondents cannot be held to have proved that the suit lands are part of an estate and they have not, in my opinion, discharged, as they ought to do, the burden of the proving that the original grant was only of the *melvaram* of the village and that the grantees at the time of the grant did not enjoy the *kudivaram* right in all the cultivated lands of the village, *i.e.*, that there were some cultivated lands of which the *kudivaram* was with others at the time of the grant. I must, therefore, find against them, if the burden of proof be held to lie on them.

16. But as I am called on to find explicitly on issues 1 and 2, I will now deal with the appellant's contentions that both issues would be found in his favour even if the burden lay on him of proving what he asserts, *viz.*, that the grant was one of land, *viz.*, *melvaram* and *kudivaram* and not of revenue, *i.e.*, of waste and not of cultivated land or if this be not so, then such land as was already cultivated was all held by the grantees at the time of the grant, so that immediately the grant was made, they possessed actual or potential *kudivaram* in the entire holding.

17. The appellant bases his case on the following grounds: Exhibit N, a *ghoshpara* or abstract showing the whole extent of land and its distribution into waste, cultivated, fallow, etc., as made up from *chittas* and dated *Fasli* 1253 (A. D. 1843-44), gives the following information about the suit village.

There were only 13 thatched houses with 33 *Malas* of whom 23 were adults and 19 women of whom 12 were adults. There were 14 ploughs. The Village Magistrate was a *Brahman*, Naganna of the Seethapalli family to whom the grant was made. There were no *Kapus* to whom *pattas* were granted; no head *Kapu*; 13 *ryots* all residents—no absentee *ryots*. The extent of land cultivated was $8\frac{1}{2}$ *kattis*. The total yield was 6 *putties* 16 *tooms* 24 *manikas*. The amount available for division between *zemindar* and *agraharamdars* after deducting the payments to village artisans was 5 *putties* 9 *tooms* $5\frac{1}{2}$ seers, of which the $\frac{3}{4}$th share of the *agraharamdars* was 4 *putties* 1 *toom* 41 odd *seers* and the $\frac{1}{4}$th share of the *zemindar* was 1 *putti* 7 *tooms* 13 *seers*. This document agrees very fairly with the state of affairs shown by Exhibit M of 15 years later.

18. As the *agraharamdars* were entitled to $\frac{3}{4}$ths of the produce of the cultivated lands with

small deduction for village service and as there were no *Kapus* with *pattas*, and none but resident *ryots* of whom there were only 13, and as the Village Magistrate was a *Brahman* of the *agraharamdars'* family, it is contended that the settlement consisted of *agraharamdar Brahmans* only and, that if the grant was not originally of uncultivated land, such cultivated land as existed at the time of the grant must have been occupied by the grantees already as *kudivaramdars*.

Even as late as 1876, Exhibit VI shows that the *agraharamdars* cultivated 83·25 acres while the *ryots* cultivated 147·92, and the extent waste or unfit for cultivation was 105·29—a total of 330·46. But the new survey has fixed the area at 600 acres of which according to the *kurnam*, P. W. No. 2, 100 acres only are under *ryots* and the rest under the *agraharamdars* in 1911. Of the 100 acres all were leased by the *zemindar* except 8 acres leased by the *agraharmdars* and the *zemindar* had taken over land from the *agraharamdars* in lieu of the *inam* quarter share.

All this, it is represented by appellant, goes strongly to show that there were no *ryots* holding *kudivaram* except the *agraharamdars*.

19. The *agraharamdars* too were residents of the village, and held large grants of village site, and so were unlike non-resident *Brahman inamdars* who have been held presumably only to have been granted *melvaram* rights. There were too no *amarakam* accounts and no *pattas*. Had there been other *kudivaramdars* as well as *melvaramdars* and the *zemindar*, one would have expected such accounts and *pattas*. P. W. No. 1 says that no accounts were kept by the *agraharamdars*. D. W. No. 2 says that there was no exchange of *pattas* and *muchilikas* in the suit village to his knowledge.

20. In Exhibit A, the agreement between the *agraharamdars* and the *zemindar*, it is stated that the produce of the crop in the village shall be kept as security by the *agraharamdars*. This it is urged implies that the crop was raised by them and that they are not mere *melvaramdars*.

Again in the agreement Exhibit B, page 12, it is entered "whether *we* cultivate or not." (This is the correct translation of the Telugu in my opinion, and the respondents do not dispute the translation.) This is taken by the appellant to imply that the *agraharamdars* are the cultivators in the main, and any others who cultivate are only sub-*ryots*, the use of which expression in Exhibit M would make it appear that the *agraharamdars* were the *ryots* and the others held under them by leases, etc., and not with the occupancy right. The respondent would take "whether *we* cultivate or not" to mean "whether we cultivate ourselves or through our tenants (who might have occupancy right)". I prefer the appellant's contention.

21. Further when land was compulsorily acquired for making a channel in 1894, (*vide* Exhibit O) compensation for the portion of the suit village land so acquired was paid entirely to *Brahman agraharamdars*, whereas in adjacent villages, tenants got 3/5ths of the award and the *zemindar* 2/5ths. As in the suit village the *agraharamdars* got all the award, it is contended by appellant, and with some show of reason, that there were no other *kudivaramdars* or they would have claimed compensation. Of course it might have happened that the land so acquired might not have been part of a *kudiraram* holding of a *non-agraharamdar* though such holding existed.

22. There is thus no direct proof that the *agraharamdars* were granted *melvaram* and *kudivaram* rights in the village (*i.e.*, that they obtained a grant of land and not of revenue) or that they held the *kudivaram* rights of all the cultivated lands in the village at the time of the grant, but as such direct proof is not to be expected in the case of a grant made so far back as A.D. 1708, we must proceed upon inferences from facts which can be shown to have existed later, and I am of opinion that issues 1 and 2 must be found in favour of the appellant (plaintiff), even if the burden of proof did not lie on the respondent, as I hold it does.

23. I, therefore, find that the grant must be presumed to have been one of land and not of revenue, that is to say, it included the *kudivaram* of the village, and that if it was not a grant of land including the *kudivaram* of the village, it was because the grantees already possessed the *kudivaram* of such land as was already cultivated. The respondents have not satisfied me that the grant was of *melvaram* only, or that any *ryot* other than the *inamdars* held *kudivaram* rights in the village at the

time of the grant, but apart from that I am of opinion that the balance of probabilities is in favour of the grant being one of waste land (*melvaram* and *kudivaram*) or of a village of waste and cultivated lands to *ryots* who already held *kudivaram* of all the cultivated lands.

24. I accordingly find the 1st and 2nd issues in the affirmative, taken alternatively, that is to say, that the original grant included the *kudivaram* of the village and if it did not, then the grantees must be held to have enjoyed the *kudivaram* rights in all the cultivated lands in the village, at the time of the original grant. Which of these alternatives is correct, it is impossible to say, owing to the fact that no record remains of the original grant. The former appears more probable, but that one or the other must be decided in the affirmative, I regard it to be presumed. That the contrary should be presumed, the respondents in my opinion have not made out, and if the burden of proving the negative of both issues lie on them, I hold that they have failed to discharge it.

25. As regards the 3rd issue, this is a last resort for appellant in case both issues 1 and 2 are decided against him. He would then shelter himself behind the exception to section 8 of the Estates Land Act and plead that he has acquired the *kudivaram* of the suit lands in addition to the *melvaram* and subsequently to the grant of the *melvaram* in the *inams*. It is for him, of course, to prove that he has the benefit of the exception. Exhibits D, E and H are surrender deeds by which the *agraharamdrs* gave half their lands to the *zemindar* to extinguish the *inam* payment on their holdings.

26. It has been held that surrender or abandonment must be regarded as acquisition for the purposes of this exception to section 8 of the Act: *Ponnuswamy Padayachi* v. *Karupudayan* (3), but in *Upadrasata Venkata Sastrulu* v. *Devi Sitaramudu* (4) following the view of Sadasiva Aiyar, J., in *Adusumulli Suryanarayana* v. *Acchutta Potanna* (2) the opposite view was held.

The plaintiff relies on abandonment and surrender of the *kudivaram* right to the *inamdars*, and not on acquisition for valuable consideration.

27. That the tenants in these lands abandoned their occupancy rights if they even had any, is made out from the following documents :—

In respect of suit No. 504, the lands of which were surrendered to the plaintiff by the *inamdars* in Exhibit E, we have a lease Exhibit C for *Fasli* 1313 to the defendant in suit No. 504, followed by Exhibit D for *Faslis* 1314-18, which contains a condition that the tenant should quit at the end of the term.

In respect of suits Nos. 505—8. Exhibits D and H being the surrender-deeds we have

(1) Exhibit G for *Fasli* 1313 to defendants in 505, 507, 508 suits, followed by Exhibits F4, F1, F2, F3 to defendants in Nos. 505, 506, 507, 508 with notice to quit at the end of the term *Faslis* 1314-1318.

The *kists* were increased heavily.

In the face of these conditions to quit and increase of *kists*, it is not likely that any *kudivaram* claim on the part of the tenants could be held then to exist. How and when the *kudivaram* was acquired, there is no direct proof, but throughout there is nothing to show that *kudivaram* was held in recent years by others than the *inamdars*.

28. Following the latest ruling, *Upadrasata Venkata Sastrulu* v. *Devi Sitaramudu* (4), I find the 3rd issue in the affirmative, namely, that subsequently to the original grant, the grantees did acquire *kudivaram* rights (if they did not already possess them) subsequently to the grant.

29. In the result I find all three issues alternatively in the affirmative, on presumptions drawn from the balance of evidence establishing inferences in favour of the appellant, there being no direct proof, but if, as I think they must, the respondents should prove the negative of issues 1 and 2, then I unhesitatingly find that they have failed so to do.

These apppeals against orders came on for final hearing after the return of the findings before Abdur Rahim and Ayling, JJ.

Messrs. *L. A. Govindaraghava Iyer* and *P. Nagabhushanam*, for the Appellant.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—We have heard the learned Vakil who appeared for the respondents fully, and we do not think that the findings of the learned District Judge are open to question before us. We accept those findings,

The result of that will be that the plaintiff will have a decree for ejectment and also for occupation rent at the rate of Rs. 40 per acre per year from *Fasli* 1319 till the date of the delivery of possession. The appellant will have his costs throughout.

*Appeal allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 456 OF 1913.

June 15, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

*Raja* ABUL HASAN KHAN—DEFENDANT—APPELLANT

*versus*

*Musammat* JAGWANTA—PLAINTIFF—RESPONDENT.

*Mortgage—Redemption—Mortgagee and purchaser of portion of equity of redemption, arrangement between, how far binding on mortgagor—Mortgage, extinguishment of—Merger—Mesne profits with interest thereon—Limitation Act (IX of 1908), Sch. I, Art. 105—Creditor having debtor's funds for payment to himself—Limitation.*

A usufructuary mortgage was made of two properties *a* and *b*. The mortgagor sold his equity of redemption in respect of *a* to *P*, leaving with him a portion of the consideration money to discharge the mortgage-debt. Instead of discharging the debt *P* sold his rights in the equity of redemption purchased by him to the mortgagee, leaving with the latter a portion of the consideration money, less than what had been left by the mortgagor with *P* himself, to be credited towards the mortgage-debt. Subsequently the mortgagor brought a suit against the mortgagee for redemption of *b*, contending that the entire mortgage-debt having been left with *P*, whose rights had been purchased by the mortgagee, she was entitled to possession of *b* without any payment and to claim from the mortgagee the surplus profits of *b* with interest thereon from the date of the mortgagee's purchase of the equity of redemption. The mortgagee contended that only so much as had been left with him by *P* could be credited towards the mortgage-debt, and that the mortgagor was not entitled to claim any surplus profits or any interest thereon:

*Held*, that the arrangement between the mortgagee and *P*, so far as the leaving of the consideration money to be credited towards the mortgage-debt was concerned was not binding on the mortgagor. [p. 730, col. 2.]

*Held*, also, that the mortgage became extinguished when the mortgagor's right merged in the mortgagee with a liability to satisfy the entire mortgage-debt. [p. 731, col. 1.]

*Held*, further, that the mortgagor was entitled to possession and surplus profits together with interest thereon. [p. 731, col. 1.]

*Haji Abdul Rahman* v. *Haji Noor Mahomed* 16 B. 141, referred to.

*Held*, lastly, that the limitation applicable for the recovery of the said profits and interest was that provided by Article 105, Schedule I of the Limitation Act. [p. 731, col. 2.]

No question of limitation arises where a creditor has funds belonging to the debtor at his disposal charged with an obligation to pay himself out of that fund. [p. 731, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 27th June 1913, upholding the order of the Munsif, Fatehpur, dated the 21st April 1913.

Mirza *Sami Ullah Beg*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for redemption of a 1-anna 4-pies share in the village Chakia. It appears that on the 21st July 1884 three mortgages were made by different sets of persons in favour of Taj-ud-din, who sold his rights therein to the father of the defendant-appellant on 7th September 1887. One of the mortgages was made by Mahesh Singh, the husband of plaintiff-respondent, wherein the property mortgaged consisted of a 1-anna 4-pies share in the village Chakia and a 1-anna 4-pies share in the village Barkharia. The other mortgage was made by Madho Singh and Ram Bakhsh Singh, and comprised certain share of the said villages with other property with which this suit has no concern. The third mortgage was made by Parwan Singh and comprised a 1-anna 4-pies share in the village Barkharia. All these mortgagors belonged to the same family. The mortgages bore interest at 1 per cent per mensem and the agreement between the mortgagors and the mortgagee was that the former should deliver possession over the mortgaged property, and that profits realized from the same would be appropriated in reduction of the principal and interest due on the mortgages. The mortgagors did not, however, deliver possession and suits were consequently filed by the father of defendant-appellant, who had purchased the rights of the mortgagee, to recover possession of the

mortgaged properties, and possession was actually obtained by him sometime in August 1888.

The mortgagors subsequently sold the equity of redemption in 6-annas 8-pies share of the village Barkharia to Parmeshar Din in lieu of Rs. 7,500 and left Rs. 5,675 out of t e same with him for payment to the father of the defendant-appellant on account of the money due to him on foot of the mortgages aforesaid. Instead of paying the money Parmeshar Din sold his rights in the equity of redemption of the said 6-annas 8-pies share of the village Barkharia to the father of the defendant-appellant on the 17th March 1893, in lieu of Rs. 7,255, out of which Rs. 3,851 were left with the latter in satisfaction of the decrees obtained by him on the prior mortgages. These decrees were evidently those which the father of the defendant-appellant had obtained for the possession of the mortgaged properties and the intention of the parties to the sale-deed was that the amount left with the vendee was to be credited towards the money due on the mortgages, which were the subject of the decrees.

The plaintiff respondent claimed in the present suit to redeem the mortgage of a 1-anna 4-pies share in the village Chakia made by her husband Mahesh Singh, and her contention was that the entire mortgage-money due by her husband having been left with Parmeshar Din whose rights had been purchased by the father of the defendant-appellant, she was entitled to the possession of her share in that village without any payment. In other words, she contended that the entire mortgage was extinguished when the liability to pay the mortgage-debt passed from Parmeshar Din to the mortgagee himself, and that she became entitled from the date of that extinguishment to the surplus profits of that portion of the mortgaged property which was still left with her.

The Courts below gave her a decree for possession with Rs. 2,649-2 on account of surplus mesne profits. That decree is impugned by the defendant-appellant on the ground that the liability which Parmeshar Din had contracted with the mortgagors to discharge, did not pass to the defendant-appellant's father under the sale-deed executed by Parmeshar Din in his favour, that in any case nothing more than Rs. 3,851, which were left by Parmeshar Din with the father of the defendant appellant, could be credited towards the money due on the prior mortgages, and that the plaintiff was not entitled to claim any surplus mesne profits or interest thereon.

It is indisputable that the mortgagors, including the husband of the plaintiff-respondent, were entitled to a lien for the unpaid portion of the purchase money left with Parmeshar Din for the payment of the prior mortgages which Parmeshar Din had failed to discharge. By the sale-deed of the 17th March 1893 Parmeshar Din undertook to relieve the father of the defendant-appellant from the liability so far as it was in excess of Rs. 3,851, but that release was not binding on the plaintiff-respondent who had a right to enforce her lien for her share of the unpaid purchase-money against the defendant-appellant who had purchased the rights of Parmeshar Din with notice of the said lien. The capacity of the defendant-appellant was thus twofold. He was the representative of the mortgagee of the entire property mortgaged under these mortgages aforesaid, and he was also a purchaser of the rights of the mortgagors in a portion of the mortgaged property. By virtue of that purchase the defendant-appellant had become liable for the amount of the unpaid purchase-money due to the mortgagors by way of a lien or charge on the property purchased. In other words, the defendant-appellant was liable to pay that money to himself in full satisfaction of the previous mortgages or else to make good the lien held by the vendors by paying them the balance of the purchase-money with any interest or compensation that might have become payable in consequence of the default. By the terms of his mortgage, he had agreed to credit Rs. 3,851 towards his mortgage-money and left the rest to be paid by Parmeshar Din, but irrespective of any arrangement that might have been made between Parmeshar Din and the father of the defendant-appellant, the liability of Parmeshar Din to make good the lien had passed with the property to father of the defendant-appellant in its entirety. The interest of the debtor and the creditor had thereby merged in one and the same person

and on general principles of equity the mortgagee was bound to apply the unpaid portion of the purchase-money which was left for payment of his mortgage-debt in reduction of the debt, because the debit and the credit accounts though arising out of different contracts related to the same transaction. The merger of the right of the mortgagor and the mortgagee in one and the same person with a liability to satisfy the entire mortgage-debt operated as an extinguishment of the mortgage and the Court below was justified in passing a decree for possession and surplus profits.

No question of limitation arises where a creditor has funds belonging to the debtor at his disposal charged with an obligation to pay himself out of that fund. An enforcement of the lien under the circumstances was out of the question, because the person in whose favour the obligation was created was himself the person liable to discharge the obligation to the extent of the lien.

The plaintiff is entitled to claim interest on the surplus profits of her share, because, from the date of the satisfaction of the mortgage, the duty of the mortgagee was to place the said surplus at the disposal of the mortgagor. Section 76 of the Transfer of Property Act directs the mortgagee to pay the surplus, if any, to the mortgagor and further directs that if the mortgagee fails to do so he may, when accounts are taken, be debited with the loss, if any, occasioned by such failure. If a mortgagee is entitled to claim interest of his money, he can be made liable for interest on any surplus profit which he may realise after his money is paid up. The conduct of the mortgagee in this case does not entitle him to any consideration or indulgence on that account. In *Charles* v. *Jones* (1) it has been held that a mortgagee makes his mortgage as a security for his debt and has no right to be in possession of the estate after he has paid himself what is due to him. He held the property for the benefit of the mortgagor and is liable for any collections he may make thereafter till the date when he settles the account to close the transaction. This view was followed in *Haji Abdul Rahman* v. *Haji Noor Mahomed* (2). The limitation applicable for the recovery of such surplus with interest thereon is that provided by Article 105 of the Indian Limitation Act, for the debit takes place when the accounts are adjusted. The other pleas are not pressed.

The appeal, therefore, fails and is dismissed with costs. The Court-fee, if any, payable on the surplus will be levied from the plaintiff before an execution is granted in respect of it and will be added to her costs.

*Appeal dismissed.*

(1) 35 Ch. D. 544; 56 L. J. Ch. 745; 56 L. T. 848; 35 W. R. 645.

(2) 16 B. 141.

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## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 272 OF 1914.

November 30, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUBBARAMA AYYAR—DEFENDANT No. 1—APPELLANT

*versus*

P. P. A. R. R. M. ARUNACHELLAM CHETTIAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), ss. 2, 47—Arrest in execution, order deciding legality of—Appeal—Application to set aside* ex parte *decree—Order giving time for payment, whether operates as stay of execution.*

An order deciding the legality of an arrest made in execution of a decree falls under sections 47 and 2 of the Code of Civil Procedure and is appealable. [p. 723, col. 1.]

*Nayana Naickan* v. *Syed Gulam Ghouse*, 5 Ind. Cas. 969; 20 M. L. J. 136; 8 M. L. T. 122, referred to.

An order giving time to pay the decretal amount, passed on an application to set aside an *ex parte* decree, does not by itself operate as a stay of execution of the *ex parte* decree itself. [p. 723, col. 1.]

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, in Execution Appeal No. 697 of 1914, in Original Suit No. 46 of 1914.

FACTS.—The plaintiff obtained against the defendant a decree *ex parte*. The defendant applied to set it aside and for stay of execution of that decree. He was then directed to furnish security on a certain date fixed, but before that date he was arrested in execution of the decree, and he pleaded exemption from arrest on the ground that the order giving him

time to pay operated as a stay of execution of the decree itself.

Mr. *A. V. Viswanatha Sastri*, for Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *K. S. Jayarama Aiyar*, for the Respondents.

JUDGMENT.—A decision on the question whether an arrest made of the judgment-debtor by the officer of the Court is legal or otherwise has been held in *Nayana Naickan* v. *Syed Gulam Ghowse* (1) to fall under sections 47 and 2 of the Civil Procedure Code and we agree with that decision. The preliminary objection that no appeal lies is, therefore, over-ruled.

On the merits, the appellant has no case, as the order giving time to the appellant till 4th September 1914 to pay the decree amount into Court, which order was passed on his application to set aside the *ex parte* decree, was not intended to, and did not legally, operate as a stay of execution of the *ex parte* decree itself.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 5 Ind. Cas. 909; 20 M. L. J. 136; 8 M L. T. 122.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 314 OF 1911.

July 30, 1912.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

SRI RAM - PLAINTIFF—APPELLANT

*versus*

RAM PARGASH AND OTHERS—DEFENDANTS RESPONDENTS.

*Jurisdiction of Civil and Revenue Courts—Joint possession of under-proprietary holding—Mesne profits in respect of* khudkasht *—Under-proprietors, suit between.*

Where the parties are under-proprietors holding specific shares in a certain area within the *mahal*, a suit between them for joint possession or for mesne profits in respect of *khudkasht* land wrongfully withheld, is not excluded from the jurisdiction of a Civil Court. [p. 733, col. 2.]

Therefore, a suit for joint possession and damages against a mortgagee, who retains possession over the mortgaged property in spite of redemption, although he be a co-sharer of the mortgagor in under-proprietary rights forming the subject-matter of the mortgage, is cognizable by a Civil Court. [p. 33, col. 2.]

*Phani Singh* v. *Nawab Singh*, 28 A. 161; A. W. N. (1905) 233, distinguished.

*Bhairon Rai* v. *Saran Rai*, 26 A. 588; A. W. N. (1904) 106; *Ram Charan Rai* v. *Kauleshar Rai*, 27 A. 153; A. W N. (1904) 199 and *Jagar Nath Ojha* v. *Ramphal*, 13 Ind. Cas. 79; 34 A. 150; 8 A. L. J. 1312 referred to.

Appeal from the decree of the District Judge, Gonda, dated the 15th June 1911, reversing that of the Munsif, Gonda, dated the 24th April 1911.

Babu *Hargovind Das*, for the Appellant.

Mr. *Sinha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant for the recovery of joint possession of a two-annas share with the right to groves and isolated trees appertaining to the same and for mesne profits.

The plaintiff's allegation was that the said property belonged to two brothers, Bhagwan Dat and Ramphal, who mortgaged the same to Hardat, the father of the defendant No. 1, and Har Prasad, the father of the defendants Nos. 2 and 3, on the 31st May 1884. Subsequently the same property was mortgaged by Bhagwan Dat by a deed of conditional sale to Gajadhar, the father of the plaintiff, on the 9th May 1893. The father of the plaintiff obtained a decree for foreclosure on his mortgage and on the strength of it filed a suit for redemption of the previous usufructuary mortgage made by Bhagwan Dat and Ramphal in favour of Hardat and Har Prasad on the 31st May 1884. He obtained a decree and in pursuance thereof obtained possession over the mortgaged property by redemption on the 14th April 1907. The plaintiff complained that, in spite of the above proceedings, the defendants did not give actual possession to him. The defendants denied that they were in possession of anything more than their share in the village.

The Court of first instance found that the defendants were in possession of the plaintiff's share during the period in suit, that the defendants prevented the plaintiff from cultivating the *khudkasht* land after the *dakhal dehani* proceedings, and that the plaintiff was not entitled to the groves or trees not covered by the previous decree. It, therefore, gave the plaintiff a decree for joint possession of the two-annas share in dispute and for Rs. 174-4-6 as damages, and dismissed the claim as regards the groves and trees. The lower

Appellate Court found that the suit for joint possession and mesne profits was not maintainable by the Civil Court, and that the plaintiff's remedy was to sue defendants for profits in the Revenue Court and to obtain, as against them, a partition of his share.

I do not think that these findings can be sustained. The previous decree obtained by the plaintiff-appellant against Hardat and Har Prasad and others of the defendants-respondents, operated as *res judicata* and the plaintiff was entitled to joint possession if, after the *dakhal-dehani* proceedings, the defendants-respondents prevented the plaintiff-appellant from cultivating the *khudkasht* area. The decision in *Phani Singh* v. *Nawab Singh* (1), relied on by the Court below, does not apply, because in that case the dispute related to some land which was cultivated by a tenant and over which one of several joint owners had taken exclusive possession after the death of the tenant and got his name recorded in the mutation department as an owner. The present dispute relates to some *khudkasht* land, which was originally the under-proprietary holding of the mortgagors. The plaintiff has stepped into the shoes of the mortgagors by virtue of the decree for foreclosure and the redemption of the previous mortgage and has a right to cultivate the said land in the same manner as it was cultivated by the mortgagors. The defendants are holding possession over the land in dispute not as co-sharers, but as the representatives of the mortgagees whose rights were determined by the previous decree for redemption and, as held in *Bhairon Rai* v. *Saran Rai* (2) a plaintiff, who has been in joint possession of the property, and has been illegally ousted therefrom, is entitled to be restored to such joint possession. The plaintiff in this case obtained joint possession by virtue of the *dakhal-dehani* proceedings, but was prevented from cultivating the land which formed the subject-matter of the redemption decree, by the defendants. In *Ram Charan Rai* v. *Kauleshar Rai* (3), where certain of the owners of immoveable property were prevented by some of the other owners from exercising their legal rights in respect of the joint property, it was held that the dispossessed co-owners were entitled to a decree that they should be restored to joint possession, and not merely to a decree declaring their rights to joint possession. This case was followed in *Jagar Nath Ojha* v. *Ramphal* (4) where it was laid down that there was no distinction on principle between the case of a person who was entitled to joint possession but had not obtained it. A plaintiff, who never had been in possession but is entitled to possession jointly with other persons, can, therefore, be granted a decree for joint possession. There is nothing to require the plaintiff to go to the Revenue Court and sue for partition. It is at his option to do so if he likes. The defendants cannot compel him to do so by wrongfully cultivating the plots, in respect of which the plaintiff had previously obtained a decree for redemption.

Both the parties are under-proprietors holding specific shares in a certain area within the *mahal* and, as between under-proprietors, a suit for joint possession or for mesne profits in respect of *khudkasht* land wrongfully withheld is not excluded from the jurisdiction of the Civil Court. Section 108, clauses 6 to 13, of the Oudh Rent Act specifies the classes of suits, other than suits regarding the division or appraisement of produce, which under-proprietors or tenants are required to file in the Revenue Court. The heading to clauses 6 to 13 of section 108 as compared with the heading to the classes of suits mentioned in clauses 15 to 18 indicates the differentiation made by the Oudh Rent Act between under-proprietors on the one hand and *lambardars*, co-sharers and *muafidars* on the other hand. A suit for damages against a mortgagee, who retains possession over the mortgaged property in spite of redemption, albeit he be a co-sharer of the mortgagor in the under-proprietary rights forming the subject-matter of the mortgage is, therefore, cognizable by the Civil Court.

Accordingly we allow the appeal and remand the case to the Court below for a trial on the merits. The costs of the appeal will abide the result.

*Case remanded.*

(1) 28 A. 161; A. W. N. (1905) 233.
(2) 26 A. 588; A. W. N. (1904) 106.
(3) 27 A. 153; A. W. N. (1904) 199.
(4) 13 Ind. Cas. 79; 8 A. L. J. 1312; 34 A. 150.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENCE PETITION No. 2 OF 1912-13 OF BALLIA DISTRICT.

August 5, 1913.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

CHAKAURI AND OTHERS—DEFENDANTS—APPLICANTS

*versus*

NAKCHEDI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act, (II of* 1901), *s.* 43—*Enhancement of rent of occupancy holding—Rent for three holdings paid in lump sum—Enhancement of rent of one holding, suit for, maintainability of.*

Where a *zemindar* sued for the enhancement of rent of an occupancy holding, the rent for which together with the rent for two fixed-rate holdings was paid in a lump sum:

*Held*, that the suit was not maintainable as it was the duty of the *zemindar* to have first the rent really due upon this holding only determined according to law.

Application for revision of the order of the Commissioner of the Benares Division, dated the 20th September 1912, confirming that of the Assistant Collector, Ballia, in a case of enhancement of rent.

### JUDGMENT.

BAILLIE, S. M.—(*July* 29, 1913).—The suit was for the enhancement of rent of an occupancy holding, 6 *bighas* 7 *biswas* 7 *dhurs*, the rent of which was stated to be Rs. 4-9-0. Both the lower Courts were of opinion that Rs. 4-9-0 was not the genuine rent of this holding. The rent is shown in the *patwari's* papers as paid in a lump sum for this occupancy holding and for two fixed-rate holdings, and the lower Courts were clearly of opinion that the occupancy rent was understated by the land-holder in order to secure a large enhancement. The suit was on this ground dismissed. This was a proper order. It is right that the respondent before suing for enhancement should have the rent really due upon the occupancy holding determined. In dismissing the suit the Commissioner added the following words: "The rent should now be worked out proportionately on the three holdings and entered accordingly".

This was a decision on a question on which, the suit for enhancement having been dismissed, the Commissioner was not empowered to issue any instructions. It decides



arbitrarily and without enquiry as to what the rent of the occupancy holding should be. This is a matter which the respondent must have determined according to law. The Commissioner was not empowered to add these directions. I would cancel this part of the order as *ultra vires* and allow applicant his costs in the application.

TWEEDY, J. M.—I concur.

*Application allowed.*

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 299 OF 1913.

January 19, 1915.

*Present*:—Mr. Stuart, A. J. C.

THAKURDIN SINGH—PLAINTIFF—APPELLANT

*versus*

*Musammat* BHAGWANT KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, *interpretation of*—"Malik kamila," *meaning of—Tribal custom—Daughters, exclusion of, from inheritance—Custom as regards family in question to be proved—Court, discretion of—Gift by Hindu widow to her married daughter. Declaration that plaintiff's reversionary rights not affected, relief as to, if entertainable.*

Where a *wajib-ul-arz* stated that a Hindu widow who succeeds her husband in absence of male offspring succeeds as "*malik kamila*":

*Held*, that the words "*malik kamila*" meant an absolute owner. [p. 735, col. 2.]

*Dhondhe Singh* v. *Sant Bakhsh Singh*, 3 O. C. 181, explained.

Where there is evidence that in certain families of a tribe residing in a district daughters are excluded from succession, it cannot be held on the basis of this evidence that there is such a tribal custom which has force in every family in the district; the custom must be proved with regard to the particular family in question. [p. 735, col. 2.]

*Surjan Singh* v. *Gur Parshad*, Select Case No. 41 and *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar*, 8 O. C. 94, referred to.

A Court should, in the case of a gift by a Hindu widow to her married daughter, refuse to grant a declaration that the deed of gift does not prejudice the plaintiff's reversionary rights. [p. 736, col. 2.]

*Bhupal Kim* v. *Lachma Kuar*, 11 A. 253; A. W. N. (1889) 22, followed.

Appeal from the decree of the District Judge, Rae Bareli, dated the 25th April 1913, upholding that of the Subordinate Judge, Partabgarh, dated the 12th December 1912.

THAKURDIN SINGH *v.* BHAGWANT KUAR.

Syed *Ali Muhammad*, for the Appellant.

Babu *Avadh Bihari Lal*, for the Respondents.

JUDGMENT.—This is a second appeal against a decree dismissing a suit for a declaration that a certain deed of sale is invalid as against the reversionary interest possessed by the appellant.

It has been found on the facts that Badal Singh, a Kanpuria Thakur, who had separated from the rest of his family, died possessed of certain immoveable property, to which his widow Bhagwant Kuar succeeded.

Bhagwant Kuar executed on the 9th October 1911, a deed of gift of the property to her daughter Raghuraj Kuar.

It is in contest whether she had a right to transfer more than a life-interest. Raghuraj Kuar would ordinarily succeed to the property, should she survive her mother, unless it is found that there is a custom in the family excluding daughters from inheritance.

The learned Counsel for the appellant argues that the evidence establishes a custom excluding Raghuraj Kuar from inheritance. Jagmohan Singh, Arjun Singh, Lachhman Singh, Bhagwant Singh, Thakurdin Singh appellant, Sheodayal Singh and Surajpal Singh, all Kanpuria Thakurs, residing in the neighbourhood, have deposed to certain instances in which daughters of Kanpuria Thakurs of the vicinity were excluded from succession to their fathers' property. These witnesses are found to be respectable witnesses, who would be likely to state facts which they knew truly.

Some of them are in a better position than others to know such instances; some of the instances can be explained to show that daughters, though excluded, were not necessarily excluded as daughters, but on the whole this evidence is sufficient to establish that in certain families of Kanpuria Thakurs, residing in the vicinity, daughters had been excluded from succession as daughters.

Three of these witnesses have, however, frankly admitted that in other families residing in the vicinity daughters were not excluded from succession to their fathers' property.

Arjun Singh gave an instance in which a daughter of a Kanpuria Thakur of the neighbourhood succeeded to her father's property, and Thakurdin Singh appellant and Debi Bakhsh Singh gave another instance in which two daughters of a Kanpuria Thakur of the neighbourhood succeeded to their father's property. None of these witnesses were able to give an instance in which a daughter in this particular family was excluded from succession, and there is no oral evidence to prove the existence of such a custom in this particular family.

The *wajib-ul-arz* of the village has been produced. It contains a clause to the effect that a widow who succeeds her husband in absence of male offspring succeeds as absolute owner. The words used are "*malik kamila.*" I am asked to interpret this portion to mean that the widow obtains the rights of a Hindu widow only. I am unable to place such an interpretation on the words. They mean nothing else than that the widow succeeds as an absolute owner. In another portion of the *wajib-ul-arz* it is stated that daughters are excluded from inheritance. The rights of widows and daughters are either correctly stated or are not correctly stated. If they are correctly stated, Bhagwant Kuar is absolute owner of the property and on the face of it has a complete title to transfer it by gift to Raghuraj Kuar and in that case the appellant has no claim to relief. If on the other hand these rights are not correctly stated, the *wajib-ul-arz* cannot be considered to support the existence of a custom excluding daughters. So in neither case can this document help the appellant.

Excluding the evidence afforded by its entries from consideration, there is not sufficient evidence to support a conclusion that daughters are excluded from inheritance in this particular family. I am asked to find on the authority of *Surjan Singh* v. *Gur Parshad* (1) that there is a tribal custom excluding daughters from succession, which has force in every Kanpuria family in the district. There is nothing, however, in that decision to support any such contention. Nor are there any materials to justify a conclusion that such a tribal custom exists. The evidence, on the other hand, shows that different Kanpuria

(1) Select Case No. 41.

families have different customs with regard to the exclusion of daughters, and it is not established that there is a custom excluding daughters in this particular family. The necessity of proving a particular family custom is laid down in the decision in *Musammat Parbati Kuar* v. *Rani Chandrapal Kuar* (2).

The learned Counsel for the appellant has referred to the decision in *Dhondhe Singh* v. *Sant Bakhsh Singh* (3) in support of the proposition that the proper construction to be put on a doubtful passage in a *wajib-ul-arz* affecting Hindus is the construction compatible with the rules of Hindu Law, and he further has brought to notice a pronouncement of Mr. Chamier in an unreported case, Second Civil Appeal No. 363 of 1909, to show that the words "*malik kamila*" which I have translated as absolute owner, need not necessarily have that meaning.

With regard to the decision in *Dhonde Singh* v. *Sant Bakhsh Singh* (3), it is sufficient to say that the rule of interpretation laid down therein would not be applicable to a case in which the meaning of the words is clear. Here there can be no doubt as to the meaning of the words "*malik kamila.*" The learned Counsel for the appellant frankly admits that these words mean absolute owner. The authority of that decision cannot be invoked to help the appellant, for the words "*malik kamila*" are as clear as the words of the passage in which it is stated that daughters are excluded from inheritance. If I were to find that a widow was not an absolute owner, because according to the rules of the Mitakshara Law a widow's estate is ordinarily less than that of an absolute owner, I should, in order to be consistent, have to find that the passage excluding daughters from inheritance must be considered not to exclude them from inheritance, as the Hindu Law does not sanction such exclusion of daughters. But in any circumstances the words have a clear meaning. I do not understand that Mr. Chamier in the unreported decision laid down that the words "*malik kamila*" did not mean "absolute owner" and it is difficult to see how that unreported decision can help the appellant, as Mr. Chamier therein clearly found that in no circumstances would he consider that the entries in a single *wajib-ul-arz* afforded sufficient evidence as to the existence of a custom.

The main objection to the argument of the learned Counsel for the appellant on this point is, that he is endeavouring to apply this *wajib-ul-arz* so far as it suits him, and to ignore its provisions where they are fatal to the success of the case of his client. The appellant cannot put forward a document and refuse to be bound by the plain meaning of one passage and to rely on another.

For the above reasons I accept the finding of the learned District Judge that no custom has been proved excluding Raghuraj Kuar from succession.

The only other point argued was that, on the hypothesis that Bhagwant Kuar has only the interest of a Hindu widow in the property and that Raghuraj Kuar is entitled to succeed on her death to a similar interest, the appellant who is a collateral should obtain a declaration that the deed of gift does not prejudice his reversionary rights. It was laid down in the case of *Bhupal Ram* v. *Lachma Kuar* (4) that a Court in proper exercise of its discretion should refuse to grant a relief of this kind to a collateral in the case of a gift by a mother to her married daughter.

It is admitted by the learned Counsel for the appellant that Raghuraj Kuar is a young married woman, who may in future bear a son, and, if I follow the decision of the learned Judges who composed the Bench which decided that case, I must reject the argument put forward by the learned Counsel for the appellant.

He has argued that that decision is erroneous, but he has not succeeded in convincing me on the point. I consider the view of the law taken by the learned Judges composing that Bench to be the correct view, and, following that decision, decide that a Court should not in proper exercise of its discretion grant the relief described.

For the above reasons the appeal fails and is dismissed. The appellant will pay his own costs and those of the respondents.

*Appeal dismissed.*

(2) 8 O. C. 94.
(3) 3 O. C. 181
(4) 11 A. 253; A. W. N. (1899) 22.

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 324 AND 325 OF 1913.

December 7, 1915.

*Present*: —Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

*Rajah* P. RAMAKRISHNA RAYANINGARU—DEFENDANT—APPELLANT IN BOTH

*versus*

IN S. A. No. 324 OF 1913

RANGACHARIAR AND ANOTHER—PLAINTIFFS—RESPONDENTS

IN S. A. No. 325 OF 1913

AUDI LAKSHMI AMMAL—PLAINTIFF—RESPONDENT.

*Landlord and Tenant—Remission—Claim for remission of "savi"—Custom or contract not proved—Claim, whether can be legally enforced.*

In the absence of a custom or a contract to the contrary, the obligation to grant remissions is purely moral, and not legal, and cannot be enforced by a suit.

*Thandavaraya Mudaliar* v. *Ramaswamy Mudaliar*, Sudder Adalut Reports of 1859, p. 105; *Alagappa Chettiar* v. *Tirunagavalli*, 13 M. L. J. 377, followed.

Second appeals against the decree of the District Court, Chingleput, in Appeal Suits Nos. 610 and 611 of 1911, preferred against that of the Sub-Collector, Chingleput, in Summary Suits Nos. 218 and 219 of 1911.

Mr. *L. Venkataraghava Aiyar*, for Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondents.

JUDGMENT.—The plaint does not allege any custom to grant remissions in case of '*savi*'. There is no finding of the existence of any such custom and the evidence as to custom is insufficient. The plaintiff in paragraph 3 of the plaint alleged an agreement to grant remissions but there is no evidence of any such agreement. In the absence of the proof of custom or contract the obligation to grant remissions is purely moral, and not legal, and cannot be enforced by suit. [*Thandavaraya Moodaliar* v. *Ramaswamy Mudaliar* (1) and *Alagappa Chettiar* v. *Tirunagavalli* (2).] We reverse the decrees of the lower Courts and dismiss the suits with costs throughout.

*Appeal allowed.*

(1) Sudder Adalut Reports of 1859, p. 105.
(2) 13 M. L. J. 377.





## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 23 OF 1913-14 OF ALLAHABAD DISTRICT.

November 30, 1914.

*Present*:—Mr. Tweedy, S. M., and Mr. Holms, J. M.

BAQRIDI KHAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Syed* ZAKIR HUSSAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 10—Sir—Will—Ex-proprietary rights in favour of heirs, if accrue.*

When a person leaves by Will his proprietary rights to third persons, his heirs get no ex-proprietary rights in the *sir*.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 1st July 1914, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

HOLMS, J. M.—(*November* 24, 1914.)—Appellant is unable to produce any rulings in support of the contention that when a person leaves by Will his proprietary rights to third persons his heirs have rights of an ex-proprietary tenant in his *sir*, nor does he wish to argue this point. A Will takes effect at the moment of death, and the contention cannot be upheld. Respondents then were not ex-proprietary tenants and could not sue to eject the appellants. In the eight ejectment suits in which respondents allege themselves to be ex-proprietary tenants, I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondents paying costs.

TWEEDY, S. M.—I agree. The Commissioner has gone utterly wrong over the case and his decision of 24th June 1913 is not binding in this case as only the respondents in the present appeal were parties. The decision of the Assistant Record Officer is also not final as it is under appeal. The appeal should be decreed.

*Appeal allowed.*

MUHAMMAD ABDUL QADIR *v.* JNAN CHANDRA PAL.

## CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 229 OF 1913.

January 21, 1916.

*Present*:—Mr. Justice Holmwood and Mr. Justice Imam.

MUHAMMAD ABDUL QADIR - DEFENDANT—APPELLANT

*versus*

JNAN CHANDRA PAL—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Matter directly and substantially in issue, determination of—Incidental finding, effect of.*

The question what was "the matter directly and substantially in issue" in a previous suit depends on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which relief was claimed, it was dealt with and decided as if it formed a direct and principal issue in the suit. [p. 739, col. 2.]

An incidental finding as to the boundary of a plot of land not on a question directly and substantially in issue in a previous suit, is not *res judicata* as regards the question of title to that strip in a subsequent suit between the same parties. [p. 739, col. 2.]

*Sitanath Midda v. Basudeb Midda*, 2 C. L. J. 540, referred to.

Appeal against a decree of the Special Land Acquisition Judge, dated the 8th March 1913.

FACTS of the case appear from the judgment.

Mr. *Zahid*, for the Appellant.—The disputed plot forms part of a strip of land to the south of the tank, which was never purchased by, and was never in possession of, the plaintiff-respondent or his predecessors-in-interest, as an examination of the several title-deeds of both parties, particularly the southern boundary as given in the later title-deeds of the plaintiff's *Touji* No. 123, the Municipal bills, and the previous litigation between the parties, and particularly the partition proceedings between the predecessors-in-interest of the parties, will show. The claim of the plaintiff, besides, is barred by *res judicata*, in that in a previous suit between the parties with regard to another portion (*c*) of the southern strip, it was held and decided that the whole of the southern strip, and for the matter of that, the portion (*c*), was outside the plaintiff's *Touji* No. 123 and formed part of defendant-appellant's *Touji* No. 28. *Vide Sitanath Midda* v. *Basudeb Midda* (1).

Babus *D. N. Bagchi* and *Purna Chandra Roy*, for the Respondent.—The finding in the previous litigation with regard to the whole of the southern strip was merely incidental and ancillary to the finding about the particular plot (*c*), which only formed the subject-matter of the suit and which alone was directly and substantially in issue, and not the whole southern strip, of which the subject-matter of the present suit forms only another different part, and as such the previous judgment is not *res judicata* in the present case. The point is obvious and no authority is required in support. Even the authorities cited by the other side go to show that, as also the authorities collected in Mr. Justice Woodroffe's edition of the Civil Procedure Code under the heading *Res Judicata*. There is thus no force in the plea of *res judicata*. And none again in the other pleas of exclusion and limitation. Although the southern boundary in the later title-deeds of the plaintiff's *Touji* No. 123 has been somewhat loose, the area remained the same in all the transfers, and it is evident that the whole land was transferred, the southern strip being never excluded, and the particular plot remained waste, as found by the learned Judge. At any rate, there was no evidence of adverse possession before 1901 and the suit was instituted in 1912. The plea of limitation, therefore, also fails. The partition proceedings, it is to be noted, were not binding upon the defendant-respondent, as he was not a party to them, and Manik Lal's interest was adverse to his. The conduct of Manik Lal and of the defendant-appellant and his predecessors-in-interest appears to be fraudulent both in the partition proceedings as well as in trying to include the southern portion of plaintiff's *Touji* No. 123 in documents of transfers of defendant's *Toujis* Nos. 28 and 124. The defendant's claim, therefore, fails and the appeal must be dismissed with costs.

JUDGMENT.—This is an appeal from a

(1) 2 C. L. J. 540.

decision of the Special Land Acquisition Judge on a reference from the Collector. The reference has not been printed and we do not really know what it was. This omission and the extraordinary manner in which the documents of the contesting parties have been intermingled in the paper book and statements vitiated by the omission of negatives in printing have caused us much difficulty in disposing of the appeal, a difficulty which has not been rendered lighter by the order in which the learned Counsel elected to argue the appeal. Among the points that arise in the appeal are a question of *res judicata* and one of adverse possession. The first, which is a bar at the outset, was not argued until the whole record had been placed before us and the appeal argued on the question of title. The second, which is the only point in the case that has any real substance in it, was not brought forward till the very end of the argument on the second day.

The question in dispute appears to be a claim to one and a half *cottahs* of land in Sealdah by two rival claimants, of whom the appellant is claimant No. 1. The learned Judge has found that the title is and has been all along with claimant No. 2, the respondent Jnan Chandra Pal. He has incidentally found that no question of adverse possession arises as the land was lying waste. He, therefore, decided that Jnan Chandra Pal, claimant No. 2, was entitled to retain the compensation money for the acquisition of 14 *cottahs* 5 *gundas* 2 *cowries* and 6 *dams* of the plots in dispute, while his co-sharer in title not having made any claim to the balance the Collector's award giving it to claimant No. 1 would be undisturbed. Against this claimant No. 1 has appealed and his learned Counsel has formulated two questions for our consideration in the first instance. The first is that the appellant will be able to show that Manik Lal Dhar has no title and that he was never in possession and the second point is that the appellant was in possession both by adverse possession and by purchase. The agrcement addressed to us was chiefly on the question of title, and we are, after going through all the documents and facts set before us, able to agree with the learned Judge in the Court below that there can be no doubt as to the title of Manik Lal Dhar to the land in dispute and as to the fact that this title had passed to Jnan Chandra Pal by foreclosure of a mortgage of the land made by Manik Lal of his whole holding of some two *bighas* odd in Survey No. 123.

Against this in the last resort two curious objections have been taken by the learned Counsel, *first*, that the title to the whole strip of No. 123 south of the tank and its extension up to the canal road having been agitated before Mr. Roe in a suit between the parties in 1909 about another plot (*c*) that appears to be in No. 124 and not in No. 123 at all, the finding of Mr. Roe that the southern boundary of Manik Lal's holding excluded the whole strip between the tank, with *pacca* wall to the east and to the north the burial ground and mosque to the south, would operate as *res judicata* inasmuch as the plot now in dispute was included in that strip. The point of law was formulated by reference to the principle that the matter directly and substantially in issue and not the subject-matter of the suit constitutes the test of *res judicata* and the case of *Sitanath Midda* v. *Basudeb Midda* (1) was relied on. But this could only be argued by begging the question, what is the matter directly and substantially in issue, and this has been laid down in numerous decisions of their Lordships of the Judicial Committee to depend on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which the relief is claimed it is dealt with and decided as if it formed a direct and principal issue in the suit. We have not got the plaint and written statement in that case. Nor does the question appear to have been raised in the lower Court, but from the issues framed and the judgment it is clear that the incidental finding as to the boundary was not (on *sic*) a question directly and substantially in issue, and furthermore as far as the facts are concerned it is still open to us to come to a finding upon them. The finding as to the boundaries was based upon an erroneous view of the partition proceed-

ings in 1901 which were not *inter partes* and upon a further erroneous view of the relation of Jnan Chandra Pal in the case as representing the estate of Manik Lal Dhar. He can in no sense be said to hold the land from Manik Lal Dhar. There is, therefore, no possible ground for applying the doctrine of *res judicata*.

The *second* point was that by partition Manik Lal Dhar, the mortgagor, substituted other security for the original security, which included the strip of land of which the plot in dispute forms a part, and omitting this strip altogether partitioned two blocks of the tank which formed part of Nos. 124 and 28 and were not in his estate at all. The case of *Hakim Lal* v. *Ram Lal* (2) was cited for the proposition that a mortgagee is bound by a substituted security. Of course this ruling to which one of us was a party has no bearing on the case of a change in the *corpus* of the estate; and the substitution shown in the partition proceedings between Manik Lal Dhar and his minor co-sharer in 1901 is, as was found by Mr. Beachcroft in 1907, very suspicious and undoubtedly done in collusion with the owners of Nos. 28 and 124 who were claimant No. 1's vendors. It is perfectly clear that until 1901 the title to the whole of No. 123 was vested in Manik Lal Dhar; and Jnan Chandra Pal having never been a party to any of Manik Lal Dhar's dealings with the appellant's vendor or to the partition proceedings his title was never affected. In this view of the case the question of adverse possession does not really arise. The claim of the respondent was made in 1912 and there is no evidence of any possession by the predecessors of appellant prior to 1901.

We may briefly glance at the oral evidence given by the appellant. The municipal clerk of the Assessment Department shows, as the learned Judge has found, that Abdul Kadir never asserted any claim to Municipal premises No. 33 in which the land in dispute is situated until the year 1906. Before that Jnan Chandra Pal alone had been registered. Abdul Kadir, the claimant No. 1, himself admitted on oath in 1908 that he had no interest in No. 123 in which the plot in dispute is admittedly situated. The oral evidence of Asadulla is, in our opinion, unworthy of credit. The land he sold was the land he got from Abdul Khansamah in No. 123. For the first time in a document of 1897 the east boundary was fraudulently extended up to the canal road and this has given rise to all the subsequent troubles and to the loss of plot (A), to which the respondent was unable to establish his title before Mr. Beachcroft. Still even in these two documents, though the southern boundary is defective, nothing that previously passed as No. 123 is excluded. An examination of the facts and history of the case clearly exposes the clandestine understanding between the appellant and his predecessor and Manik Lal Dhar to defeat the just right of the latter's mortgagee. We see no reason to interfere with the decision of the learned Judge, which is affirmed and the appeal is dismissed with costs.

There is a cross-objection as to the small residue of the co-sharer. We find that the respondent has no *locus standi* to contest this matter. The title is found with a third party who is not a party to the proceedings and the possession is with the appellant. The decision of the claim to this small sum of money will in no way affect the title of the real owner if he is not the appellant. The counter-objection is also dismissed with proportionate costs.

*Both appeal and cross-objection dismissed.*

(2) 6 C. L. J. 46.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 557 OF 1913.

July 13, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

CHAUHARJA BAKHSH—DEFENDANT—APPELLANT

*versus*

RAM HARAKH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Construction of document—Pleading - Plaintiff, position of—Mortgage—Covenant that mortgagor not to redeem previous mortgage without paying subsequent advances, if valid and enforceable—Charge—Mortgaged property not described in deed of furthtr charge, effect of—Subsequent advances tacked on to*

CHAUHARJA BAKHSH *v.* RAM HARAKH.

*previous mortgage—Clog or fetter on equity of redemption.*

A plaintiff cannot, in sec nd appeal, be permitted to resile from the position he took up in the plaint. [p. 741, col. 2.]

The construction placed on one document cannot be of any material help in construing another. [p. 742, col. 2.]

Where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the latter without paying the former, is valid and enforceable. [p. 742, col. 2.]

If the intention of parties to a transaction, as gathered from the document as a whole evidencing that transaction, is to create a charge, the mere fact that the mortgaged property is not described therein, because the money advanced is tacked on to a previous mortgage, does not detract from the validity of that charge. [p. 743, col. 1.]

*Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree*, 6 M. I. A. 393 at p. 411; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 and *Thakur Vasonji Morarji* v. *Musammat Chanda Bibi*, 29 Ind. Cas. 781; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130, referred to.

Where certain deeds, styled as "*rehennama zar mazid*," provided that the property mortgaged by previous deeds of mortgage and further charge should not be redeemed until the amounts due on the former deeds were first paid, and that without paying up those amounts the mortgagors and their heirs should have no right to redeem the mortgaged property, but did not specifically describe in them the mortgaged property, although the context clearly showed that the amounts due on them were tacked on to the previous deeds of mortgage and further charge:

*Held*, that the said deeds created a charge on the mortgaged property and could not be treated as clogging or fettering the equity of redemption and were valid and enforceable deeds. [p. 742, col. 1.]

*Radha Krishna* v. *Sheo Dial*, 8 O. C. 132, *Chandrika Pershad* v. *Jagannath*, 8 O. C. 227; *Bhikham Singh* v. *Shankar Dayal Singh*, 1 Ind. Cas. 345; 6 A. L. J. 225; *Ranjit Khan* v. *Ramdhan Singh*, 2 Ind. Cas. 859; 31 A. 482; 6 A. L. J. 654; *Brij Lal Singh* v. *Bhawani Singh*, 7 Ind. Cas. 115; 32 A. 651; 7 A. L. J. 821 and *Hari* v. *Vishnu*, 28 B. 349; 6 Bom. L. R. 313, referred to.

*Ram Adhin Misra* v. *Sitla Bakhsh Singh*, 25 Ind. Cas. 905; 17 O. C. 303 and *Ganesh Prasad* v. *Bisram Singh*, 18 Ind. Cas. 461, explained.

Appeal from the decree of the District Judge, Fyzabad, dated the 10th September 1913, modifying that of the Additional Munsif, Fyzabad, dated the 28th March 1913.

Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Jiban Krishna Banerji* and Mr. *N. N. Dutt*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for redemption brought by the plaintiff-respondent in respect of a mortgage effected by Ajudhia Singh and *Musammat* Dilraj Kuar, acting as a guardian of her minor sons, Lakhpati Singh and Suraj Bakhsh Singh, in favour of the defendant-appellant on 17th January 1895, and a deed of further charge executed by Ajudhia Singh and Lakhpati Singh in favour of the same on the 13th July 1901. The plaintiff is a subsequent mortgagee of the property comprised in the said mortgage and further charge. The defence was that the plaintiff was not entitled to sue for redemption without paying the amounts due to the defendant-appellant on account of certain deeds of further charge, set forth in the written statement, and that the mortgagee was entitled to the revenue which he had paid since the revision of the Settlement in excess of what he had contracted for. It was further pleaded that the plaintiff was liable to discharge the amount due on certain prior mortgages before obtaining redemption of the mortgage in suit and that the mortgagee held some *birt* land in the village which should be excluded from the claim.

The Court of first instance found that the deeds of further charge were proved, that certain prior mortgages existed in which the defendant-appellant held or had acquired a half share, that no *birt* land belonged to the mortgagee, and that the enhanced revenue paid by the mortgagee could not be recovered without showing that the profits derived from the mortgaged property had proved insufficient to pay the interest secured by the mortgage. The lower Appellate Court confirmed that decree, except in so far as it disallowed the amount claimed by the defendant-appellant on the deeds of further charge. It found that the said deeds did not create any charge or hypothecate the property as security for the repayment of the moneys advanced thereby.

So far as the first deed of further charge, dated the 13th July 1901, is concerned, the plaintiff never denied that it created a charge. On the other hand he sued for its redemption and offered to pay Rs. 206 in respect of the same. He cannot now be permitted to resile from the position he had taken up in the plaint. In regard to the

other deeds, which were executed by Ajudhia Singh and Suraj Bakhsh Singh on the 11th and 13th September 1904, it is clear from the provisions contained therein that they created a charge on the mortgaged property. They provided that the property mortgaged by the previous deeds, registered and unregistered, shall not be redeemed until the accounts due on the deeds of further charge are first paid, and that without paying up the amounts due on the latter deeds, the mortgagors and their heirs shall have no right to redeem the mortgaged property. The property mortgaged is not specifically described in the said documents, but the context clearly shows that the amounts due on the said deeds were tacked on to the previous deed of mortgage, which was registered, and the deed of further charge, which was unregistered, and as observed by a Bench of this Court in *Radha Krishna* v. *Sheo Dial* (1) and *Chandrika Pershad* v. *Jagannath* (2), the said deeds cannot be treated as clogging or fettering the equity of redemption and are valid and enforceable. The intention of the parties was that the mortgaged property should be treated as security for the sums subsequently advanced, the deeds being styled "*rehennama ear mazid*," and it cannot be assumed that in embodying the above terms the parties aimed at merely fixing the time when redemption was to be allowed. Section 61 of the Transfer of Property Act lays down that a mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims on property, other than that comprised in the mortgage, which he seeks to redeem. It contemplates the possibility of a lawful contract to consolidate a mortgage with another mortgage in favour of the same mortgagee respecting other property, and *a fortiori* recognises the validity of a contract to consolidate a mortgage with subsequent advances, where the same property may be hypothecated or charged in both. In *Bhikhan Singh* v. *Shankar Dayal Singh* (3), where a document described as a bond tacked on to a mortgage contained a covenant that whenever in any way the mortgagor shall pay the amount due under the mortgage, he shall, along with it, also pay the principal and interest due on that document and shall take back the field and the document and that no claim shall be brought meanwhile, it was held that the document created a charge, and that the property originally mortgaged was made security for the repayment of the subsequent advance. This decision was followed in *Ranjit Khan* v. *Ramdhan Singh* (4), where the circumstances were somewhat similar to those of the present case. In *Brij Lal Singh* v. *Bhawani Singh* (5), a covenant postponing redemption of a mortgage till a subsequent mortgage was satisfied was held to be valid and not a clog on the equity of redemption. In *Hari* v. *Vishnu* (6) the same principle was extended where the payment of an earlier *tahi* debt was tacked on to a later mortgage, the mortgage-deed being stamped as a mortgage for the entire amount. In regard to the tacking on of unsecured debts to a debt due on a mortgage, the decisions of the different High Courts are by no means unanimous, but it is practically well settled that where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the latter without paying the former is valid and enforceable.

On behalf of the plaintiff-respondent reliance is placed on the decisions in *Ram Adhin Misra* v. *Sitla Bakhsh Singh* (7) and *Ganesh Prasad* v. *Bisram Singh* (8). But the construction placed on one document cannot be of any material help in construing another. In the latter decision, the document was described as a *tamassuk* or simple money bond, while in the former, as a deed of further charge. In none of these cases, the decisions of a Bench of this Court in *Radha Krishna* v. *Sheo Dial* (1) and *Chandrika Pershad* v. *Jagan-*

(1) 8 O. C. 132.
(2) 8 O. C. 227.
(3) 1 Ind. Cas. 345; 6 A. L. J. 225.
(4) 2 Ind. Cas. 859; 31 A. 482; 6 A. L. J. 654.
(5) 7 Ind. Cas. 115; 32 A. 651; 7 A. L. J. 821.
(6) 28 B. 349; 6 Bom. L. R. 313.
(7) 25 Ind. Cas. 905; 17 O. C. 303.
(8) 18 Ind. Cas. 461.

*nath* (2) seem to have been brought to the notice of the Court. The work of conveyancing is still largely in the hands of ignorant and ill-educated petition-writers and village scribes, and as pointed out by their Lordships of the Privy Council in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (9) and *Thakur Vasonji Morarji* v. *Musammat Chanda Bibi* (10) documents in India should be liberally construed. If the intention of the parties as gathered from the document as a whole was to create a charge, the mere fact that the mortgaged property was not described, because the money advanced was tacked on to a previous mortgage, would not detract from the validity of that charge. A document would not be described as a *rehannama zar mazid* or render the mortgaged property irredeemable, unless the amounts due on the previous mortgage and the subsequent advance were both paid, if it was not intended to make the property a security for the repayment of the latter as much as of the former.

In regard to the claim for the excess revenue paid by the defendant-appellant, it is clear from the mortgage-deed that provision was made therein for the payment of interest at a specified rate, and, in the absence of evidence to show that the profits derived from the mortgaged property proved to be insufficient to pay interest at the said rate, that claim cannot be entertained.

With reference to the previous mortgages, one of which was effected by Gayadin in favour of Tulshi and the other by Jang Bahadur Singh and Ajudhia Singh, sons of Gaya Din Singh, in favour of the defendant-appellant, it is not disputed that the money required for the redemption of the former and the money lent under the latter were advanced from the joint family, of which the plaintiff-respondent and the defendant-appellant were at one time members. A partition subsequently took place between them, by which it was agreed that each of them shall have an eight-annas share in the ancestral and collaterally inherited property, as distinct from the property obtained by gift from *Musammat* Sita Bai or personally acquired. It is obvious, therefore, that the property acquired from joint family funds was treated as falling under the first category, and the Courts below rightly allowed the plaintiff-respondent an eight-annas share therein.

There is no reference to the *birt* land claimed by the defendant-appellant in the mortgage-deed, which purports to be a mortgage of a fractional share, and it is not necessary under the circumstances to express any opinion in regard to it.

The appeal is, therefore, allowed and the decree of the Court of first instance restored with the costs incurred subsequent to that decree, which shall be payable by the plaintiff-respondent to the defendant-appellant.

*Appeal allowed.*

(9) 6 M. I. A. 393 at p. 411; 18 W. R. 81 *n.*; Sevestre 253 *n.*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147

(10) 29 Ind. Cas. 781; 19 C. W. N. 873; 17 Bom. L. R. 556; 18 M. L. T. 31; (1915) M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 816 OF 1915.

December 2, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

NAGAMUTHU PILLAI AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

DASI SUNDARAM—PLAINTIFF—RESPONDENT.

*Hindu Law—Adoption—Dancing girl, when can adopt—Taking child for purpose of household duties—Adoption, validity of—Calling child* "abimanaputhri," *effect of.*

An adoption of a daughter by a dancing girl is valid in Madras Presidency if it is not made for the purpose of making the girl a prostitute. [p. 744, col. 1.]

An adopted girl does not cease to be such if she is called "*abimanaputhri*" and does not thereby lose her right of succession to her adoptive mother. [p. 744, col. 1.]

Where, therefore, a dancing girl took a young girl to help her in her household duties out of compassion for the helpless child and without any intention of forcing her to a life of prostitution and adopted her, though she was designated as "*abimanaputhri*":

*Held*, that the adoption was valid and the adopted girl was entitled to succeed the adoptive mother. [p. 744, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tanjore, in Appeal Suit No. 290 of 1914, preferred against that of the Court of the District Munsif, Tanjore, in Original Suit No. 54 of 1913.

ANANDRAM v. NITYANANDA BARHAM.

Mr. *K. S. Jayarama Aiyar* for Mr. *R. Kuppusawmy Aiyar*, for the Appellants.

Mr. *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The first point is really covered by a series of authorities of this Court laying down that the adoption of a daughter by a dancing girl is valid in this Presidency if it is not made for the purpose of making the girl a prostitute. We have been referred to certain adverse observations in some judgments of a very general character but the learned Pleader who appeared for the appellant admits that the authorities are all against him on that point.

It is found in this case that Vijayambal, the person who adopted the plaintiff, took the girl to help her in her household duties out of compassion for the helpless child and that she did not intend to force her to a life of prostitution. That being the finding, the adoption according to the rulings of this Presidency must be held to be a valid one.

Then the further question is raised as to whether the evidence warrants the inference that there was adoption within the meaning of the law. The whole argument of the learned Vakil turns really upon the use of the word "*abimanaputhri*." That apparently is the word used in the *muchilka*, Exhibit B, in describing the adoption. Both Courts have found that as a matter of fact the plaintiff was adopted within the meaning of the law. It may be that that phrase "*abimanaputhri*" ordinarily means that the child which is so brought up is not regularly adopted. But evidence was given in the case with a view to show that, however the plaintiff was designated, she was in fact adopted by Vijayambal as her daughter. There is also evidence which has been accepted by both the Courts that according to the custom she, the plaintiff, being adopted though called "*abimanaputhri*" was entitled to succeed her adoptive mother. I do not think, therefore, there is any substance in the point raised by the learned Vakil for the appellant.

Then there was also a question raised as to the jewels belonging to the deceased Vijayambal. It is attempted to be argued before us that even if the plaintiff was the adopted daughter she would not be entitled to those jewels. But no such plea was raised in either Courts or in the grounds of appeal before us. I would, therefore, dismiss the second appeal with costs.

AYLING, J.—I agree.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 291 OF 1915.

January 31, 1916.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

ANANDRAM—DECREE-HOLDER—APPELLANT

*versus*

NITYANANDA BARHAM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Decree, date of—Execution, erroneous order for, when binding upon judgment-debtor—Notice, proper service of—Amendment of barred decree—Limitation Act (IX of 1908), Sch. I, Art.* 182, *cl.* (4).

A decree has to bear the same date as that of the order making it, and not the date on which it is signed by the Court. [p. 747, col. 2.]

An erroneous order for execution of a decree passed after notice to the judgment-debtor cannot, although unreversed, be treated as valid against him where the service of the notice has not been made in accordance with law and there is nothing to show that the judgment-debtor became aware of the execution proceeding. [p. 747, col. 2.]

*Mungul Pershad Dichit* v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 113; 8 I. A. 123 (P. C.); 4 Sar. P. C. J. 229, distinguished.

A service of a notice by affixing a copy on the entrance door of the house of a judgment-debtor without making a diligent search for him is not a service in accordance with law. [p. 747, col. 2.]

An amendment of a decree after its execution has been barred by limitation, cannot give a fresh start to limitation from the date of the amendment under Article 182, clause (4), of the First Schedule of the Limitation Act, 1908. [p. 747, col. 2.]

Appeal against the order of the Sub-Judge, Bhagalpore, dated the 16th June 1915.

FACTS of the case appear from the judgment.

Sir *Rash Behari Ghose* with Babu *Naresh Chandra Sinha*, for the Appellant:—The decree under section 90 of the Transfer of Property Act was really made on

the 6th October 1909, when it was signed and became operative. On the 26th September 1909, only an order was passed for making the decree. That order was not the decree and could not be the decree. If 6th October is the date of the decree, then the application of the decree-holder for execution of the decree which was made on the 30th September 1912 was not barred by limitation. Notice of this application was served upon the judgment-debtors, so that even if the application for execution were barred, the judgment-debtors could not now take objection to execution on the ground of limitation as they did not raise that objection when the previous application, dated the 30th September 1912, was made after notice to them. The Subordinate Judge says that the notice was not duly served. Why? No evidence has been given to prove non-service or illegal service. And in the absence of such evidence it must be held that the serving peon performed his duty in accordance with law. Even the judgment-debtors did not examine themselves to prove that no notice was served upon them or that they were not aware of the execution proceeding. The learned Subordinate Judge was clearly wrong in holding that the notice was not served. The case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) is applicable to the facts of this case. After keeping silent when the previous application for execution was made, the judgment-debtors could not now turn round and say that the previous application for execution was barred by limitation.

The decree as it stood originally was wholly incapable of execution. It was made against the deceased judgment-debtor and "others." Who were these "others" was not stated in the decree. So it was impossible to execute the decree without amendment. The application for amendment was accordingly made on the 20th March 1914, and the decree was amended on the next day, *i.e.*, the 21st March 1914. An application was then made for the execution of this decree as amended on the 25th March 1914. Under clause 4, Article 182, of the Limitation Act limitation begins to run from the date of amendment. So it cannot by any means be said that the execution of this decree which is the only decree capable of execution is barred by limitation. The law is clear on this point. The present Limitation Act has set at rest by enacting Article 185, clause 4, the conflict of opinions on this point of the several High Courts. Though Calcutta, Madras and the Bombay High Courts held even before the amendment of the Limitation Act that limitation runs from the date of the amendment of decree, the Allahabad High Court was of opinion that even after amendment of a decree limitation runs from the date of the original decree. See *Amar Chandra Kundu* v. *Asad Ali Khan* (2).

[TEUNON, J.—If your application on the 30th September 1912 was barred, then how could you execute the decree now by a fresh application for execution?]

That application was to enforce a decree against a person who was dead and, therefore, was not a valid application. It asked the Court to do something which could not have been done. That application should be altogether put out of consideration. The application which was made after the amendment of the decree is the application which should be taken notice of. See *Mahamaya Prasad Singh* v. *Abdul Hamid* (3). Before the amendment the decree was so much waste paper, it could not have been executed at all against any person, neither against the original judgment-debtor who was not then in this world nor even against his heirs because their names were not given in the decree.

The Subordinate Judge says that it was not necessary to amend the decree. He had no power to say so. As the amendment was made by his predecessor by an order passed on the application of the decree-holders for amendment, the present Subordinate Judge cannot say that the amendment made by his predecessor was wrong.

Babu *Mohendra Nath Roy*, with Babu *Sarat Chandra Mukherjee*, for the Respondent.—In 1912 the decree-holders did not think that the decree was incapable of execution. They

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123 (P. C.); 4 Sar. P. C. J. 249.

(2) 32 C. 908.

(3) 21 Ind. Cas. 615; 18 C. W. N. 266.

applied for execution of the original decree apparently knowing that no amendment was at all necessary. After they found that their application for execution made on the 30th September 1912 was barred by limitation, they came to discover for the first time that the decree was incapable of execution and required an amendment before it could be enforced. This application for amendment was a mere device on their part to save their decree from the limitation bar. At the time of this application the decree had ceased to be enforcible, more than three years having elapsed from the date of the decree. A dead decree cannot be revived by an application for amendment, assuming for argument's sake that the amendment was at all necessary. The decree before the amendment was not incapable of execution; the words "and others" were in the decree. They might be vague, but their meaning was clear as who were meant by those words was well known to the judgment-debtors as well as to the decree-holders. The objection raised by the other side, is a purely technical one and has no substance in it.

Babu *Naresh Chandra Sinha*, in reply.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal by the decree-holders against the order of the Subordinate Judge of Bhagalpur, dated the 16th June 1915. The facts necessary for the purposes of this appeal are these :—

The decree-holders obtained a mortgage-decree on the 8th September 1902 against one *Raja* Thakur Barham. The amount of the money due was Rs. 2,96,369-5-0, but after the mortgage decree was made absolute, the mortgage properties were sold for Rs. 2,93,405 and were purchased by the decree-holders. There was, therefore, a balance of Rs. 2,964-5-0 due to the decree-holders.

The decree-holders made an application on the 25th May 1905 for a decree under section 90 of the Transfer of Property Act in respect of the above balance. On a notice being issued to the judgment-debtor, *Raja* Thakur Barham, he filed an objection and the 4th November 1905 was fixed for the objection to be heard. It appears, however, that the objection was not taken up on the date fixed and nobody took any notice of the objection till the 2nd July 1909, when the decree-holders made an application praying that orders might be passed upon their previous application.

It appears that by the time when the application on the 2nd of July 1909 was put in, *Raja* Thakur Barham, the judgment-debtor, died, and the necessary notices were, therefore, issued against his representatives, namely, Jai Barham and Gajai Braham.

The Court on receiving the return of the services of the notices passed an order on the 26th September 1909 for a decree to be drawn up under section 90 of the Transfer of Property Act.

The application put in by the decree-holders on the 2nd July 1909 had prayed for a decree under section 90 against the assets left by the deceased *Raja* Thakur Barham in the possession of his heirs, Jai Barham and Gajai Barham.

The decree under section 90 of the Transfer of Property Act, bears no date but at the end of the decree we find the following :

"Given under my hand and the seal of the Court this day the —— —— of October 1909.

"*Signed* PARESH CHANDRA BANERJEE, Subordinate Judge.

6-10-1909."

In the body of the decree we find it stated that a sum of Rs. 638-6-0 as principal with interest up to the 5th day of October 1909 had been left in arrears. This decree was originally described as a decree between the plaintiffs, decree-holders, and *Raja* Thakur Barham and others, defendants.

On the 30th September 1912 two of the decree-holders filed the firs application for execution of the decree under section 90. It was prayed that as Gajai Barham, one of the two representatives of the *Raja* had died, his two minor sons should be substitu ed in his place and it was fur her prayed that the execution should be issued against Jai Barham for self and as guardian to two minor sons of Gajai Barham and also against one Jai Kissen Barham as heirs of the *Raja*. Notices were ordered to be issued and after the return of the services of the notices the execution case was dismissed on the 20th January 1913, but it appears that no order was passed about

substituting the names of the twc minor sons in place of Gajai Barham.

On the 17th March 1914, an application was filed on behalf of the decree-holders stating that through some mistake in the office the name of Jai Barham and Gajai Barham had not been mentioned in the decree and it was prayed that the decree might be amended by removing the name of *Raja* Thakur Barham and substituting in its place the names of Jai Barham and Gajai. The Court ordered the mistake to be corrected and correction was made on the 25th of March 1914. The application for execution now in question was then made by one of the decree-holders, as the other decree-holders were dead.

This execution was objected to by the judgment-debtor on amongst other grounds that one of the decree-holders being dead, the execution could not proceed until the representatives of the deceased decree-holders were brought on the record and that the decree had become barred by limitation.

On the above facts the Subordinate Judge held that the application in question for execution was barred by limitation and hence the present appeal by the decree-holders.

The grounds taken in the appeal before us are these:—

1. That the decree as it stood before the amendment was incapable of execution as being against a dead man and that, therefore, limitation would begin to run from the date of amendment and the present application having been within three years from the date of amendment, the execution is not barred.

2. That if the time ran from the date of the decree under section 90 of the Transfer of Property Act it would run from the 5th October 1909, up to which date interest was calculated in the decree.

In the lower Court seven issues were framed but for the purposes of the present appeal we are concerned only with the 5th issue, which is to the effect "whether the execution was barred by limitation?"

The decree under section 90 of the Transfer of Property Act was passed on the 26th September 1909 although signed on the 6th October 1909. There can be no doubt that the decree has to bear the same date as that of the order. Although the decree was signed on the 6th of October 1909, the date of the order being the 26th September 1909, the decree should be treated as having been made on the 26th September 1909. The first application for execution was made on the 30th September 1912. Obviously, therefore, the application was barred. On behalf of the appellant reliance has been placed on the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), where it was held that "Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet, if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid." In this reported case it appears that the judgment-debtor, so far from appealing against the order of attachment, acknowledged its validity and presented a petition by which he prayed to stay the attachment.

In the present case, however, the report of the peon states that he made enquiries as to the defendants but not having found them in their houses, on the identification of the identifier he stuck up the notices on the entrance doors of the houses. Order V, rule 19, provides that in case where the return has nct been verified the Court should examine the serving officer on oath with regard to his proceedings. In the present case the return was not verified nor was the peon examined. Further the report itself shows that no diligent search was made for the judgment-debtor; the service of notice was, therefore, not in accordance with the law, and there is nothing to show that the judgment-debtors became aware of the proceedings. I am, therefore, of opinion that the reported case cannot be of any help to the decree-holders.

The next point urged on behalf of the appellants, decree-holders, is that the decree having been amended on the 21st March 1914, limitation should be counted from that date under clause 4, Article 182 of the Limitation Act. The clause 4 of the above Article provides that limitation begins to run from the date of amendment where a

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decree has been amended, namely, three years from the date of amendment, but the question is whether on the 21st March, 1914, there was any decree having legal effect. The decree under section 90 is dated 26th September 1909 and the first application for execution was made on the 30th of September 1912, that is, more than three years after the date of the decree; that application, therefore, was barred.

We have to see whether this application can be saved from limitation by any conduct of the judgment-debtors. We find that the notices to the judgment-debtors were not legally served nor does it appear that the judgment-debtors were even aware of this execution petition. I am of opinion that there was no decree having any legal effect on the date of amendment. It has been contended that the decree was incapable of execution because the judgment-debtors were stated to be the deceased *Raja* Thakur Barham and others. In this connection reliance has been placed by the appellants on the case of *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (4) and *Mahamaya Prasad Singh* v. *Abdul Hamid* (3). In these two reported cases the decree had become incapable of execution. In the present case, however, the decree was in fact passed not against any deceased person but against the representatives of that deceased person. Though through some mistake in the office the name of the deceased was inserted in the decree and after the name of the deceased the other judgment-debtors were described by the word "others", this was a clerical mistake of the office. The amendment was made on the 21st March 1914 and on the 25th March 1914, the last application for execution of the decree under section 90 of the Transfer of Property Act was put in by the decree-holders. In their first application for execution it is clearly stated that Thakur Barham died on the 7th September 1905, and that Jai Barham and Gajai Barham are his heirs, that these latter are in possession of the assets of Thakur Barham and that the decree under section 90 was passed against the two latter, and that after the passing of that decree Gajai Barham died leaving him surviving two minor sons, and these minors are in possession of the estate left by Gajai Barham, deceased, and it was prayed in that petition that the name of Gajai Barham should be struck off and the names of his minor sons be entered as judgment-debtors through the guardianship of Jai Barham. It is clear, therefore, that the decree-holders knew who their judgment-debtors were and they wanted an execution not against any person deceased but against his living representatives. If any amendment was necessary the decree-holders should have had it made before the 26th September 1912.

For the above reasons I am of opinion that all the grounds urged on behalf of the appellants fail and the appeal is, therefore, dismissed with costs.

TEUNON, J.—I agree.

*Appeal dismissed.*

(4) 17 A. 39; A. W. N. (1894) 191.

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## OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 63 OF 1914.

July 16, 1915.

*Present:*—Mr. Lindsay, J. C.

BASDEO SINGH—DEFENDANT—APPELLANT

*versus*

RAM PHAL SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Custom, proof of—Proof, sufficiency of—Document, construction of—Fact, finding of—Oudh Civil Digest* (1912), *Vol. I, Chap. VII, para.* 272, *rule III, as corrected, effect of.*

A second Appellate Court is bound by the finding of the lower Courts that certain documents constitute sufficient proof of an alleged custom. [p. 749, col. 1.]

*Pragi* v. *Baiju*, 4 O. C. 71, referred to.

Rule III of para. 272, Chapter VII, Oudh Civil Digest (1912), Vol. I, as corrected by the correction slip, dated 18th February 1914, does not introduce any new rule, but declares the meaning of the rules as they stood before. [p. 749, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 12th December 1913, upholding the order of the Subordinate Judge, Fyzabad, dated the 10th May 1913.

Babu *Rudra Dutt Sinha*, for the Appellant.

Syed *Ali Muhammad*, for the Respondents,

JUDGMENT.—Three points arise for decision in this second appeal.

The *first* is as to the existence of a custom by which daughters and their issue are excluded from inheritance. Both Courts have found that this custom is proved sufficiently by the statements recorded in the *riwaj-i-am* and *ikrar-malikan*. The former document shows that the custom of exclusion prevails in the *pargana* in which the property in suit is situated. The latter document embodies a declaration by some of the proprietary body to the effect that the custom set down in the *rivaj-i-am* is the custom which obtains in their family. The learned Judge was in error when he wrote that this declaration was attested by Har Prasad Singh, the last male owner of the property in dispute, for the entry shows that Har Prasad had died by the time (25th November 1872) when this declaration was drawn up. But referring to the pedigree filed in the case it is apparent that the declaration was signed by a good many of the co-sharers and that the others who were then interested did not sign because they were absent from the village on that date. I am bound by the finding of the lower Appellate Court, that these documents constitute sufficient proof of the custom [*Pragi* v. *Baiju* (1)].

The *next* point taken is that the plaintiffs failed to adduce proof that there were no nearer heirs to Har Prasad than themselves. The appellant does not cite the name of any person whom he alleges to be nearer in degree than the plaintiffs and indeed the relationship of the plaintiffs with the propositus does not seem to have been disputed. The Munsif, relying upon the pedigree and upon the *khewat* which shows the devolution of the shares, was satisfied that the plaintiffs are the nearest heirs and the learned Judge has accepted this finding of fact. The appellant cannot succeed on this plea.

The *third* and last point relates to costs. It is complained that the sum awarded to the plaintiffs as Pleader's fee, Rs. 75, is excessive. The suit was valued for jurisdiction at Rs. 1,500 and the fee appears to have been correctly calculated. Reliance is placed upon the correction slip, dated 18th February 1914, at page 88 of the Oudh Civil Digest* which explains the meaning of the words "amount or value of the claim for the purpose of assessment of Pleader's fee" and it is pointed out that this new rule came into force after the case was decided in the Court below. I hardly think it correct to speak of the slip as containing a new rule. It only declares the meaning of the rules as they stood before. I hold that the fee is correct.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) 4 O. C. 71.

*Oudh Civil Digest (1912), Vol. I, Chap. VII, para. 272, rule III, as corrected by the slip.

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1108 AND 1109 OF 1913.

January 6, 1916.

*Present*:—Mr. Justice Chapman and Mr. Justice Mullick.

*Choudhury* BHAGABAN MAHAPATRA AND ANOTHER—DEFENDANTS—AFPELLANTS

*versus*

PALTURAM SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of* 1885), *ss.* 30, 113, *Ch. X—Enhancement on ground of prevailing rate, limit of—Settlemant of rent, proceeding for, after settlement under Chapter X, maintainability of—Non-joinder of party, effect of—Civil Procedure Code (Act V of* 1908), *O. I, r.* 4.

A settlement of rent with reference to the prevailing rate is not illegal if it involves an enhancement of more than two annas in the rupee, as there is no limit to the amount of enhancement which can be effected on the ground of prevailing rate. [p. 750, col. 2.]

An entry of a certain sum as rent at a settlement made under Chapter X of the Bengal Tenancy Act is no bar to a proceeding for settlement of rent within the next fifteen years when the entry was merely an entry of the existing rate. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years under section 113 of the Act is applicable. [p. 750, col. 2.]

Under the Civil Procedure Code, 1908, an appeal is not to be dismissed on the mere ground of non-joinder of parties. [p. 751, col. 1.]

Appeals against the decrees of the District Judge, dated the 6th of January 1913, reversing that of the Revenue Officer, Cuttack dated the 28th of May 1912.

BHAGABAN MAHAPATRA *v.* PALTURAM SINGH.

Babus *Provash Chandra Mitra* and *Satish Chandra Bose*, for the Appellants.

Babu *Rai Guru Saran Prosad*, for the Respondents.

JUDGMENT.

Nos. 1108 and 1109.

These two appeals arise out of two suits, which were tried together. The first suit out of which Appeal No. 1108 of 1913 arises, was instituted by the landlords for rent at the rate of Rs. 48 odd. The second suit which has given rise to Appeal No. 1109 of 1913, was a suit brought by the tenants asking for a declaration that the rental was Rs. 14 and that the entry in the Record-of-Rights to the effect that the rental was Rs. 48 odd was incorrect. The landlords succeeded in both suits in the first Court. In appeal the learned District Judge has held that the rental is Rs. 14 as alleged by the tenants and not Rs. 48 odd as alleged by the landlords and has decided the two suits accordingly. The landlords now appeal to this Court.

It appears that at the Orissa Settlement, the rental was recorded as Rs. 14 in or about the year 1897. In the year 1905, a proceeding was instituted in the Collectorate by the landlords asking for the creation of a rental of Rs. 48 odd with effect from the ensuing year. The tenants appeared in that proceeding; but the final decision was made *ex parte* in favour of the landlords, the decision being to the effect that from the following year the rental should be at the rate of Rs. 48 odd. Thereafter a suit was instituted by the tenants to set aside this decree upon the ground of fraud. This suit failed. In 1910-1911, the landlords instituted a suit for rent at the rate of Rs. 48 odd but succeeded in obtaining a decree at the rate of Rs. 14 only and this decision was upheld in appeal. At the recent Provincial Settlement, the rental was entered as Rs. 48 odd. From these facts the learned District Judge has drawn the conclusion that the rental is Rs. 14 and not Rs. 48 odd. His judgment has been assailed by the landlords-appellants mainly upon the ground that the learned District Judge has fallen into an error in the view he has taken of the decree of 1905, which created a rental of Rs. 48 odd from the ensuing year. Shortly stated the ground on which the learned District Judge has refused to give any effect to that decree is that that decree involved an illegal enhancement, being an enhancement from Rs. 14 to Rs. 48 odd within fifteen years from the settlement. In taking that view, the learned District Judge fell into an error. The rental appears to have been settled by that decree with reference to the prevailing rate and a settlement with reference to the prevailing rate is not illegal merely for the reason that it involves an enhancement of more than two annas in the rupee. There is no limit to the amount of enhancement which can be effected on the ground of prevailing rate. As regards the period of fifteen years from the date on which Rs. 14 was entered at the Provincial Settlement as the rent payable, we are not satisfied that the learned District Judge really directed his mind to the essential question, whether that entry of Rs. 14 was merely an entry declaring the existing rate or whether it was an entry resulting from a settlement of rent. Under the law as it stood when the Provincial Settlement was made, a settlement of rent could only have been effected upon the ground of difference in area or upon the application of the landlord or of the tenant. No reference to these matters appears to have been made by the learned District Judge and this makes it clear that he did not direct his mind to the point. The importance of the matter is this that, if the entry of Rs. 14 was merely an entry of the existing rate, then there was no bar to a proceeding for settlement within fifteen years. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years under section 113 of the Bengal Tenancy Act would be applicable. The learned District Judge has also somewhat confused the question of the importance of the decree of 1905 by taking it as a question of *res judicata*. It was really a decree creating a new relationship between the landlord and the tenant and the question was, whether the Revenue Officer who made that decree had the power to make it and whether he did, in fact, make it and whether the effect of that decree had subsequently been modified. There is another matter as to which there is some confusion, and as the documents

are not before us, we have not been able to elucidate it. The Revenue Officer who tried the tenants' suit states in his judgment that the decree for rent, which is the latest in date, is in favour of the landlords. No reference is made to this decree in the judgment of the learned District Judge in the case brought by the tenants; but, in his judgment in appeal in the suit brought by the landlords, he appears to say that the latest decree is adverse to the landlords' case. This is a matter which requires clearing up and will have to be considered by the learned District Judge when the case is remanded to him.

In the suit brought by the tenants (Suit No. 298 of 1911-12), there was a mistake in the memorandum of appeal (Special Appeal No. 133 of 1912) to the District Judge. The landlords, defendants in that suit, were named as Bhagawan, Trilochan and Narahari; but in the memorandum of appeal by the tenants to the District Judge, the respondents were named as Bhagawan, Parasuram and Narahari. The defendant Trilochan's name was omitted and, in the place of that name, the name Parasuram was given, Parasuram who is now dead being the father of Trilochan. This mistake was not noticed by either party or by the Court during the hearing of these appeals by the learned District Judge. It would seem, therefore, that Trilochan was not affected by the adverse decision of the learned District Judge in appeal. Trilochan, however, did join Bhagawan and Narahari in the appeal to this Court, although subsequent to the filing of the appeal a Rule was obtained on the tenants to show cause why his name should not be removed upon the ground that he was not bound by the adverse decision of the learned District Judge. The argument of the landlords now is that the tenants' appeal to the learned District Judge should stand dismissed upon the ground of non-joinder of Trilochan. Upon the law as it stood before the recent amendment of the Code of Civil Procedure, the non-joinder of Trilochan would have been fatal to the appeal; but we feel pressed by the recent amendments of the Code which have been directed to the avoidance, if possible, of the defeat of litigation merely upon the ground of non-joinder. Our consideration of the case upon the law has led us to the conclusion that there must be a remand to the learned District Judge; and, as there has to be a remand and as this point was not taken at the first hearing before the District Judge, we think it desirable that the learned District Judge, on remand, should consider whether Trilochan cannot now be added as a party under Order XLI, rule 20, of the Schedule to the Code of Civil Procedure so that an adjudication may be come to between the parties. We accordingly set aside the judgment and decree of the learned District Judge in the tenants' suit (Special Appeal No. 133 of 1912) and direct the learned Judge to consider whether he cannot under Order XLI, rule 20, Civil Procedure Code, now add Trilochan as a party to the tenants' appeal. We say nothing in regard to the application of the law of limitation or any other law which may prevent such a course being taken. If Trilochan cannot be added, then the tenants' appeal must stand dismissed. If Trilochan can be added, the learned District Judge will proceed to dispose of the tenants' appeal in the light of the remarks we have made. The judgment of the learned District Judge in the landlords' suit (Rent Appeal No. 26 of 1912) is a judgment which depends entirely upon the decision of the tenants' suit. As this judgment in the tenants' suit has been set aside and the said case has been remanded, it is necessary now for us to set aside the judgment and decree of the learned District Judge in Rent Appeal No. 26 of 1912 also and direct him to decide that appeal afresh after deciding the analogous appeal arising out of the suit by the tenants (Special Appeal No. 133 of 1912).

Costs of both cases will abide the result.

RULE No. 767.

This Rule is discharged. We make no order as to costs.

*Decree set aside; Case remanded.*

*Rule discharged.*

GANGA DAS SIL *v.* SECRETARY OF STATE.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1796 OF 1913.

January 21, 1916.

*Present*:—Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

GANGA DAS SIL—PLAINTIFF—APPELLANT

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 80, notice under—Plaint, variance in, effect of—Bengal Land Revenue Sales Act (XI of 1859)—Sale*—Noabad taluk, *purchaser of—Amendment of plaint, objection to, waiver of—Bengal Land Revenue Sales Act (VII of 1868, B. C.), s. 12.*

Where in a suit against the Secretary of State for declaration of title to, and recovery of possession of, certain lands alleged to have formed a *noabad taluk*, the plaintiff in his notice under section 80, Civil Procedure Code, mentioned two Maghi Survey Dags as constituting the *taluk* but in describing the lands in the plaint, mentioned only six cadastral survey plots and omitted to mention some other plots, which omission was supplied by amendment of the plaint at a late stage of the suit:

*Held*, that inasmuch as the Maghi Survey plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint was not such as to lead to the dismissal of the suit. [p. 752, col. 2.]

Where the defendants, in their additional written statement filed after the amendment of the plaint, do not raise any objection to the amendment, they must be taken to have waived their objection on the point. [p. 752, col. 2.]

A purchaser of a *noabad taluk* (which is found to be a non-permanent tenure) at a sale held under the provisions of Act XI of 1859, acquires it in the state in which it was at the time of the last Settlement, as provided by section 12 of Act VII of 1868, B. C., and not in the state in which it was at its creation. [p. 753, col. 1.]

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 8th March 1913, reversing that of the Munsif, Chittagong, dated the 30th August 1911.

Babus *Ram Chandra Majumdar*, *D. L. Kastgir* and *Jogesh Chandra Bose*, for the Appellant.

Babu *R. C. Mitra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for declaration of title to, and recovery of possession of, the lands in dispute, which are alleged to have formed a *noabad taluk* purchased by the plaintiff at a sale held under the provisions of Act XI of 1859. The defendants did not deny the plaintiff's title to the six plots of land originally claimed in the plaint, but denied his title to the additional plots which were subsequently included in the plaint by way of amendment.

The Court of first instance gave a decree to the plaintiff for all the plots. On appeal that decree was reversed and the suit was entirely dismissed, the Court of Appeal below having held that the plaintiff had no cause of action with respect to the six plots as to which the plaintiff's title was not denied. The plaintiff has appealed to this Court.

The Court of Appeal below held that the plaint which was amended at a late stage is at variance with the notice served under section 80 of the Civil Procedure Code upon the defendant No 1 and that either the amendment ought not to have been allowed or the suit should have been dismissed on the ground of the variance between the notice and the plaint.

It appears that the two Maghi Survey Dags Nos. 440 and 539, which constituted the *taluk* were mentioned in the notice but in describing the lands in the plaint, only six cadastral survey plots were mentioned and there was an omission to mention the other plots which, the plaintiff alleged were also included in the said two Maghi Survey Dags constituting the *taluk*.

Having regard to the fact that the Maghi Survey Dags (which it is alleged comprised all the plots) were mentioned in the notice, we do not think that there was such a variance between the notice and the plaint as should lead to the dismissal of the suit.

Then as regards the amendment of the plaint it appears that defendants did not raise any objection to the amendment in their additional written statements filed after the amendment or at the trial. Under these circumstances, the defendants must be taken to have waived the objection on the point.

The next question for consideration is whether the plaintiff as purchaser of the *noabad taluk* is entitled to all the lands forming the *taluk* at its creation or only such lands as were included in it in the year 1898 when, according to the defendants, there was a re-settlement of the *taluk* It is contended on behalf of the plaintiff that the *taluk* purchased by him is an estate and not a tenure,

and it is a permanent one. It appears, however, that the Government is the proprietor of the lands (it being a *khas mahal*) and the *taluk*, therefore, cannot be an estate but is a tenure.

As to the question whether the *taluk* is permanent or not, the Court of first instance found that it is permanent, but that finding has been reversed by the Court of Appeal below. A good deal of argument was addressed to us upon the question. It is unnecessary to consider the precise nature of *naobad taluks* generally, as we are bound in the present case by the finding arrived at by the Court below upon the evidence that it is not a permanent *taluk*. The *taluk* being a tenure and not being a permanent tenure, the plaintiff by his purchase acquired it in the same state in which it was at the time of the last settlement as provided by section 12 of Bengal Act VII of 1868, although the sale was held under the provisions of Act XI of 1859.

It appears that the term of the settlement of the *taluk*, which was for 30 years and which was subsequently extended to 50 years, terminated in the year 1898, and a fresh settlement was made in that year. It is contended on behalf of the appellant that there was no fresh settlement in the year 1898, but only a fresh assessment or adjustment of rent. But it appears from Exhibit C that not only there was a fresh assessment, but there was an alteration of the area also. The Court of first instance also found that some lands of the original *taluk* were left out, and some other lands not forming part of the *taluk* were included in it in order to make up the shortage, although that Court was of opinion that there was no fresh settlement. The Court of Appeal, however, has come to a distinct finding upon the evidence that there was a re-settlement and that a new *taluk* was created in 1898. That being so, the plaintiff cannot having regard to the provisions of section 12 of Act VII of 1868, B. C., referred to above, claim anything more than what was included in the *taluk* as it was at the time of the last settlement in 1898.

We do not, however, see any reason why the plaintiff should not get in this suit such of the lands covered by the last settlement as are claimed by him in the present suit.

The learned Subordinate Judge says that as the defendants did not deny the plaintiff's title he had no cause of action for six plots originally claimed in the plaint. But the plaintiff gave notice to the defendants claiming the lands of the *taluk* and it does not appear that the defendants admitted the plaintiff's title at any time before the institution of the suit.

The fact that the defendants did not deny the plaintiff's title in their written statement does not show that the plaintiff had no cause of action.

The learned Subordinate Judge held that no portion of the lands of the *taluk* (as resettled) falls within the compound of the defendant No. 2. In so holding he rejected the measurements made by the Commissioner and the Munsif as unsatisfactory. We are of opinion that the matter has not been properly enquired into by the Court of Appeal below, and that under the circumstances of the case it should have directed a fresh investigation in the matter, when it rejected the Commissioner's measurements and map.

We accordingly remand the case to the Court of Appeal below, in order that it may ascertain the lands which constituted the *taluk* at the last settlement (in the year 1898) and whether any portion of the lands of the *taluk* so constituted and claimed in this suit falls within the compound of the defendant No. 2 and pass a decree in favour of the plaintiff for such lands as may be found to have been included in the *taluk* as it was constituted in 1898, as the result of such enquiry in so far as such lands have been claimed in the present suit. The claim of the plaintiff in respect of any lands not covered by the last settlement (of 1898) will be disallowed.

The appellant must pay $\frac{1}{3}$rd of the costs of the defendants in all the Courts up to this stage, and future costs will abide the result.

*Case remanded.*

## OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 26 OF 1915.

July 22, 1915.

*Present*:—Mr. Kanhaiya Lal, A. J. C.

DELHI AND LONDON BANK, LTD.—DECREE-HOLDER—APPELLANT

*versus*

RAM RATAN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

*Execution of decree—Court, power of—Decree absolute—Premia paid by decree-holder on account of insurance of mortgaged property subsequent to decree, whether recoverable in execution—Judgment-debtor, position of—Objections in execution department*—Res judicata—*Estoppel.*

No addition can be made by a Court executing a decree beyond such as the decree directs, other than the costs arising out of the execution proceeding. [p. 754, col. 2.]

Thus, in mortgage suits, a decree absolute determines the amount which is recoverable from the mortgaged property and no execution can be granted for any sum not covered by the decree or incidental to its execution. [p. 754, col. 2.]

Where, therefore, a decree-holder claimed to add certain premia paid by him on account of the insurance of the mortgaged property against fire subsequent to the date of the decree obtained by him on his mortgage, but the decree did not contain any authority for adding such premia, although the mortgage-deed empowered him to insure the mortgaged property against fire and to add the premia paid by him to the mortgage-money:

*Held*, that the decree-holder could not recover the premia claimed by him. [p. 754, col. 2.]

A judgment-debtor who puts forward objections in the execution department is not always bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res judicata* against him. [p. 754, col. 2.]

*Kalian Singh* v. *Jagan Prasad*, 27 Ind. Cas. 950; 13 A. L. J. 162, referred to.

Where a judgment-debtor acknowledged the correctness of the amount claimed in execution on previous occasions but objected to the same amount being claimed in subsequent execution proceedings:

*Held*, that the judgment-debtor was not estopped by his previous acknowledgment unless it was shown that he had knowledge of the details of the amount previously claimed. [p. 755, col. 1.]

Appeal against the order of the Subordinate Judge, Lucknow, dated the 26th March 1915.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Babu *Har Dayal*, for the Respondents.

JUDGMENT.—In this case the mortgagee claims to add certain premia paid by him on account of the insurance of the mortgaged property against fire subsequent to the date of the decree obtained by him on his mortgage. The mortgage-deed empowered the mortgagee to insure the mortgaged property against fire and to add the premia paid by him to the mortgage-money. The decree did not, however, contain any authority for adding such premia and it is a well-known principle governing proceedings in execution that no addition can be made by a Court executing a decree beyond such as the decree directs, other than the costs arising out of the execution proceeding. A decree absolute determines the amount which is recoverable from the mortgaged property and no execution can be granted for any sum not covered by that decree or incidental to its execution.

It is urged on behalf of the decree-holder-appellant that on two previous occasions applications for execution were made by him for the recovery of money due under the decree with premia paid subsequent to the decree superadded but no objection was taken to those execution proceedings by the judgment-debtor concerned. It is also urged that in those proceedings objections were filed by the present judgment-debtor in regard to other matters and that the correctness of the amount for which the execution was claimed was then either directly or indirectly admitted to be correct.

It is not clear, however, whether a knowledge of the fact that the amount claimed included the premia paid subsequent to the decree absolute for sale had been brought home to the objector, and as held in *Kalian Singh* v. *Jagan Prasad* (1) a judgment-debtor who puts forward objections in the execution department is not always bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res judicata* against him.

In an application made by the judgment-debtor concerned on the 3rd May 1912, the Court was asked by him to grant him a year's time for payment of the decree and the correctness of the amount then claimed was

(1) 27 Ind. Cas. 950; 13 A. L. J. 162.

acknowledged. But whether that acknowledgment was based on a knowledge that the amount claimed included the premia paid subsequent to the decree absolute for sale or not, is not clear and no argument in the nature of an estoppel can be based on it. The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REFERENCE No. 5 OF 1914-15 OF MUTTRA DISTRICT.

March 1, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

JAISI RAM AND OTHERS—APPLICANTS

*versus*

NATHU LAL—OPPOSITE PARTY.

*Agra Tenancy Act (II of 1901), ss. 60, 61—Decree for arrears of rent—Ejectment—Fifteen days' notice not given—Gross and palpable error of law—Revision.*

Where an Assistant Collector did not comply with the provisions of sections 60 and 61 of the Tenancy Act and ordered ejectment before the expiry of the required 15 days:

*Held*, that the Assistant Collector committed a gross and palpable error of law resulting in an injustice to the ejected tenant and the order was liable to be revised.

*Debi Prashad* v. *Mehendar Singh*, Selected Decision No. 1 of 1904, not followed.

*Sheo Singh* v. *Pahalwam Singh*, Petition No. 63 of 1910-11, followed.

Reference made by the Commissioner, Agra Division, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February* 22, 1915.)—It is not denied that the Assistant Collector did not comply with the provisions of sections 60 and 61 of the Tenancy Act and ordered ejectment of the tenant before the expiry of the required 15 days. The only question raised is whether the Board should interfere in revision in a case of this sort. The respondent refers me to *Debi Prashad* v. *Mehendar Singh* (1) which certainly favours his contention. Since then, however, the Board have taken a wider view of their powers of interference on revision, which has been consistently acted on for the past few years, although this view has not been embodied in a selected decision. There is an unpublished

(1) Selected Decision No. 1 of 1904.



decision, *Sheo Singh* v. *Pahalwan Singh*, Petition No. 63 of 1910-1911, in which the Board laid down that they have power to interfere and correct gross and palpable errors of Subordinate Courts so as to prevent grave injustice in non-appealable cases and that the question whether any case comes under this category has to be determined with reference to the grossness and palpableness of the error complained of and to the gravity of the injustice resulting from it. To my mind, the present case is one in which the Board should interfere. The Assistant Collector certainly committed a gross and palpable error of law in not complying with the clear provisions of sections 60 and 61, and the result has been substantial injustice to the ejected tenant.

I would, therefore, set aside the order for ejectment. In the circumstances, parties will bear their own costs in all Courts.

CAMPBELL, J. M.—I agree.

*Appeal allowed*

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MADRAS HIGH COURT.

**FULL BENCH.**

SECOND CIVIL APPEAL No. 242 OF 1914.

October 18, 1915.

*Present*—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT No. 1—APPELLANT

*versus*

ILLIKKAL ASSAN AND OTHERS—DEFENDANTS Nos. 2 TO 4—PLAINTIFFS—RESPONDENTS.

*Madras Land Encroachments Act (III of 1905), ss. 5, 6, 7, 14—Notice under s. 7, effect of—Cause of action.*

A mere notice under section 7 of the Madras Land Encroachments Act, 1905, calling on the person in occupation to show cause why he should not be proceeded against under section 5 or section 6 of the Act, does not give rise to a cause of action. [p. 757, col. 1.]

*Narayana Pillai* v. *Secretary of State*, 15 Ind. Cas. 257; (1912) M. W. N. 703; 12 M. L. T. 165; 23 M. L. J. 162, followed.

*Devaguptapu Bhaskarudu* v. *Pamarthy Subbarayudu*, 21 Ind. Cas. 840; 14 M. L. T. 572; 38 M. 674; (1914) M. W. N. 53; 26 M. L. J. 60, dissented from.

Second appeal against the decree of the Court of the Temporary Subordinate Judge,

SECRETARY OF STATE *v.* ILLIKKAL ASSAN.

Palghat, in Appeal Suit No. 347 of 1913, preferred against that of the Court of the District Munsif Parapanangudi, in Original Suit No. 650 of 1911.

This second appeal first came on for hearing before Spencer and Seshagiri Aiyar, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question that arises for our decision is, whether the period of limitation for a suit brought by a person who seeks a declaration of his title as against the Government on account of a notice issued by Government under Madras Act III of 1905 is six months as provided by section 14 of that Act, or some longer period as provided for suits brought under section 42 of the Specific Relief Act.

In the plaint it is stated that the Collector of Malabar sent a notice to the plaintiff in September 1910, stating that a certain piece of land belonged to Government and offering the plaintiff a *pattah* for a portion and requiring him to give up the rest at once. In answer to that notice, it is stated that the Collector was required on 21st December 1910 by a registered notice to release the claim set up by Government and to refund the penalty levied under the Act. It is quite clear that the plaintiff's suit is barred, so far as the recovery of the sum collected by Government is concerned, and both the lower Courts have held the suit to be barred in this respect. Now, the cause of action is stated in the plaint to have arisen on the 21st December 1910, when a demand was sent to the Collector of Malabar and he did not comply with that demand. But the respondent's Vakil concedes that, so far as a cloud was thrown upon his title by the action of Government, the cause of action must date from the notice sent by the Government in September 1910.

It was held in *Narayana Pillai* v. *Secretary of State* (1) that there were only two causes of action by which a party might be aggrieved and have a right of suit under section 14 of this Act, and that they were (1) the levy by penalty and (2) eviction or forfeiture; and the learned Judges who decided that case observed that a person could not be regarded as "aggrieved" by a mere preliminary notice by Government before exercising their powers under the Act. But in *Devaguptapu Bhaskarudu* v. *Pamarthy Subharayudu* (2), another Bench decided that a mere notice or denial of the plaintiff's title to property, if taken under the provisions of the Act, would give the plaintiff a cause of action upon which he must sue within six months from the date of the act alleged. The learned Judges observed that if the plaintiff did not feel himself aggrieved by the notice, he must wait until some further action was taken by Government, but if he alleged it to be a proceeding under the Act, he was bound to sue within six months.

We find it difficult to reconcile these two decisions of different Benches of this Court. The later decision does not seem to have taken account of the words in section 14, "such persons, for any such cause of action unless such a suit shall be instituted within six months." "Such cause of action" appears to refer to the proceedings mentioned in the first part of the section, by which persons may "deem themselves aggrieved"; but the explanation shows that a person can be "aggrieved" within the meaning of this section only by the levy of penalty or by eviction, and this was pointed out in *Narayana Pillai* v. *Secretary of State* (1). No doubt, the service of a notice is a preliminary act before evicting the occupant of the land [see sections 6 (2) and 7 of the Act]. But if a person possesses a substantive right to establish his title to property as against any other person who denies his title, such substantive right will not be taken away by an Act of the Legislature without an express declaration to that effect. But as the decision in *Devaguptapu Bhaskarudu* v. *Pamarthy Subharayudu* (2) is against the view we are inclined to take, we refer to a Full Bench the question:—

"Whether a suit for a declaration of title to a land in dispute, if brought in consequence of a notice given under Act III of 1905 to vacate the land, is governed by the six months' limitation provided in section 14 of the Act?"

The other point argued on behalf of Government is that the suit is barred by limitation under Act XXVIII of 1860. But on this point we consider that the lower Courts were right in deciding that there was no bar, as

(1) 15 Ind. Cas. 257; 23 M. L. J. 162; (1912) M. W. N. 703; 12 M. L. T. 165.

(2) 21 Ind Cas. 840; 26 M. L. J. 60; 14 M. L. T. 572; 38 M. 674; (1914) M. W. N. 53.

there is no material for deciding that the plaintiff had notice of the decision of the Survey Officer in 1903 and was concluded by it.

The *Government Pleader*, for the Appellant.

Mr. *Ranganatha Iyer* for Mr. *A. V. K. Krishna Menon*, for the Respondents Nos. 2 and 3.

Mr. *C. V. Anantakrishna Iyer*, for Respondents Nos. 5 to 10.

This second appeal came on for hearing before the Full Bench which delivered the following

OPINION.—We think that a notice under section 7 calling on the person in occupation to show cause why he should not be proceeded against under section 5 or section 6 of the Act, does not give rise to a cause of action. This was pointed out in *Narayana Pillai* v. *Secretary of State* (1). If the learned Judges who decided *Devaguptapu Bhaskarudu* v. *Pamarthy Subbarayudu* (2) were of a different opinion we are with respect unable to agree with them. Further, whether the present suit be regarded as based on the notice under section 7 or on the levy of penal assessment in June 1910 more than six months before the date of suit, it is in either view barred under section 14 because it was not instituted within six months from the date at which the cause of action arose.

This case coming on for final hearing after the expression of opinion of the Full Bench on 14th January 1916, the Court (the Hon'ble Mr. Justice Abdur Rahim and the Hon'ble Mr. Justice Seshagiri Aiyar) delivered the following

JUDGMENT.—The appeal must be allowed having regard to the opinion of the Full Bench that there was no cause of action based on the notice dated September 1910.

The decree of the lower Court will be reversed and that of the District Munsif restored with costs in this and in the lower Appellate Court.

The memorandum of objections is dismissed.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 603 OF 1914.

January 20, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

RAMU PAL AND OTHERS—DEFENDANTS NOS. 1, 2 AND 8—APPELLANTS

*versus*

PRAKASH CHANDRA SARMA PURKAYESTHA—PLAINTIFF—RESPONDENT.

*Estoppel—Non-transferable occupancy holding, sale of, in execution of money decree without objection of tenant—Co-sharer landlord—Purchaser of co-sharer landlord's interest—Civil Procedure Code (Act V of 1908), s. 47—Landlord and Tenant Procedure Act (VIII of 1869, B. C.), s. 27—Limitation, special, applicability of.*

Where the proprietors of a share in a *mauza* held a non-transferable occupancy holding within it and in execution of a money decree against them, the holding was sold without any objection on their part to its saleability in the execution proceedings:

*Held*, that a purchaser of the proprietary share of these proprietors was estopped from objecting to the sale on the ground that the holding was not saleable by the custom of the locality, inasmuch as his vendors having opportunities of taking the said objection in the execution proceedings did not do so. [p. 759, col. 1.]

Section 27 of the Bengal Act VIII of 1869 applies only to a case where dispossession of the tenant has been made by the whole body of the landlords. [p. 759, col. 1.]

*Brojo Mohun De Sirkar* v. *Sheikh Dengu*, 7 C. L. R. 141; *Gando Patuni* v. *Sarat Patuni*, 32 Ind. Cas. 510, followed.

Appeal against the decree of the Subordinate Judge, Sylhet, dated the 24th November 1913, modifying that of the Additional Munsif, Sunamganj, dated the 25th of June 1912.

FACTS of the case appear from the judgment.

Babu *Sasadhar Roy*, for the Appellants.—Nepal and Gopal had occupancy right in the lands in dispute. They also acquired a share in the superior proprietary right in the village in which the above lands are included. They then sold their proprietary share to defendant No. 8 in 1894. The present plaintiff purchased at an auction sale the non-transferable occupancy right of Nepal and Gopal. Defendants Nos. 1—6 took settlements of the disputed lands from defendant No. 8 in 1895. Plaintiff's cause of action arose in 1894. The date of the present suit is 8th April 1911. Plaintiff has been out of

possession for seven years before the institution of the present suit. The question is whether the plaintiff's right is barred by the special limitation of one year. The plaintiff asks for a declaration of right. Has the plaintiff any title and if so, is it not barred by the special law of limitation? As regards the question that the occupancy holding is non-transferable, the question is, who can raise the question of transferability? *Vide Dayamoyi* v. *Ananda Mohan Roy Chowdhuri* (1). In the present case the present landlord, defendant No. 8, has not given previous or subsequent consent to the sale at which the plaintiff purchased. Defendant No. 8 is not estopped from raising the question of transferability simply because Nepal and Gopal remained silent at the sale. The plaintiff by purchase of the occupancy right which was not transferable has got nothing. Moreover, he is debarred from any remedy by reason of the special law of limitation. The plaintiff was dispossessed in 1904 and the suit was brought seven years after dispossession, so the suit is barred by section 27 of the Bengal Act VIII of 1869.

Dr. *Sarat Chandra Basak* (with him Babu *Bipin Chandra Basu*), for the Respondent-Plaintiff, argued that the point of limitation raised by the other side was not applicable here on the authority of the case of *Brojo Mohun De Sirkar* v. *Sheikh Dengu* (2) and the unreported case of *Gando Patuni* v. *Sarat Patuni* (3) in Second Appeals Nos. 1122, 1298 and 1299 of 1912 decided by Woodroffe and Coxe, JJ., on the 19th August 1914. As regards the question of transferability, in 1896 the old tenants had a share in the *maliki* right and were parties to execution proceedings and as such they ought to have raised the question whether the holding was saleable in execution of a money decree. Nepal and Gopal combined in them *maliki* and *ryoti* interests and they should have objected to the sale. They cannot later on say as *maliks* that the holding was not saleable. They allowed the holding to be sold; here is clear estoppel by conduct. Section 27 of the Bengal Act says 'person' and it means the entire body of landlords and not a co-sharer.

Babu *Sasadhar Roy*, in reply.

JUDGMENT.—Two persons of the name of Nepal and Gopal owned an occupancy holding consisting of the disputed lands in this case. These two persons had also a proprietary right in the *mauza* in which these lands were situated. In execution of a money-decree against these two persons their occupancy holding was brought to sale and was purchased by the plaintiff. In the execution case Nepal and Gopal did not take any objection that the property was not saleable and could not, therefore, be sold. They kept silent and the property was sold and purchased by the plaintiff in 1896. In this case, it has been held by the learned Subordinate Judge that occupancy holdings are not saleable by the custom of the locality in which the disputed lands are situated. In the execution case in 1896 Nepal and Gopal should have objected both as *raiyats* and as landlords that the occupancy holding sought to be sold was not saleable and could not be sold. That was a matter concerning the satisfaction of the decree in execution, and could be raised under section 244 of the old Code of Civil Procedure which was then extant. It was not so raised and the property was sold. Defendant No. 8, who is the purchaser of the proprietary share of Nepal and Gopal, now says that she is entitled to object to the sale to the plaintiff on the ground that the property was not saleable. The learned Subordinate Judge has held that it does not lie in the mouth of defendant No. 8 who has purchased the share of Nepal and Gopal to say that the property was not saleable, when her vendors had an opportunity of taking the said objection in the execution proceedings which terminated in the sale to the plaintiff.

It is contended in appeal before us that the learned Subordinate Judge is wrong in so holding. We do not think that this is so. It was open to the learned Subordinate Judge to decide upon the facts found in the case, whether or not defendant No. 8 who derived her title from Nepal and

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172 (F. B.).
(2) 7 C. L. R. 141.
(3) Since reported; See 32 Ind. Cas.

Gopal was estopped and it was decided that she was. On principle also, we think that the position of Nepal and Gopal as landlords and tenants could not be differentiated in the execution proceeding in that they were judgment-debtors in the money decree and their rights in the occupancy holding were going to be sold, and if they wanted to stand upon their rights as landlords to oppose the sale they should have done so. They could have done so both as *raiyats* and landlords, but they did not do that and the result was that the property was sold and the decree which was binding upon them was to the extent of the purchase-money satisfied. That purchase-money came from the plaintiff and it can now be said that if it were not for the conduct of Nepal and Gopal in not taking the objection to the sale, the plaintiff might not have made the purchase. In this view of the case the contention of the learned Vakil for the appellant fails.

The next contention is that upon the allegation of the plaintiff in this case, the plaintiff was dispossessed in 1904 and the suit was brought in 1911, admittedly seven years after the dispossession.

It is contended that as defendant No. 8 is one of the co-sharer landlords the suit is barred by section 27 of the Bengal Act VIII of 1869. This contention is also wrong, as it has been held in the case of *Brojo Mohun De Sirkar* v. *Sheikh Dengu* (2) that the said section applies only to a case where dispossession has been made by the whole body of the landlords. That case has been followed by a recent unreported case, that of *Gando Patuni* v. *Sarat Patuni* (3), in Second Appeals Nos. 1122, 1298 and 1299 of 1912 decided by Woodroffe and Coxe, JJ., on the 19th August 1914. We do not think that there is any reason for departing from the view which was taken by the learned Judges in this case. The second contention also fails.

In this view of the case we dismiss the appeal with costs.

*Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 391 AND 392 OF 1914.

August 26, 1915.

*Present*:—Mr. Justice Seshagiri Aiyar.

IN C. R. P. No. 391 OF 1914

THOPPUKATTU RAMAYA GOUNDEN AND ANOTHER—DEFENDANTS—PETITIONERS

IN C. R. P. No. 392 OF 1914

KARUPPA MOOPPAN—DEFENDANT—PETITIONER

*versus*

R. SADAGOPACHARIAR—PLAINTIFF—RESPONDENT IN BOTH.

*Practice—Appeal—Order directing plaint to be presented to Revenue Court set aside– Remand—Jurisdiction.*

An Appellate Court, setting aside on appeal an order of a Civil Court directing the plaint in a rent suit to be presented to a Revenue Court, should not remand the suit for fresh disposal after restoring it to file but leave the parties to take such steps as they choose to adopt or take such proceedings as they think proper in the Court of first instance. [p. 760, col. 1.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, Salem, in Civil Miscellaneous Appeals Nos. 3 and 2 of 1913, preferred against the orders of the Court of the Principal District Munsif, Salem, in Original Suits Nos. 1512 and 1505 of 1911, respectively.

Mr. *B. Sitarama Rao*, for the Petitioners.

Mr. *C. Narasimhachariar*, for the Respondent.

JUDGMENT.—In these cases suits for declaration were filed in the District Munsif's Court. Among the reliefs prayed for, the questions regarding the right of the tenant to the trees on their holding whether the trees can be cut by them, were asked to be decided. The District Munsif was invited to give and did give his finding upon the matters in controversy between the parties. Ultimately he held that the suits ought to be instituted in the Revenue Court and that he had no jurisdiction; he, therefore, directed the plaintiff to present his plaints in the proper Court. Against those orders appeals were preferred to the District Judge. Before the District Judge the parties agreed that, as there was a prayer which asked for a declaration of rights, the District Munsif had jurisdiction to dispose of the suits. In this view the only order that

should have been passed was to annul the orders of the District Munsif directing the return of the plaints for presentation to the proper Court. The parties should have been asked to take such steps as they chose to adopt or to take such proceedings as they thought proper in the Court of first instance. Instead of that, the learned District Judge has directed the District Munsif to restore the suits to his file and to dispose of them according to law. Apparently the District Judge considered that he was remanding the appeals for disposal to the lower Court. That portion of the District Judge's judgment in which he directs the District Munsif to restore the suits to his file must be deleted. It must be left to the District Munsif to decide whether he should re-hear the cases, or whether, having regard to the agreement between the parties, he should give his findings anew upon all the issues or whether he should now proceed to give judgment on the basis of the findings already arrived at in the cases. It is to be regretted that in these cases a great deal of time should have been taken up in dealing with matters which ultimately may prove to have no bearing upon the judgment to be pronounced The petitions are dismissed subject to the modification suggested.

Under these circumstances I make no order as to costs in this Court.

*Petitions dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1749 OF 1914.

December 8, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, KT.

MANCHUKONDA APPADU AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

ATCHI APPALASWAMY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Evidence Act (I of 1872), s. 69—Proof of mortgage-bond—Finding by first Court—Document "legally proved"—Appellate Court, whether should interfere.*

A Court of first instance that records the evidence in a case is in the best position to say what a witness means, and when it comes to a finding as to a document having been "legally proved" within the meaning of section 69 of the Evidence Act, an Appellate Court should be very slow to interfere with the finding especially when no objection has been taken to its admissibility at the time of the hearing. [p. 760, col. 2.]

Second appeal against the decree of the District Court of Vizagapatam, in Appeal Suit No. 436 of 1913, preferred against that of the District Munsif, Vizagapatam, in Original Suit No. 272 of 1912.

Mr. *V. Ramesam*, for the Appellants.

Mr. *B. Narasimha Rao*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The suit is on a mortgage-bond. As required by section 69 of the Evidence Act the executant's signature has to be proved. The second plaintiff in the case gave evidence and the form in which it is recorded is in these words: "The bond was executed to me and to second plaintiff: Exhibit A", which is the mortgage-bond. Then he says later on in cross-examination: "I took the bond from only two people as the *patta* stood in their name." The District Munsif who delivered judgment in the case was the very gentleman before whom the witness gave his evidence. He says in his judgment, paragraph 4: "Plaintiff's witness No. 2 who is 1st plaintiff in the suit proves that the bond was executed to him by A. Appanna and his son A. Pydayya." There can be no doubt that what he means to convey by this is that the 2nd plaintiff in the witness-box proved the signature of these two persons and that the bond was, therefore, legally proved. It was only in the appeal before the District Judge that objection was taken that what is recorded in the deposition is not sufficiently proved within the meaning of section 69 of the Evidence Act. The learned District Judge yielded to that argument and dismissed the plaintiff's suit. It appears to me that he is wrong. It was the District Munsif who heard the witness and recorded his evidence that was in the best position to say whether the witness proved the signature of the executant of the mortgage-bond or not. What is most important is that no objection was taken to the admissibility of the document by the defendant. If the signature was not proved he ought to have

then and there objected to the document being admitted in the evidence and marked as an Exhibit. He did not do so. In my mind it shows conclusively that, as a matter of fact, the document was proved as required by law and that it was too late for the defendant to take such an objection in appeal. The second appeal will be allowed and the suit remanded to the District Court for disposal according to law on the other issues in the case. Costs will abide the result.

AYLING, J.—I agree.

*Decree set aside; Case remanded.*

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## ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1651 OF 1914.

January 5, 1916.

*Present*:—Mr. Justice Walsh.

GIRDHARI CHAUBE AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

RAM BARAN MISIR—DEFENDANT—RESPONDENT.

*U. P. Land Revenue Act (III of 1901), ss. 40, 44, 203, 207—Mutation—Arbitration—Award—Subsequent suit in Civil Court, maintainability of*—Res judicata.

An award given by arbitrators in a mutation proceeding is no bar to a subsequent suit for possession in a Civil Court. [p. 762, col. 1.]

Second appeal from the decision of the Additional District Judge, Gorakhpur, dated the 13th June 1914.

Mr. *Parmeshwor Dyal*, for the Appellants.

Mr. *Iswar Saran*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Additional District Judge of Gorakhpur giving judgment for the defendant in the suit and reversing the decision of the Munsif who had granted a decree in favour of the plaintiffs. The action was brought by the plaintiffs for a declaration of title and for recovery of possession of certain property. At the date of the last Settlement, the defendant's predecessors-in-title had been recorded in the revenue papers. In 1887 the plaintiffs' predecessors-in-title brought a similar suit to the present against the defendant's predecessors-in-title. In that suit they succeeded, and, it is alleged, obtained possession as the result of the decree in their favour. Inasmuch as they were in possession they did not take the trouble to apply for an alteration in the revenue entries, which, therefore, remained uncorrected. In 1912 disputes having arisen between the plaintiffs and the defendant, as they had arisen between the plaintiffs' predecessors and the defendant's predecessors, the plaintiffs applied to the Assistant Collector for mutation. Either at the request of, as appears to be found by the Additional District Judge, or by the consent of, the parties to that dispute in the Revenue Court, the Assistant Collector referred the matter in dispute to three arbitrators under section 203 of the Land Revenue Act (Local Act III of 1901). What the ambit of the reference purported to be, there is nothing before me to show. One thing, however, is perfectly clear, *viz.*, that that arbitration related only to, and could relate only to, the question arising for decision in the Revenue Court as to whose name should be placed upon the register. In the result, two of the arbitrators decided against the plaintiffs and one in their favour. Following the decision of the majority of the arbitrators the Assistant Collector rejected the application of the plaintiffs on the 17th of March 1913. On the 2nd of July 1913, the plaintiffs instituted this suit. In the course of his judgment upon facts the learned Munsif before whom that suit originally came held as a fact that "the defendants had miserably failed to prove their adverse possession over the plaintiffs' land". That appears to be a finding of fact by a Judicial Tribunal in a Civil Court after hearing the evidence according to law. The learned Additional Judge, against whose judgment this appeal is brought, overruled that finding of fact, not on the evidence which was before the learned Munsif, nor, as I understand it, on evidence which was before him other than by way of record, but on the broad simple ground that the decision of the arbitrators in the Revenue Court was a decision of a competent Court from which no appeal had been brought, which was final and which was binding upon him and upon every other Court, Civil or otherwise. With that decision I find it impossible to agree. It would be surprising if any decision of any Tribunal, charged with

the duty of deciding the nature of entries upon a register for the purposes of revenue, should be held to be conclusive between the parties as to their rights to property. Questions of title and rights to property are *prima facie* matters for the Civil Courts of the country and I should require very strong unambiguous language to satisfy me that any proceeding in a Revenue Court could abrogate the natural right of every citizen to seek redress for wrong in the Civil Courts of the country to which he belongs. It is sought, however, to support the view that an award of this kind ousts the jurisdiction of the Civil Courts by referring to sections 203 to 207 of the Land Revenue Act. In the first place, it is not immaterial to observe that those sections are contained in Chapter IX of the Act which relates to the procedure of Revenue Courts and Revenue Officers. They are in fact provisions dealing with the machinery in the Revenue Courts and section 207 undoubtedly provides that in certain circumstances where an award has not been appealed and the decision given in accordance with the award is not otherwise impugned, no person shall institute any suit in the Civil Court for the purpose of setting aside the award or against the arbitrators on account of their award. Speaking for myself if that section stood alone, I should feel considerable difficulty in holding that it was either intended, or could be treated, in the least degree, as effectual, for the purpose of abrogating or destroying the ordinary right of a person to assert his title in a Civil Court. To my mind the language is not only wholly insufficient but is clearly directed to a different set of circumstances; and when attention is directed to the effective part of the enactment which deals with the duties and the acts of the Revenue Courts, included amongst them are found section 40 and section 44 which in the clearest possible terms provide that no decision of a Revenue Court shall affect the right of any person to claim and establish in the Civil Court any interest in land. If any interpretation or any guide were required for the right understanding of section 207, then those two sections make it abundantly clear that section 207 has not the effect contended for.

It was further contended by the respondent's Counsel that this arbitration was entered into by the consent of the plaintiffs and that, therefore, they must be taken to have surrendered their right to come to a Civil Court. I think that this is really the same point in another form because according to section 203 no arbitration can be ordered except by the consent of parties, but out of respect to the argument addressed to me, I will deal with it in a few words. I quite agree that if consent had been given outside the Act submitting on behalf of both parties the determination of their rights to a special Tribunal such as these arbitrators were, they must be taken to have consented to be bound for all purposes by that special Tribunal and to have surrendered their ordinary rights to come to a Civil Court. There is nothing to show that they did anything of the kind. What was done was done inside the Revenue Act. It was part of the machinery of the Revenue Act, it was part of the procedure provided by the Revenue Act, and all that they consented to, or can be taken to have consented to, in the absence of proof of some special agreement, was that the arbitrators should be substituted for the Collector in the discharge of the duties under the Act. It was, therefore, an act of consent to something within the four corners of the Revenue Act. By giving such consent, the plaintiffs, in my opinion, did not lose the protection given to them by the Act under which their such consent was given and this argument also fails.

The result is that the decision of the Court below on the point must be reversed. It is perhaps to be regretted that the materials for the final disposal of this suit are not immediately available. Under the circumstances I have no alternative but to frame an issue and refer it for trial under Order XLI, rule 25, of the Civil Procedure Code to the Court from whose decree this appeal is brought. It appears to me that the lower Appellate Court has not addressed itself at all to the real question of fact, *viz.*, whether the plaintiffs have been out of possession so as to have lost their title, but has held itself bound by the finding, which, as I have held above, it is not binding upon a Civil Court. The issue will be:—

"Whether or no the plaintiffs or their predecessors-in-title have been wholly out of possession throughout the period between the 2nd of July 1901 and the 2nd of July 1913 of any, and if so which, of the plots comprised in the land in dispute."

Under the circumstances parties ought to be at liberty to produce any material evidence on the above issue. On receipt of findings ten days will be allowed for objections.

The lower Appellate Court, unless it is prepared to adopt the findings of fact in the Munsif's Court, should come to an independent finding upon all the evidence available, without regard to the findings of the majority of the arbitrators.

*Case remanded.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1355 OF 1911.

September 21, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SUPPAYYA PATTAR *alias* SUPPAYYA IYER—PLAINTIFF—APPELLANT

*versus*

DAWOOD HAJI AHMAD SAIT AND OTHERS—DEFENDANTS—RESPONDENTS.

*Principal and agent—Agent borrowing without authority—Principal, liability of.*

Where a principal has been benefited by the money borrowed by an unauthorised agent from the plaintiff, either by the principal having received the money directly or by its having been spent in meeting his legal liabilities, the principal is equitably bound to return to the plaintiff the said money to the extent that he has derived benefit therefrom. [p. 763, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 537 of 1910, preferred against that of the Court of the District Munsif, Chowghat, in Original Suit No. 226 of 1909, on 12th August 1914.

FACTS.—The plaintiff sued to recover from the defendants Rs. 2,500 with future interest and costs. He alleged that the 1st defendant's brother and 2nd defendant's father Cassim Haji Ahmad Sait (deceased), who was a trader at Cochin, carried on trade at Kuttingal near Gurvayur, that at the latter place it was conducted through his agent Ibrahim who borrowed money from him (plaintiff) in cash and *hundis*, that he also made certain repayments, that the accounts in respect of all these were settled on the 3rd *Dhanu* 1083, that it was then found that the amount due to him (plaintiff) was Rs. 2,215, that an agreement was then made between the plaintiff and the agent to repay the aforesaid amount with interest at 12 per cent. per annum and that the fact was evidenced by an account stated and signed by the agent, that Rs. 22 was alone paid towards the debt and that the defendants, who are the heirs and legal representatives of Cassim Haji Ahmad Sait, were therefore liable to pay the plaint amount with future interest and costs to the plaintiff. The defendants contended that Ibrahim borrowed no money from the plaintiff for the purpose of Cassim Haji Ahmad Sait's trade, that he possessed no power to do so, that the suit was the result of collusion between him and plaintiff and that they were liable to pay nothing to the plaintiff.

The defendants did not seriously dispute that Ibrahim had borrowed money from the plaintiff and that the plaint amount was due by him to the plaintiff. The question was whether the defendants, as heirs and representatives of the principal, Cassim Haji Ahmad Sait (deceased), are liable for the debt. That depended upon the construction of the power-of-attorney evidenced by Exhibit I under which Ibrahim above mentioned was appointed the agent of Cassim Haji Ahmad Sait to conduct trade at Kuttingal. The aforesaid Exhibit ran as follows:—

"Know all men by these presents that I, Cassim Haji Ahmad, merchant, carrying on business at Cochin and elsewhere and residing at Mattancheri in Cochin aforesaid, have made, ordained, constituted, nominated and appointed and by these presents do make, ordain, constitute, nominate and appoint Ibrahim Haji Hassam of Cochin as my true and lawful attorney for me and in my name to carry on business as rice merchant at Chowghat in the District of Malabar, ask, demand, sue, recover and receive of and from all person or persons whatsoever in Chowghat aforesaid all sum

or sums of money as are now due or may hereafter become due to me by way of mortgages or whatsoever other manner and upon payment thereof to grant in my name and behalf good and proper discharge in respect of such payment or upon non-payment in my name and behalf to sue such person or persons in any Court or Courts of Law and upon decree or upon compromise to execute such decrees or carry such compromise into effect and to grant in my name and behalf good and sufficient discharges for all moneys received through Court or otherwise. I also authorise my said attorney to appear and represent me in any Court or Courts as appellant, petitioner or respondent, counter-petitioner and also to do such other acts and things as may be required and necessary to do in respect of my affairs and business at Chowghat aforesaid and to appoint one or more attorneys under him for one or all of the aforesaid purposes, ratifying and confirming all what my said attorney or his substitutes may do or cause to be done within the premises. In witness whereof I have hereunto set my hand at Cochin this 24th day of September 1906."

The District Munsif found that the payments alleged by the plaintiff are true, that under the power-of-attorney, the agent's power cannot be held to have been limited in any way, that he had authority to borrow, that the *hundis* obtained by the agent were in respect of moneys borrowed by him and that the principal has been benefited by these amounts. Relying on Article 103 in Bowstead on Agency that where by the wrongful unauthorised act of an agent, money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property, he held that the principal was bound to the plaintiff. On appeal, the Subordinate Judge held that the authority should be found within the four corners of the power either in express terms or by necessary implication, that the power was limited to sell rice and to recover outstandings in respect of the same and not to contract any debts; that the agent obtained *hundis* from the plaintiff and sent them to his masterin lieu of money, that the principal was not aware of the loan and that the amount borrowed by the agent was outside the ordinary course of his employment and that it went in discharge of his own liability to the principal. In the result he held that the agent had no authority, express or implied, to borrow. The Sub-Judge reversed the Munsif's decree and dismissed the plaintiff's suit.

Mr. *S. Srinivasa Iyengar*, for the Appellant.

Mr. *S. T. Srinivasagopalachariar*, for the Respondents.

JUDGMENT.—We are satisfied that the agent Ibrahim had no authority to borrow money for making remittances to his principal. The only ground on which the plaintiff could succeed is that, as decided in the English and Indian cases quoted by the appellant's learned Vakil, *viz.*, *Reid* v. *Righy* (1), *Banmatyne* v. *MacIver* (2), *Reversion Fund and Insurance Company Limited* v. *Maison Cosway Limited* (3), *Marsh* v. *Keating* (4), *Heramba Chandra Pal Chowdhury* v. *Kasi Nath* (5) and *Ghasiram* v. *Raja Mohun Bikram Sha* (6), where the principal has been benefited by the money borrowed by the unauthorised agent from the plaintiff, either by the principal having received the money directly or by its having been spent in meeting his legal liabilities, the principal is equitably bound to return to plaintiff the said money to the extent that he has derived benefit therefrom. Before dealing with this question of law in detail and before disposing of this appeal finally we think it advisable to call for definite findings on the following questions:—

1. Were all or any of the sums mentioned in the credit side of the account, Exhibit B, received by Cassim Haji, either as sent by *hundi* drawn in his favour or as otherwise received by him or his servant Mustappa? What is the total amount of the sums so received?

(1) (1894) 2 Q. B. D. 40; 10 R. 280; 63 L. J. Q. B. 451

(2) (1906) 1 K. B. 103; 75 L. J. K. B. 120; 94 L. T. 150; 54 W. R. 293.

(3) (1913) 1 K. B. 364; 82 L. J. K. B. 512 108 L. T. 87; 20 Manson 194; 57 S. J. 144.

(4) (1834) 1 Bing (N. C.) 198; 2 Cl. & F. 250; 8 Bli. (N. S.) 651; 1 Scott. 5; 1 Mont. & Ayr. 592; 131 E. R. 1094.

(5) 1 C. L. J. 199.

(6) 6 C. L. J. 639.

2. Whether the plaintiff in dealing with Ibrahim intended to deal with him as Cassim's agent or intended to hold Ibrahim himself independently liable on the dealings?

The finding will be submitted on the evidence on record within six weeks from the date of receipt of papers. Ten days will be allowed for filing objections.

[The Subordinate Judge returned the Finding on the first issue that all sums mentioned on the credit side of Exhibit B except a sum of Rs. 2,500 and odd were received by Cassim and that they amounted to Rs. 49,000 and odd. The Sub-Judge also found that what had been remitted by the agent to the principal or had been otherwise recovered by him was less than the amount shown on the debit side of Exhibit B, *i.e.*, the amount repaid by the agent to the plaintiff. On the 2nd issue he found from the plaintiff's accounts that the plaintiff was dealing with Ibrahim as agent of Cassim].

JUDGMENT.—We accept the findings and dismiss the second appeal with costs.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 45 OF 1914-15 OF AGRA DISTRICT.

March 1, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

KIDDHA—DEFENDANT—APPELLANT

*versus*

NEKRAM—PLAINTIFF—RESPONDENT.

*Agra Tenancy Act* (*II of* 1901), *ss.* 11, 58—*Cultivation for a number of previous and subsequent years—Cultivation in intervening years, no proof of—Presumption—Ejectment.*

Where a person is found to be cultivating a certain land for a number of previous years and a number of subsequent years and there is no evidence that any other person cultivated the land in the intervening years, the presumption is that the same person cultivated it throughout. [p. 765, col. 2.]

Second appeal from the order of the Commissioner of the Agra Division, dated the 29th July 1914, reversing that of the Assistant Collector, 1st Class, Agra District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February* 15, 1915.)—The cross-objection relates to two plots, Nos. 2504/3408 and 2540/3406. As regards plot No. 2540/3406 the Assistant Collector has found that the respondent did not hold as a sub-tenant or tenant-in-chief in 1310 *Fasli*, and his term commenced from 1311 and, therefore, he did not acquire occupancy rights. The Commissioners took somewhat the same view. I think both Courts have not come to the right conclusion on the only evidence produced by the *zemindar*, the *khasra* entries. The entries show Kiddha recorded as sub-tenant in 1309 *Fasli* and Jugal Kishore as tenant-in-chief: Jugal Kishore recorded as tenant-in-chief in 1310 *Fasli*, without a sub-tenant, and Kiddha recorded as tenant-in-chief from 1311 *Fasli* onwards. Both Courts have held that Jugal Kishore was never a tenant at all. The result is, therefore, that we find Kiddha was tenant-in-chief in 1309 *Fasli*. As regards 1310 *Fasli* there is no entry in the *patwari's* papers, as to who cultivated, which can be relied on, whereas Kiddha is shown as cultivating from 1311 onwards. On these facts the inference which could be drawn is that Kiddha never gave up his cultivation in 1310 and has acquired rights of occupancy.

As regards No. 2504/3408, the cross-objector's present contention is that this number was amalgamated with plot No. 2529/5. The evidence which I have allowed to be adduced consists of an extract from the *khasra* of 1309 *Fasli*, which shows these plots as amalgamated and shows the total area, 13 *biswas*, as cultivated, and the *patwari's* statement which shows that they were amalgamated in 1311 *Fasli*. The *zemindar*, however, should have an opportunity of rebutting, if he wishes, this fresh evidence which should have been produced before the Court of first instance. I have allowed the tenant to put in fresh evidence, as the entry regarding No. 2504/3408 in the *khasra* abstracts is not clear in itself and the lower Court should have cleared this up.

I would, therefore, set aside the order of the lower Courts as regards plot No. 2540/3406 and dismiss the suit for ejectment in respect of this plot, and remand the case for a finding on the following issue:

GHULAM ABBAS *v.* FIDA HUSSAIN.

"Was plot No. 2504/3408 amalgamated with No. 2529/5 in the last twelve years ?", fresh evidence on this point being produced if necessary. Objections within ten days of date of finding. No fresh date to be fixed unless objections are filed. Cross-objector will pay costs in any case.

CAMPBELL, J. M.—I concur.

*Order set aside; Case remanded.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 3 OF 1914-15 OF BARA BANKI DISTRICT.

February 11, 1915.

*Present:*—Mr. Campbell, J. M.

GHULAM ABBAS—DEFENDANT—APPELLANT

*versus*

*Chaudhri* FIDA HUSSAIN AND OTHERS —PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 158—Mortgagee of rent-free holding—Absolute transferee.*

A mortgagee of a rent-free holding is not an absolute transferee and he cannot, therefore, be considered to be a 'successor' to the grantee within the meaning of section 158 of the Tenancy Act.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 28th August 1914, reversing that of the Assistant Collector, Bara Banki, in a case of resumption.

JUDGMENT.—I see no reason to interfere with the Commissioner's order. I agree with him that there has been no absolute transfer of appellants' rent-free holding to the mortgagee, and, therefore, he cannot claim to be a successor to the holding. I also agree with him in his finding that appellants are only the second in succession to their father, and cannot claim under-proprietary rights in their part of the holding, and think that his solution of the difficulty of giving Barkat Ali his one-third as under-proprietor is an equitable one.

There is no evidence that defendant's ancestor acquired the land for valuable consideration.

I, therefore, uphold the Commissioner's order and dismiss this appeal with costs.

*Appeal dismissed.*

NASARAT KHAN *v.* MANULLA.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 69 OF 1914.

January 19, 1916.

*Present:*—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

NASARAT KHAN—PLAINTIFF—APPELLANT

*versus*

*Sheik* MANULLA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3—Suit dismissed for default—Decree drawn up—Appeal, maintainability of.*

In disposing of a suit a Munsif passed the following order: "The plaintiff's Pleader says that he and his client would retire from the case as the plaintiff has no witness to-day, so the case is dismissed for default". A decree was, however, drawn up in the case:

*Held,* that the order was an order under Order XVII, rule 2, and was not appealable. [p. 767, col. 1.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 23rd July 1913, affirming that of the Munsif, 3rd Court, Kishoregunj, dated the 22nd of August 1912.

FACTS of the case appear from the judgment.

Babu *Gopal Chandra Das*, for the Appellant.—The Munsif, though he said in his order the case is dismissed for default, signed a decree which was drawn up in his office. So the order must be treated as an order under Order XVII, rule 3. If the decree had not been made then we would not have appealed at all. Rightly or wrongly the decree was made and we had the right to appeal against the decree. Section 96 of the Civil Procedure Code gives a right to appeal against any decree. Even assuming that the decree was drawn up through mistake or oversight, the plaintiff ought not to suffer for that. So long as the decree was on the record, the plaintiff had no duty to consider whether it ought not to have been made. Again, the previous adjournment was at the instance of a party and not at the instance of the Court, therefore, the order of the Munsif must be held to be an order under rule 3 of Order XVII, Civil Procedure Code [*vide Kantella* v. *Jiban Mohan Roy* (1)].

On the face of it it is a decree and, therefore, there was a right to appeal against it.

(1) 23 Ind. Cas. 769; 18 C. W. N. 775; 19 C. L. J. 35; 41 C. 156.

CHURA MAL v. JIT SINGH.

Mr. *A. K. Fazlul Haq*, for the Respondents.—The so-called decree could not be a decree, it does not fall within the definition of a decree.

[D. CHATTERJEE, J.—But the framing of the decree in this case misled the plaintiff.]

The plaintiff desired to be misled and, therefore, he allowed himself to be misled wilfully. He might have drawn the attention of the Court to this fact, his Pleader could have represented to the Munsif that no decree need be drawn up in the case. If he had any good case and evidence to prove it he would have asked for review, instead of running to the Appellate Court.

Babu *Gopal Chandra Das*, for the Appellant, replied.

JUDGMENT.—In this case the plaintiff applied for time for the production of certain documents and witnesses. His application was rejected, upon which his Pleader said that he and his client would retire from the case and the order of the Munsif was: "The plaintiff's Pleader says that he and his client would retire from the case as the plaintiff has no witnesses to-day, so the case is dismissed for default". The Munsif evidently meant to pass this order under Order XVII, rule 2. If he had meant to proceed under rule 3 of the said Order, he would have proceeded to decide the case upon the evidence that was on the record. But although he expressly dismissed the suit for default, his office drew up the decree in regular form as if the case was decided in the presence of both the parties. Against that decree there was an appeal to the Subordinate Judge, who held that no decree could have been framed and that it was a mistake of the office to frame one. He, therefore, did not entertain the appeal. We think that the learned Subordinate Judge is right in the view that he takes. We take it that the order of the Munsif was under Order XVII, rule 2. In this case, if the order had been made as one under rule 2 of Order XVII, the appellant would have had an opportunity of applying under Order IX for re-hearing of the case. The appellant says that the drawing up of the decree misled him and that he could not make this application in the face of the decree which was in existence. That may or may not be. This is a matter with regard to which we do not express any opinion. The appellant had his remedy under Order IX and if an application is now made, the Court will consider whether he is entitled to proceed with the application now and whether he was really misled.

In this view of the case, we dismiss the appeal with costs.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION NO. 9 OF 1912-13 OF MEERUT DISTRICT.

March 17, 1914.

*Present*:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

CHURA MAL—DEFENDANT—APPELLANT

*versus*

JIT SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 22—Succession—Last male occupancy tenant dying before 1901—Daughter, succession by—Adoption by daughter—Adopted son, right of—N.-W. P. Rent Act (XII of 1881).*

The last male owner of an occupancy holding died while Act XII of 1881 was in force and was succeeded by his daughter who adopted a son while Act XII of 1881 was still in force. This adopted son, however, did not share in cultivation with his maternal grandfather:

*Held*, that the adopted son having acquired a right of succession under Act XII of 1881 could not lose that right by the passing of the Tenancy Act of 1901 inasmuch as section 2 of the latter Act preserved such a right. [p. 768, col. 1.]

Second appeal from the order of the Commissioner of the Meerut Division, dated the 13th March 1913, confirming that of the Collector of Meerut, in a case of correction of *jamabandi*.

JUDGMENT.

BAILLIE, S. M.—(*March* 5, 1914.)—The facts rejecting irrelevant matter are as follows:

*Musammat* Sarupi was in possession with a Hindu daughter's rights of an occupancy holding which formerly belonged to her father, who died when Act XII was in force. Appellant is the adopted son of Sarupi. About the fact of adoption, there is no manner of doubt and neither of the lower Courts appear to have considered the fact of adoption to be in any way doubtful. The Commissioner held that appellant could

not succeed to his mother's rights, as it was a life-interest, and that he could not succeed to his grandfather's rights as he did not share in the cultivation with him. It appears, however, that appellant was adopted while Act XII was still in force and that he had under Act XII a right of succession. It was held by both the Members of the Board in *Harbans* v, *Bishambar Singh*, Petition No. 10 of 1911-12, that a person who had under Act XII a right of succession did not lose that right owing to the fact that the Tenancy Act provided that a daughter's son should only take if he co-shared in cultivation with the previous tenant. It was considered that section 2 of the Tenancy Act preserved all rights acquired under the Rent Act and that this right of succession was thereby maintained. These principles apply in the present case also.

I would allow this appeal, cancel the orders of the lower Courts and direct record of appellant as occupancy tenant.

Costs on respondents throughout. Pleader's fee Rs. 15.

TWEEDY, J. M.—I concur.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 995 OF 1912.

June 12, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Leslie Jones.

BUDHI SINGH AND OTHERS - DEFENDANTS—APPELLANTS

*versus*

MOHAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Custom—Succession—Village proprietary body, rights of—Village, nature of—Mortgage—Redemption.*

A mortgagor who was a member of a village proprietary body died leaving no direct heir of his own. The plaintiffs who were of the same tribe and *got* as the mortgagor sued as members of the village proprietary body to redeem lands belonging to the mortgagor. The village was, however, found to be homogeneous and did not consist of a number of proprietors of different tribes, religions and castes. The mortgagees though distantly related to the mortgagor were not proprietors in the village:

*Held*, that the mortgagees had no right to succeed and that the plaintiffs were entitled to redeem. [p. 768, col. 2; p. 769, col. 1.]

*Wazira* v. *Mangal*, 10 Ind. Cas. 294; 3 P. W. R. 1911 Rev.; 188 P. L. R. 1911; 2 P. R. 1911 Rev., referred to.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 23rd March 1912, reversing that of the District Judge, Simla, dated the 1st February 1912, dismissing the suit.

Mr. *Badar-ud-din Kureshi*, for the Appellants.

Mr. *Muhammad Rafi*, for the Respondents.

JUDGMENT.—The facts of this case are stated fully and clearly in the judgment of the Divisional Judge and need not be repeated. After arguments had concluded at the hearing before us on the 18th and 19th May last, the learned Counsel for the appellants and the respondents suggested the possibility of a compromise being arrived at, and in order to enable the parties to come to an amicable settlement we deferred giving judgment upon the appeal. We are now informed that the parties are unable to effect a settlement and, therefore, proceed to dispose of the appeal.

In our opinion plaintiffs, as members of the proprietary body, are entitled to the land which originally belonged to Ram Singh who died on the 29th of August 1899, leaving no direct heir of his own. It is to be remembered that the plaintiffs were brought into the village by Ram Singh's ancestors at an early date after its foundation and that they are of the same *got* and tribe as Dhanni Ram, the original founder. It seems to us that the only claimants to Ram Singh's land whose right can legally be recognized are (1) Government; if it claims to succeed by right of escheat; and (2) the proprietary body of the village, provided that the village is homogeneous and does not consist of a number of proprietors of different tribes, religions and castes. In the present case Government has put forward no claim to the property and the village is of the homogeneous type. We cannot see that defendants, who after all are mere mortgagees of Ram Singh's property, have any claim to succeed thereto, though it may be that they are distantly related to Ram Singh. Admittedly they are not proprietors in the village and their relationship, if it exists at all, is remote. Of course it is for plaintiffs who seek to redeem the property to

prove , that they are entitled to succeed to it, and their claim cannot be decreed simply and solely because defendants have no right to succeed. We agree, however, with the Divisional Judge that plaintiffs have established their right of succession, and in this connection we would refer to a very elaborate and full discussion of the rights of the proprietary body to succeed in cases of this kind in *Wazira* v. *Mangal* (1). We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

(1) 10 Ind. Cas. 294; 2 P. R. 1911 Rev.; 3 P. W. R. 1911 Rev.; 188 P. L. R. 1911.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 2 OF 1914-15 OF FYZABAD DISTRICT.

January 9, 1915.

*Present*:—Mr. Holms, S. M.

*Raja Syed* ABU JAFAR—PLAINTIFF—APPELLANT

*versus*

SAT NARAIN GOSHAIN—DEFENDANT—RESPONDENT.

*Oudh Rent Act (XXII of* 1886), *s.* 107—*Rent-free land —Grove, plantation of---Resumption—Period for which land remains under grove, if excluded.*

When a man, originally a rent-free grantee, plants a grove in the land, the period under which the land remains under grove is not to be excluded from the fifty years' period in section 107*H* of the Oudh Rent Act.

Appeal from the order of the Commissioner of the Fyzabad Division, dated the 21st July 1914, confirming that of the Collector of Fyzabad, in a case of resumption.

Syed *Ali Muhammad*, for the Appellant.

Babu *Ram Saran Sinha*, for the Respondent.

JUDGMENT.—The grounds of appeal are very vaguely drafted. Two points are urged in appeal. *First*, that there is no evidence to support the conclusion that the land was held rent free for fifty years and by two successors. Even excluding the *sanad*, I find there is such evidence. This is not an appeal on the facts, and, unless there is clearly no evidence to support the finding, the Board would not interfere in third appeal. The *other* point raised is that, as the land was under grove for a long





period, this period should be excluded from the calculation. This ground was not clearly put forward in the grounds before the Commissioner nor in the present grounds before the Board, but I have looked into it. At the first Regular Settlement, the column of tenant is blank as regards old No. 103, and the trees in it are recorded in the possession of the respondent's father. The present respondent got a decree in 1883 for possession of the old No. 101 against Kulhal Singh, who is recorded as in the possession of trees in it at the first Regular Settlement. The claim was for possession on the basis of *muafi* when Kulhal Singh compromised the suit, the inference being that he admitted the present respondent's title. The oral evidence goes to show that the land was originally given rent free and that the grove was planted on it after this. When a man, originally a rent free grantee, plants a grove in the land, there seems to me no reason why the period under which the land was under grove should be excluded from the 50 years' period in section 107H. The case of land being given originally for a grove to be planted on it is different. I dismiss the appeal with costs.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 30 OF 1914.

CIVIL REVISION PETITION NO. 174 OF 1914.

April 15, 1915.

*Present*:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SIVASAMBA IYER - PLAINTIFF—PETITIONER - APPELLANT

*versus*

KUPPAN SAMBAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of* 1908), *s.* 47, *O. XXI, rr.* 100, 103, *scope of—Execution proceedings—Delivery in execution of decree, question as to—Defendant against whom no relief granted, if a party—Civil Procedure Code (Act XIV of* 1882), *s.* 244.

A question arising between a decree-holder and a defendant against whom no relief was granted relating to the propriety of a delivery in execution, is a question arising under section 47 of the Civil Procedure Code, 1908, and an order deciding such question is appealable. [p. 771, col. 1.]

SIVASAMBA IYER *v.* KUPPAN SAMBAN.

*Gathavedan Nambudiri* v. *Kunchu Achan*, 30 M. 72; 2 M. L. T. 34; 16 M. L. J. 433, distinguished.

Section 47 of the Civil Procedure Code, 1908, is comprehensive, and the fact that an alternative procedure by suit, instead of appeal, is provided in certain circumstances, cannot affect its character. [p. 771, col. 1.]

*Vibudhapriya Tirthaswami* v. *Yusuf Sahib*, 28 M. 380; 15 M. L. J. 202; *Sorabji Coovarji* v. *Kala Roghunath*, 12 Ind. Cas. 911; 13 Bom. L. R. 1193; 36 B. 156, followed.

Civil miscellaneous second appeal against the order and petition for the revision of the decree of the Court of the Subordinate Judge of Negapatam, in Appeal Suit No. 668 of 1913.

FACTS of the case appear from the following judgment of the lower Appellate Court:—

"This is an appeal from an order of the District Munsif of Tiruvalur by which the claim of the appellants to items Nos. 7, 9, 11 and 12 was disallowed. The appellants were defendants Nos. 6 to 8 in Original Suit No. 419 of 1909. The respondent was the plaintiff in Original Suit No. 419 of 1909, which was a suit on a mortgage in favour of the plaintiff. There were 13 defendants in that suit, of whom several including the present appellants were exonerated. The plaintiff executed the mortgage decree and in executing it purchased the hypothecated properties. The appellants stated that they were owners of items Nos. 7, 9, 11 and 12, and not the mortgagor, and wanted that the delivery of the plaintiff should be set aside. The District Munsif dismissed their petition. Defendants Nos. 6 to 8 have preferred this appeal against that order.

2. The appellants are ignorant *Pariahs*. The plaintiff is an intelligent *Brahmin*. When the plaintiff filed Original Suit No. 419 of 1909 on the mortgage-bond in his favour he made the mortgagor as well as the persons in possession of the hypothecated properties parties to that suit. As the appellants did not claim any right to the properties in their possession through the mortgagor but set up an independent title to the properties, they were exonerated. It was not necessary for them to prove their right to the properties in Original Suit No. 419 of 1909. The District Munsif seems to think that they should have proved their right to the properties in Original Suit No. 419 of 1909. They have had no opportunity of contesting that suit as they were exonerated. In any case it was the duty of the plaintiff to prove that the hypothecated properties belonged to the mortgagor.

3. The petition put in by defendants Nos. 6 to 8 was adjourned several times in order that both parties might adduce their evidence. The plaintiff did not choose to adduce any evidence either oral or documentary. The appellants filed some registered documents, Exhibit B series, and examined some witnesses. They have proved by means of this document that they are entitled to the items claimed by them. Exhibits B, B-1 and B-2 refer to items Nos. 11 and 12. Exhibit B is a sale-deed executed in 1871 by the original owner to Narayana Iyer, who sold items Nos. 11 and 12 to the vendor of the defendants Nos. 6 to 8. Exhibit B was executed in 1883 in favour of the vendor and Exhibit B-2 was executed in 1888 in favour of the appellants. There can be no doubt that they are entitled to items Nos. 11 and 12.

4 Items Nos. 1 to 9 are referred to in Exhibit B-3 which was executed in 1897 in favour of appellants by Ramasami Iyer. There is a slight mistake about the survey letter N, item No. 9, but the names and survey Nos. of items Nos. 7 and 9 are correctly mentioned in Exhibit B-3. The plaintiff who did not attempt to adduce any evidence in the lower Court states that Ramasami Iyer, the vendor of the appellants, sold in 1897 what his father Hyatheswara Iyer had sold to the plaintiff's mortgagor more than 30 years ago. The plaintiff wants some registered document purporting to have been executed by Hyatheswara Iyer to be renewed now. But I refuse to receive it. The plaintiff had several opportunities of proving that document in the lower Court but he did not do so. There is no guarantee that the $\frac{1}{3}$rd share sold by Hyatheswara Iyer to the plaintiff's mortgagor was the identical $\frac{1}{3}$rd share sold by his son Ramasami Iyer to the appellants.

The appeal is allowed and the application for execution dismissed."

The present appeal is against the order of the Subordinate Judge.

BISHESHAR AHIR *v.* DUKHRAN AHIR.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.—The order of the District Munsif was not one passed under section 47 of the Code of Civil Procedure and no appeal lay to the lower Court. The respondents were not judgment-debtors, having been exonerated from the liability; and the order was within Order XXI, rule 101, and no appeal lay to the lower Court.

Mr. *T. Narasimha Aiyangar*, for the Respondents, was not called upon.

JUDGMENT.- It is argued, *first*, that the lower Appellate Court's decision, dissenting from that of the District Munsif in favour of the respondents-defendants, cannot be sustained, because no appeal lay to it. The question was between parties to the decree under execution, though against defendants no relief had been granted, and related to the propriety of a delivery. It, therefore, in our opinion was one for disposal under section 47 of the Code of Civil Procedure. *Jathavedan Nambudiri* v. *Kunchu Achan* (1), relied on by plaintiff, decided only that a dispute between such parties could be dealt with by enquiry under section 331 of the Code of Civil Procedure and a subsequent suit, not that the procedure under section 244 of the Code of Civil Procedure was not a legitimate alternative, the headnote to that effect being inaccurate. The question is, in our opinion, concluded by *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (2), which was followed in *Sorabji Coovarji* v. *Kala Raghunath* (3) and which is consistent with the course of decisions in this Presidency. Section 47, we must hold, is comprehensive and the fact that an alternative procedure by suit, instead of appeal, is provided in certain circumstances cannot affect its character. We, therefore, disallow this contention.

*Next*, it is argued that the District Munsif erred in allowing the defendants to include two items in their petition by an amendment, which would ordinarily have been out of time. The objection was not taken in the lower Appellate Court and we have not been provided with any materials for a consideration of the facts on which the District Munsif proceeded. The objection fails.

On the merits, the lower Appellate Court's findings are clear and sufficient, and we have not been shown that the plaintiff was in any way prevented from adducing evidence before the District Munsif. The appeal against appellate order and the civil revision petition fail and are dismissed with costs of the appeal only.

*Both Appeal and Petition dismissed.*

(1) 30 M. 72; 2 M. L. T. 34; 16 M. L. J. 433.
(2) 28 M. 380; 15 M. L. J. 202.
(3) 12 Ind. Cas. 911; 36 B. 156; 13 Bom. L. R. 1193.

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## ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 60 OF 1915.

January 11, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

BISHESHAR AHIR—PLAINTIFF—APPELLANT

*versus*

DUKHRAN AHIR—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 22—N. W. P. Rent Act (XII of 1881), s. 8—Occupancy holding—Succession opening before operation of Agra Tenancy Act—Daughters, succession by—Female estate—Death of daughter after operation of Act—Daughter's son, right of—Hindu Law.*

*K*, a Hindu occupancy tenant, died while the Rent Act of 1881 was in force leaving behind two daughters *D* and *S*. *D* died 14 years before the suit was instituted leaving plaintiff as her son; *S* died in 1913 leaving defendant as her son:

*Held*, that the succession was governed by the ordinary Hindu Law and that on the death of *S* both her son and that of her predeceased sister *D* were entitled to equally succeed to the occupancy holding of *K*. [p. 773, col. 2.]

There is nothing beyond the ordinary estate of a Hindu female in the Agra Tenancy Act, which enlarges the estate in an occupancy holding of a Hindu female in possession at the time the Act was passed. [p. 772, col. 2.]

Letters Patent Appeal against the decision of Mr. Justice Rafique, in Second Appeal No. 884 of 1914, decided on the 4th of June 1915.

FACTS appear clearly from the following judgment of Rafique, J., appealed against :—

"The dispute between the parties to this appeal relates to succession to an occupancy holding. It appears that one Katwaru originally held the land in suit as occupancy tenant. He died more than twenty-four years ago, leaving him surviving two daughters, namely, *Musammat* Dilasi and *Musammat* Sumitra. *Musammat* Dilasi died about fourteen years ago and *Musammat* Sumitra died on the 11th of September 1913. The defendant-appellant is the son of *Musammat* Sumitra. The plaintiffs are the son and grandson of *Musammat* Dilasi. They instituted the suit out of which this appeal

has arisen in the Court of the Additional Munsif of Azamgarh for the recovery of joint possession over this occupancy holding. They alleged that they were entitled to one-half of the holding as they were descended from *Musammat* Dilasi, one of the daughters of Katwaru. The principal plea in defence was that the provisions of Act II of 1901 relating to succession to an occupancy holding barred the claim. The learned Munsif decreed the claim in favour of plaintiff No. 1 but dismissed the claim of plaintiff No. 2. The decree of the learned Munsif was upheld by the lower Appellate Court. Both the Courts proceeded on the ruling in the case of *Dulari* v. *Mulchand* (1). In appeal to this Court it is contended that the present case is distinguishable from the case relied upon by the lower Courts inasmuch as the right of succession accrued to Bisheshar, the successful plaintiff, after the passing of Act II of 1901. Under the said Act a daughter's son can only succeed if he has been joint in the cultivation of the holding with his maternal grandfather at the time of the latter's death. Bisheshar did not base his claim on the allegation that he was joint in cultivation with his maternal grandfather. He based his claim on the Hindu Law of succession and he cannot, therefore, succeed in his claim. In support of this contention the learned Counsel for the appellant relies upon the case of *Musammat Sumari* v. *Jageshar* (2). For the plaintiff-respondent the contention is that he had acquired some interest in the succession to his maternal grandfather at the time of the latter's death, because he could have questioned an alienation by his mother or his aunt or both if any had been made. As he had acquired an interest in the succession prior to the passing of Act II of 1901 the provisions of that Act do not apply to him. I think that this appeal must prevail. The plaintiff-respondent acquired his right to succeed on the death of his aunt *Musammat* Sumitra on the 11th of September 1913, that is, after the passing of Act II of 1901. The right of the plaintiff-respondent to question an alienation, if any, made by his mother or his aunt is not the same thing as a right of succession. The claim of the plaintiff-respondent must, therefore, fail in view of the provisions of section 22 of Act II of 1901. The same provisions, of course, would defeat the title of the defendant-appellant also if the *zemindar* chose to enforce them against him, but that is not at present the question for determination. I allow the appeal, reverse the decree of both the Courts below and dismiss the claim of the plaintiff-respondent with costs in all Courts."

Mr. *Iqbal Ahmed*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—This appeal relates to a suit in which the plaintiffs claimed a half share in an occupancy holding. The facts are very simple and undisputed. Katwaru was the tenant of the occupancy holding. He died many years ago before the Agra Tenancy Act came into force, leaving two daughters *Musammat* Dilasi and *Musammat* Sumitra. *Musammat* Dilasi died about 14 years before the suit was instituted, leaving her surviving her sister *Musammat* Sumitra who died on the 11th of September 1913. The plaintiffs are the son and grandson of *Musammat* Dilasi and the defendant is the son of *Musammat* Sumitra. It is admitted that on the death of Katwaru his two daughters became entitled to possession of the property as Hindu females. According to the provisions of the Rent Act of 1881 an occupancy holding (subject to certain qualifications) descended "as land". It is admitted that if the Agra Tenancy Act had never been passed, the plaintiff No. 1 would be entitled to succeed in the present suit. Section 22 of the Agra Tenancy Act provides that when an occupancy tenant dies, his interest shall devolve as therein provided. If we regard *Musammat* Sumitra as the "occupancy tenant" within the meaning of section 22 of the Tenancy Act, the plaintiff's title fails. It seems to us that we cannot regard *Musammat* Sumitra as the full occupancy tenant. When she and her sister succeeded, they succeeded merely as Hindu ladies. There is nothing beyond the ordinary estate of a Hindu female in the Agra Tenancy Act, which enlarges the estate in an occupancy holding of a Hindu female in possession at the time the Act was passed. If the Act has not provided for the devolution of the interest in an occupancy holding where it was at the

(1) 5 Ind. Cas. 384; 32 A. 314; 7 A. L. J. 293.
(2) 20 Ind. Cas. 7.

passing of the Act in the possesaion of a Hindu female as such, we think that we ought to go to the ordinary Hindu Law to ascertain the rights of the parties in a case like the present. There has, no doubt, been some conflict of views upon the point. The important matter is to have a definite ruling one way or the other. The cases, as time goes on, in which the question will arise, must become fewer and fewer. It is said that the Board of Revenue have taken a decided view that a female Hindu is the full occupancy tenant within the meaning of section 22 and the case of *Babu Bansidhar* v. *Musammat Rajwantia* (3) is relied upon. In that case, no doubt, the view contended for seems to have been taken, and the Members of the Board seem to have considered that upon the death of a Hindu widow all occupancy rights ceased to exist and were extinguished. In another case before the Board of Revenue, *Sital Prasad* v. *Bishen Dat* (4), quite a contrary view appears to have been taken by the Board. This case was decided on August 22, 1912. In that case one Rahman had been the occupancy tenant. On his death prior to the passing of the present Agra Tenancy Act his widow *Musammat* Niraini became entitled to possession. She died after the new Act came into force, leaving two daughters and a daughter's son. The Senior Member of the Board of Revenue stated in the clearest way possible, that upon the death of the widow, who had only been in possession for her life, her daughters became entitled and were then the occupancy tenants. On behalf of the appellants the following cases were relied upon: *Deoki Rai* v. *Musammat Parbati* (5); *Nathu* v. *Gokalia* (6); *Dulari* v. *Mulchand* (1). The two first mentioned cases are, no doubt, clearly distinguishable and the question which we have to decide in the present case was not decided. In *Dulari* v. *Mulchand* (1) there was the distinction which had been pointed out by the learned Judge of this Court, that the plaintiff's right had already accrued to her before the present Act came into operation, and her rights were only postponed by reason of the fact that she was rich while her sister was poor. We think that the decisions of the Courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court, and we direct that the parties do pay their own costs in this Court.

*Appeal allowed.*

(3) Selected Decision No. 3 of 1907.
(4) 30 Ind. Cas. 804.
(5) 23 Ind. Cas. 100.
(6) 30 Ind. Cas 215; 13 A. L. J. 947; 37 A. 658.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 4 OF 1913-14 OF GONDA DISTRICT.

June 16, 1915.

*Present*:—Mr. Holms, S. M.

GUR PRASAD AND OTHERS—APPELLANTS

*versus*

RAM GOBIND AND OTHERS—RESPONDENTS.

*U. P. Land Revenue Act (III of 1901), s. 109 (2)—Partition of under-proprietary* mahal *—Compactness impossible, if bar to partition.*

The partition of an under-proprietary *mahal* cannot be refused on the ground that the partition cannot be made compact. The only conditions that must be fulfilled are laid down in section 109 (2) of the Land Revenue Act, which applies to under-proprietary *mahals* as well. [p. 774, col. 1.]

Reference made by the Commissioner, Fyzabad Division, in a case of partition.

JUDGMENT.—Read the Deputy Commissioner's report of the 4th March 1915. This is an under-proprietary (sub-settled) *mahal* of 840 acres paying an under-proprietary rent of Rs. 2,008-8-0, of which perfect partition has been applied for under section 138 (1) of the Land Revenue Act. The partition is under that section to be carried out according to the provisions of Chapter VII, so far as they are applicable. I should be inclined to read section 109 (2) thus:—

"No under-proprietary *mahal* shall be formed by perfect partition unless the area thereof is at least 100 acres, or unless, if the area is less than 100 acres, the under-proprietary rent thereof is at least Rs. 100,"

ANANDA KUMAR *v.* SECRETARY OF STATE.

If this interpretation is adopted, the 12 *mahals* which it is proposed to form, as stated by the Deputy Commissioner in his order of the 22nd December 1913, fulfill the necessary conditions. The Deputy Commissioner, in his original reference submitted through the Commissioner, asked for the sanction of the Board to the partition being disallowed solely on the ground of incompactness. Apparently, a compact partition is not possible and the partition should not be disallowed on this ground. The Deputy Commissioner, however, now points out that in the partition proceedings drawn up the provisions of section 123 have not been complied with. These provisions, however, only apply to an imperfect partition, and in the present case only apply to the creation of *pattis* within the new *mahals*. Apparently, however, the partition proceeding has been drawn up on a wrong basis and the existing imperfect partition into *thoks* has been disregarded, and the provisions of section 125 have not been given effect to. The Deputy Commissioner will now pass necessary orders for the amendment of the partition proceedings and the record may be returned.

*Reference allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3695 OF 1913.

January 31, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

ANANDA KUMAR BHATTACHARJEE—PLAINTIFF APPELLANT

*versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Land revenue, assessment of, when barred—Assam Land and Revenue Regulation (I of 1886), s. 28, proviso, cl. (4)—Bengal Land Revenue Assessment (Resumed Lands) Regulation (II of 1819), ss. 21, 23—Bengal Land Revenue Assessment (Resumed Lands) Regulation (III of 1828), s. 10—Regulation II of 1805, s. 2 (2)—Limitation, if bar to Government's right to assess revenue—Statute, when retrospective—Evidence Act (I of 1872), s. 65—Public documents, secondary evidence of—Limitation Act (IX of 1908), Sch. I, Art. 149.*

Per *Curiam*.—Clause 4 of the proviso to section 28 of the Assam Land and Revenue Regulation, I of 1886, does not authorise assessment of revenue on a property, otherwise assessable under section 28, which has been held by the owner for more than 60 years without payment of revenue, unless it is shown that the owner had a right to hold it revenue free and that right has been lost within 60 years. [p. 779, col. 1; p. 780, col. 1.]

Per *D. Chatterjee, J.*—The mere fact that the plaintiff in a suit against the Secretary of State for India in Council for a declaration of his revenue-free title to a *mahal* produced and proved the *thakbast* proceeding of 1861, in which the *mahal* was described by the Thak Authorities as a resumed *mahal*, does not operate as an admission on the part of the plaintiff of Government's title to assess revenue in 1861. [p. 777, col. 1.]

The Government's right to assess revenue on a property assessable to revenue becomes barred by limitation after it has been held without assessment and payment of revenue for sixty years. [p. 778, col. 1.]

Where at the time of the Permanent Settlement in 1793 the Government had to abstain from making a settlement of land revenue on a certain land on its owner claiming a *lakheraj* title:

*Held*, that the cause of action arose in 1793 and no revenue having been assessed within 60 years the Government's right to assess revenue was barred by limitation. [p. 778, col. 1.]

A claim of Government to assess revenue becomes barred by limitation where, after a decision of the Board of Revenue in a resumption proceeding that the property is assessable, the owner continues to hold it without payment of revenue for 60 years. [p. 778, col. 2.]

The right of Government to assess revenue may be barred by the operation of the Law of Limitation. [p. 778, col. 1.]

*Boddupalli Jagannadham* v. *Secretary of State*, 27 M. 16, dissented from.

A Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing. [p. 778, col 2.]

*Reg.* v. *St. Mary, Whitechapel*, (1848) 12 Q. B. 120 at p. 127; 17 L. J. M. C. 172; 116 E. R. 811, followed.

Per *Beachcroft, J.*—A certified copy is not the only admissible secondary evidence of the contents of a public document; when the original of the public document has been destroyed or lost, any secondary evidence of its contents becomes admissible. [p. 779, col. 2.]

The effect of proviso 4 to section 28 of the Assam Land and Revenue Regulation I of 1886 is to save a land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within 60 years there was a cessation of the assessee's right to so hold it. [p. 780, col. 1.]

The words "held revenue free" in the proviso 4 to section 28 of the Assam Land and Revenue Regulation I of 1886 mean "held without the payment of revenue", and not "held revenue free" as of right. [p. 779, col. 2.]

*Quære.*—Whether the right of Government to assess land revenue can never be barred? [p. 779, col. 2.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 10th of July 1913, affirming that of the Subordinate

Judge, second Court at Sylhet, dated the 25th of May 1912.

FACTS of the case appear from the judgment.

Babu *Bepin Behary Ghosh*, for the Appellant.—The lower Appellate Court was wrong in holding that there was a resumption decree in 1842 without any evidence to prove the existence of such a decree. The decree would be a public document and no secondary evidence of its contents except a certified copy would be admissible, see section 65 of the Evidence Act. The plaintiff has acquired a right to hold the property revenue free. The right of Government to assess revenue has been barred by adverse possession for more than 60 years. No settlement was made at the time of the Permanent Settlement: the ancestor of the plaintiff asserted a right to hold it revenue free at the time of the Permanent Settlement and since then no assessment has been made by the Government. So after so many years the Government cannot exercise its right of assessment, which has been extinguished by adverse possession. Even assuming there was a resumption decree in 1842, no effect has been given to the decree since then. Under Regulation II of 1819 and Regulation II of 1828, the Collector had to assess immediately after the decision of the Board of Revenue. The plaintiff and his ancestor continued to hold the property revenue free in spite of the decree, so if the Government got the right to assess by that decree, the possession of the property without payment of revenue since 1842 has extinguished that right. The lower Appellate Court says that Government has a right to assess revenue upon this land by virtue of section 28 of the Assam Land and Revenue Regulation and that clause 4 of the proviso to that section does not apply to this case, as that would be giving a retrospective effect to that clause, and it has referred to the case of *Manjuri Bibi* v. *Akkel Mahmud* (1). But the resumption decree, even if it were ever made, was in 1842 and the Assam Regulation was passed in 1886, so when this Regulation was passed 60 years had not expired since 1842 and the Government could have assessed revenue at any time within 60 years from 1842. This right, which was capable of being exercised after the passing of the Regulation of 1886, was not exercised, so the ruling in *Manjuri Bibi* v. *Akkel Mahmud* (1) does not apply. Section 28 of the Regulation does not speak of a limitation bar and hence also the ruling cited by the Court of Appeal below is inapplicable. The Judge has referred to some Bengal Regulations but all those Regulations have been repealed by the Assam Regulation, so the only law applicable to this case is that enacted in that Regulation.

[BEACHCROFT, J.—Is there any other right of the Government to assess revenue in this case independently of the Assam Regulation?]

No. Section 28 of the Assam Land and Revenue Regulation contains the only law that confers the right upon Government to assess revenue in this case, but the 4th clause to the proviso bars the exercise of the right, after the property has been held without payment of revenue for 60 years.

The possession of the plaintiff was adverse and it was for more than 60 years, whether time is reckoned from 1793 or 1842 (the date of the alleged resumption decree), possession is *prima facie* adverse. See *Ramalakshamma* v. *Ramanna* (2) and *Mohanlal Jechand* v. *Amratlal Bechardas* (3). The onus is upon the Government to prove that the plaintiff's possession was permissive and not adverse.

The Advocate-General, for the Respondent.—The sovereign right of Government to assess revenue can never be barred. See *Boddupalli Jagannadham* v. *Secretary of State* (4). The law in this respect is the same in Bengal and Madras. The plaintiff holds possession subject to the right of Government to assess revenue. This possession cannot be adverse against the Government's right of assessment. Latches could not be imputed to the Crown, so it cannot be said that Government lost its right of assessment by its latches. The plaintiff never put forward the fact that he ever gave notice to the Collector that he claimed to hold the property revenue free. If

(1) 19 Ind. Cas. 793; 17 C. W. N. 889; 17 C. L. J. 316.

(2) 9 M. 482 at p. 491; 13 I. A. 147; 4 Sar. P. C. J. 728; 10 Ind. Jur. 425.

(3) 3 B. 174 at p. 177.

(4) 27 M. 16

through oversight or negligence of the Government officials the plaintiff succeeded in holding it without payment of revenue for 60 years, he cannot acquire a right to defraud the public revenue. The Government has clearly a right by virtue of section 28 of the Assam Land and Revenue Regulation; the 4th proviso does not apply. In order to make it applicable it must be shown that the property was held revenue free for 60 years as of right.

[BEACHCROFT, J.—You say "held revenue free" in that proviso means "lawfully held revenue free." May it not mean "which has in fact been held revenue free?"]

I am not disputing the other meaning; Your Lordships would decide what meaning should be given to these words in a section which affects the right of Government to assess public revenue.

[D. CHATTERJEE, J.—If he was holding revenue free as of right, then there would be no occasion for assessing revenue.]

[BEACHCROFT, J.—If it was held revenue free as of right, how will the right cease to exist? Have you heard of a revenue-free grant for a time?]

Perhaps the latter meaning is correct.

The plaintiff produced and proved the *thakbast* papers of 1861, in which it was distinctly stated that this *mahal* was a resumed *mahal*. This was an admission on the plaintiff's part that his ancestor did not claim to hold it revenue free in the year 1861. So the right of Government to assess would not be barred for another term of 60 years from 1861.

[BEACHCROFT, J.—You mean to say that if your right was admitted in the 59th year, you get another period of 60 years from that time?]

Yes. Section 28 of the Assam Land and Revenue Regulation defines the right of Government to assess. That right cannot be abrogated by giving a retrospective effect to the fourth proviso.

[BEACHCROFT, J.—Do you say that the 60 years mentioned there does not refer to the past but to the future period?]

Yes; if after the passing of the Regulation a property is held revenue free for 60 years then it will be free from the liability to assessment. I may go further; this right of Government to assess accrues from day to day, *de die in diem*, and can never be barred. The proviso cannot bar this right. At any rate it cannot have a retrospective operation: the right which was vested in Government to assess cannot be taken away by giving a retrospective effect to the proviso.

[BEACHCROFT, J.—Can it not be said that this Regulation does not lay down substantive law but only prescribes the procedure by which the Revenue Authorities are to be guided in assessing revenue?

It will be difficult to say that this Regulation gives any right to Government which it had not before. But it certainly protects subjects from assessment and thus gives right to subjects against the Government claim for revenue. So it is not merely a procedure code.

No construction of section 28 of the Regulation can bar the absolute right of Government to assess revenue. At any rate the Government have the right to assess within 60 years from 1836 when this Regulation was passed.

Babu *Bepin Behary Ghosh*, in reply.

JUDGMENT.

D. CHATTERJEE, J.—This was a suit for a declaration that the plaintiff had a revenue-free title to the property in suit and the defendant, the Secretary of State, had no right to assess revenue upon it. Both the Courts below have dismissed the suit and the plaintiff appeals mainly on the grounds (1) that there is no evidence of any resumption decree having been passed in favour of the Government in 1842, and the findings based on the existence of such a decree are bad; (2) that assuming that there was such a decree or a resumption by the Revenue Authorities, no action having been taken upon the same for more than 60 years the right of the Government is barred; (3) that the plaintiff having held the property without payment of revenue for more than 60 years, no assessment can be made by reason of clause 4 of the proviso to section 26 of the Assam Land and Revenue Regulation, I of 1886.

Before discussing these points I may shortly state the facts that are admitted or found. The disputed property which was formerly a tank and has now silted up was owned by certain Muhammadans, who in

1806 sold it to the ancestor of the plaintiff: the deed of sale does not state that the property was *lakheraj* and there is no documentary evidence of a grant in *lakheraj* right. The defendant admits that Kasba Beniachong, the *mahal* in which the disputed property is situate, was excepted from the Permanent Settlement in 1793 as the then holders of the same claimed a *lakheraj* right. The plaintiff admits that there was a measurement in 1839-40 with a view to resumption. The defendant says there was a resumption suit in 1842 which was decided in favour of Government. Neither the decree nor an attested copy of the same is forthcoming, but there are recitals of a resumption case and decree in a number of papers, including a *kabuliat* by the father of the plaintiff but not in respect of the disputed land. These documents make out a resumption of the *mahal* in 1842, but it does not necessarily follow from that that the disputed land was included in the resumption. Next in point of time is the *thakbust* proceeding, Exhibit 3 produced and proved by the plaintiff. Under the heading "Number Touji and name of Mahal" we find the entry is "Non-settled resumed Mahal," and under the heading "the Mahals which have been enclosed by boundaries or plotted," we find No. 170 the disputed property, and under the heading of "Remarks" we find that the name of the Government was originally recorded as the owner in possession but was removed on the objection of the plaintiff's ancestor, whose name was recorded instead. It is contended by the learned Advocate-General that this document being filed by the plaintiff it operates as an admission of the title of the Government in 1861. I do not see how this may be. The description of the *mahal* as a resumed *mahal* was made by the Thak Authorities, and not by the plaintiff or his ancestor. It was not the business of the Thak Authorities to decide whether a particular piece of land was resumed or not: they took the name as it was given by the Government Revenue Authorities who succeeded in getting an entry as owner in possession but that entry was expunged on objection by the plaintiff's ancestor. The enclosing by boundaries of the disputed plot also does not show that it was resumed, for *lakheraj* lands were as a matter of fact enclosed by boundaries during the *thak*. Even if the description of the *mahal* as resumed *mahal* could apply to the disputed plot there is nothing in this to show that it was resumed under a decree of the Civil Court. This is all the evidence that we have of a resumption decree as it is called. I do not see my way to adopt this view and I think the appellant is right in contending that there is no evidence of a resumption decree in 1842 in respect of the disputed land.

There was, however, admittedly an attempt at resumption. The resumption *chitta* is clear evidence of that and we may take it there was a resumption by the Revenue Authorities, that is to say, a decision by the Revenue Board that the land was assessable to revenue. Section 21, clause 4, Regulation II of 1819 provides that upon such a decision by the Board the duty of the Collector would be to make an assessment after notice to parties. See also section 23, Regulation II of 1819. There is no provision in this Regulation as to the time within which this assessment was to be made. Now this Regulation was modified by section 10 of Regulation III of 1828, which directed the assessment to be made at once and that if the owner declined to pay he must be dispossessed. In the present case there was no immediate assessment and the owner was allowed to continue in possession. It is said that this was so because the land was a tank and unfit for settlement. The learned Judge says this is clear from Exhibits V and T. I do not see how this is so. Exhibit T describes No. 2532 as a tank and gives its boundaries and Exhibit V does not mention No. 2532 at all. If Exhibit T shows anything it shows that the property was a tank which would ordinarily be more valuable than waste land. Then again the learned Judge says the possession of the plaintiff was permissive, but that was never the case of the defendant who only said that no assessment was made of tanks, *gopaths* and waste lands as unfit for the settlement and as no one applied for them. The finding of the character of plaintiff's possession, therefore, is against the case of the defendant and is an inference which, as far as I can see, is not supported by evidence. On the other hand if the defendant had a right to dispossess the plaintiff in 1842 and did not exercise its (*sic*) right, the possession of the plaintiff became adverse to the

defendant from that time. That possession continued for more than 60 years and the defendant's right of recovery of possession is lost. It is said, however, that the right to assess revenue is a sovereign right and cannot be lost. Reliance is placed in support of this view on the case of *Boddupalli Jagannadham* v. *Secretary of State* (4) With great respect to the learned Judges I do not feel at all pressed by the opinion expressed in that case in favour of a sovereign right of assessment, The particular Madras Regulation XXV of 1802 which was the subject-matter of discussion expressly reserved the right of Government, to continue or abolish exemptions from the payment of revenue and no question of prerogative was pertinent. The unreported case relied on by the learned Judges goes perhaps a little further, but there it was stated that "no limitation is placed on the exercise of that right by any Statute or law." That was probably so in Madras. In Bengal, however, we find that there is such a Statute. Sub-section 2 of section 2 of Regulation II of 1805 is to the effect "that all claims on the part of Government, whether for the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption or for the recovery of arrears of the public assessment or for any other public right whatever (the judicial cognizance of which may not have been otherwise limited by some special rule or provision in force), shall be heard, tried and determined, etc., if the same be regularly and duly preferred at any time within the period of 60 years from and after the origin of the cause of action."

The origin of the cause of action was in 1793 at the time of the Permanent Settlement, when the predecessors-in-title of the plaintiff claimed a *lakheraj* title and the Government had to abstain from making a settlement. If the proceedings of 1842 declared the land liable to assessment the Collector should have proceeded to assess at once but he did not. Whether we count 60 years from 1793 or from 1842 the claim of the Government is barred. This disposes of the second question.

The last question argued is that the assessment is barred by section 28 of Assam Regulation I of 1886. That section enacts that all land shall be liable to assessment except land expressly exempted and land for which a tax is levied under section 47: "provided that nothing in this section shall authorize the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold it has ceased to exist."

The land in this case has been admittedly held revenue free for more than 60 years and the Bengal Regulations under which assessments were previously made being repealed by this Regulation as to Assam and the operation of this section being excluded by the said proviso, there would be no law under which the disputed land could be assessed.

The learned Judge, however, thinks that to apply this section to the present case would be to give a retrospective effect to it and that 60 years have not elapsed from 1886. It is true that all legislation must be considered as prospective unless anything to the contrary is expressly or by necessary implication provided. But a Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing: see *Reg* v. *St. Mary Whitechapel* (5). If the proviso is considered to be an enacting part of the section, which it apparently is not, it operates on the state of things that it finds existing on its promulgation. If it finds that a particular piece of land answers to the description contained in its wording, it operates by excluding it from the operation of the enacting part.

But the matter may be looked at from another point of view. The proviso excepts a particular class of lands from the operation of the enacting part of the section. The enacting part, therefore, does not apply and no retrospective effect is given to any enactment.

In the next place, it may be said that it does not take away or affect any vested right: it declares what the legal position of these lands was at its passing. The Limitation Regulation had barred the right of assessment in such cases and it was thought proper to add this proviso just for

(5) (1848) 12 Q. B. 120 at p. 127; 17 L. J. M. C. 172; 116 E. R. 811.

the purpose of preventing misconception and dispute.

The second clause to the proviso might at first sight appear to authorise the assessment of the disputed lands as excepted from the Permanent Settlement.

In construing that clause, however, it must be remembered that the Regulation was originally passed for the Province of Assam, where the Permanent Settlement came very much later where it did come and in many places it has not come even now, so that it cannot be said that the assessment of lands excepted from the Permanent Settlement in 1793 was contemplated in 1886 after more than 93 years. Clause 2 of the proviso, therefore, would authorise the assessment of lands excepted from the Permanent Settlement if they were not saved by any of the other excepting clauses of the proviso, and in the present case clause 4 has saved them.

In this view of the case I would allow the appeal and decree the suit with costs in all Courts in the following manner that it be declared that the disputed land is not liable to be assessed with revenue and the Secretary of State be enjoined not to realise the sum claimed in the notice of December 1908. If the amount has been realised it will be refunded to the plaintiff.

BEACHCROFT, J.—As regards the first point argued on behalf of the appellant, I am not prepared to say that there is no evidence that the land was resumed in 1842. There is no doubt that there was evidence before the learned Judge that resumption proceedings were taken in respect of the whole of the Baniachong, in which area was included the subject-matter of dispute, and that this particular piece of land, then a tank, figured in the resumption *chitta*. Then the learned Judge says: "the *rubakari* (Exhibit V) shows besides that plaintiff or his father preferred no objection with regard to the disputed tank." It has not been suggested that this is an incorrect statement of the contents of the exhibit, nor has it been taken as a ground of appeal that the learned Judge has in the passage misstated the evidence. An extract from the exhibit has been printed. It mentions that objections were made in respect of some lands. But the whole exhibit has not been placed before us, and though in the portion printed there is no mention of this particular plot there is no reason to suppose that the portions not printed, to some passage in which the learned Judge presumably refers, did not bear out his statement of their contents.

It was urged that as under section 65 of the Indian Evidence Act, the only secondary evidence admissible of the contents of a public document is a certified copy, there was no evidence of the contents of the resumption decree. But the rule is obviously subject to the rule that when the original has been destroyed or lost any secondary evidence may be given.

The appeal must, however, in my opinion, succeed on the ground that the assessment complained of is barred by section 28 of the Assam Land and Revenue Regulation, 1886. It is argued for the respondent that the right of the Government to assess land revenue, which, as is pointed out in the preambles to Regulations XIX and XXXVII of 1793, is based on the ancient law of the country, can never be barred. As to the proposition stated in those general terms it is not necessary to express an opinion. For it is clear that Government can divest itself of the right to assess revenue and can make such Regulations for the guidance of its officers as will have the same practical result as renunciation of the right to assess revenue. Now the Assam Land and Revenue Regulation has repealed the Bengal Regulations so far as they apply to territories to which the Regulation has been extended, so the only provisions for assessment of the land revenue as extant in Sylhet are those to be found in the Regulation itself. Section 28 provides that all land shall be deemed liable to be assessed to revenue, subject to exceptions in two classes of land, and subject also to certain provisos. Exemption is claimed under the 4th proviso which declares that nothing in the section shall "authorise the assessment of any land which has been held revenue free for sixty years continuously unless it is shown that the right so to hold has ceased to exist." The learned Advocate-General argued that the words "held revenue free" meant so held "as of right", but he was not prepared to argue that they could not mean merely "held

without payment of revenue" apart from any question of the right so to hold the land. I think that if the former meaning had been intended it would have been expressed in definite terms and that the meaning to be attached to the words is the alternative one suggested. The proviso then would seem intended to reproduce the rule of 60 years' limitation provided by section 2 of Regulation II of 1805. It is also definitely enacted that the proviso is made inapplicable if it be shown in the case of land so held that the right so to hold it has ceased to exist. The qualification is probably intended to save the land revenue in cases where at some time the land has been rightly held without payment of revenue within the sixty years. The effect of the proviso appears to be to save the land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within the 60 years there was a cessation of the assessee's right to so hold it. If it were sufficient for Government to show that at any time, even before the 60 years, the owner had no right to hold the land revenue free or had lost the right, the practical effect of the proviso would be merely to raise a presumption in favour of freedom from assessment after 60 years' holding without payment of revenue. If that had been the intention, I think, it would have been expressed in simpler language. It seems to be a case of an exception within an exception. So that if in fact there has never been a right to hold the land revenue free, the second exception will not apply and the holding of the land without payment of revenue for 60 years will bar the assessment.

I must confess that I express this opinion as to the meaning of the 4th proviso with considerable diffidence in view of the fact that the 2nd proviso contemplates cases of assessment of land which was not included in the assets of an estate at the time of the Permanent Settlement, but I do not see what other construction can be placed upon it.

The learned District Judge favoured the view that the proviso to section 28 could not have retrospective effect, in other words, that it could not come into operation till the year 1946. This view was only faintly supported in this Court and does not commend itself to me. There does not appear to be any parallel between this case and the case relied on by the learned Judge.

In the present case the appellant has held the land for more than 60 years without payment of rent: it is not shown that he lost the right within the 60 years preceding the suit, in fact it is not shown that he ever had the right to hold revenue free. The result is that the Regulation does not authorise assessment in his case.

I, therefore, agree in allowing the appeal and decreeing the plaintiff's suit.

*Appeal allowed; Suit decreed*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1286 OF 1915.

January 12, 1916.

*Present*:—Mr. Justice Shadi Lal.

ANANT RAM—DEFENDANT—APPELLANT

*versus*

MANSA RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

*Hindu Law—Joint family—Money borrowed by father for family purposes—Son, whether liable for re-payment—Death of son pending appeal—Liability of family property.*

Where, in a suit to recover money due on a deed, it appeared that the father of the defendant borrowed the money for family purposes, the father and the son forming a joint Hindu family:

*Held*, (1) that the father in borrowing the money acted as the agent of the family and, therefore, the son was as much liable for the payment of the debt as the father; [p. 781, col. 1.]

(2) that under the circumstances the question of the son's personal liability did not arise, as he had died during the pendency of the appeal leaving his widow as his sole heir, and that the family property was liable for the amount. [p. 781, col. 1.]

Second appeal from the decree of the District Judge, Karnal, dated the 22nd March 1915, varying that of the Munsif, First Class, Karnal, dated the 29th of April 1914, decreeing plaintiff's claim.

Bakhshi *Gokal Chand*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The District Judge has, after considering the evidence, come to the

conclusion that Bhairon Parshad, the father of the defendant Anant Ram, borrowed the money for family purposes, and this finding cannot be impeached in second appeal. As the father and the son formed a joint Hindu family, it follows that the father in borrowing the money acted as the agent of the family, and it seems to me that Anant Ram was as much liable for the payment of the debt as Bhairon Parshad. It is, however, unnecessary to discuss this matter any further, because Anant Ram died during the pendency of the appeal leaving his widow as his sole heir. The question of his personal liability does not, therefore, arise, and the property whether belonging to him or to Bhairon Parshad is liable for the decretal amount.

The appeal, therefore, fails, but in view of all the circumstances I direct the parties to bear their own costs in this Court.

*Appeal dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 25 OF 1913-14 OF AGRA DISTRICT.

February 15, 1915.

*Present*:—Mr. Holms, S. M.

GIRWAR AND OTHERS—DEFENDANTS—APPLICANTS

*versus*

GULAB AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 194 (1)—Ejectment, suit for, by four out of five brothers—One brother absent abroad—Agent - Presumption.*

Where four out of five brothers brought a suit for ejectment, the fifth one being absent in Burma:

*Held*, that the suit was maintainable, inasmuch as it must be assumed that the four brothers had been appointed by the absent brother as agents to act on his behalf under section 194 (1) of the Tenancy Act.

Application for revision of the order of the Commissioner, Agra Division, dated the 29th April 1914, confirming that of the Assistant Collector of Agra District, in a case of ejectment.

JUDGMENT.—I take up ground No. 2 of the application first of all. It is perfectly true that section 194 (3) of the Tenancy Act only applies to suits for money



and not to a suit for ejectment; but in the special circumstances of the case when four brothers sue and the fifth brother is absent in Burma, it may, I think, be assumed that the four brothers have been appointed by him as agents to act on his behalf under section 194 (1), and this view is supported by the evidence of the *patwari*.

I have had considerable difficulty in understanding what the case is about, largely owing to the incorrect statement of the plaintiffs in their plaint that they are tenants-in-chief of twelve years' standing. This they admit they are not, athough they are incorrectly entered in the *patwari's* papers as such. No question of ex-proprietary rights arise because the mortgage was prior to 1902, and the only question is whether the defendants held as sub-tenants under Agnu Mal, the mortgagee of the plaintiffs' *sir*, or under the plaintiffs. The Commissioner has found as a question of fact that the plaintiffs are still in possession of the land they cultivated before the mortgage and that the appellants, therefore, hold under them.

I see no reason to interfere on revision and dismiss the application. As the respondents have confused matters by their incorrect statement of facts in their plaint, they will bear the whole costs of the application in revision.

*Application dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3882 OF 1913.

December 17, 1915.

*Present*:—Mr. Justice Richardson and Mr. Justice Imam.

KUNYA KESORI PAL CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

*Srimati* BAMA SUNDARI DASYA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Non-transferable occupancy holding—Transfer of portion—Transferee's right, when* raiyat *refuses to pay rent for transferred portion—Landlord, rights of.*

When a tenant of a non-transferable occupancy holding, after having transferred a portion of his

holding, refuses to pay rent for that portion and tenders to the landlord the proportionate rent due in respect of the remainder of the holding, it is open to the landlord to decline to accept an apportionment of the rent and recognise any division of the holding and hold the tenant liable for the entire rent. [p. 783, col. 1.]

In such a case a landlord is at liberty, if he so chooses, to accept from the tenant the amount of rent tendered by him for the land he still holds without prejudice to his rights as against the transferee in respect of the transferred portion. [p. 783, col. 1.]

As between such a transferee and the landlord the latter is *prima facie* entitled to *khas* possession of the land transferred. [p. 783, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Dacca, dated the 12th August 1913, reversing that of the Munsif, Additional Court, Naraingunge, dated the 25th of April 1912.

FACTS of the case appear from the judgment.

Dr. *Sarat Chandra Basak* (with Babu *Hari Har Prosad Singh*) for the Appellant.—The conduct of the *raiyat* shows that he abandoned the portion transferred by him. He refuses to pay rent for that portion, therefore, he disclaims his interest in that portion. His right as a tenant of that portion has been ceased by the transfer as he does not consent to pay rent for that portion. The landlords are not bound to accept rent from the transferee, so they are entitled to eject him. By accepting rent due in respect of the portion retained by the *raiyat*, the landlord with the consent of the *raiyat* has effected a division of the holding; of which one portion must be taken to have been surrendered or abandoned by the *raiyat* as he does not claim to hold it or accept liability for rent of that portion.

Babu *Gobinda Chandra Dey Roy*, for the Respondent.—The landlord has acquired no right of re-entry in this case. The original tenant has sold only a portion of his holding. It is settled law that the transfer of a portion of a non-transferable holding does not work a forfeiture entitling the landlord to re-enter. See *Kabil Sardar* v. *Chunder Nath Nag Chowdhury* (1), *Dayamoyi* v. *Ananda Mohan Roy* (2). The non-payment of rent or the unwillingness to pay rent in respect of the transferred portion cannot affect the tenant's liability to do so or put an end to his tenancy rights. The landlord must show that he is entitled to eject the *raiyat* for one of the reasons mentioned in the Bengal Tenancy Act.

Abandonment is a question of fact and the finding of the lower Appellate Court is that there was no abandonment. That Court says:—"The burden of proof is on the plaintiffs and they have, in my opinion, failed to prove the alleged surrender by reliable evidence. It does not appear probable that there was surrender in favour of some of the landlords owing 6 annas $7\frac{1}{2}$ *gandas* share." "It is also doubtful if a surrender in favour of some of the landlords in respect of a portion of the holding is legally sufficient to entitle them to recover *khas* possession of their share."

As regards the refusal to pay rent, the lower Appellate Court held that it was due to the fact that the land had been sold and the alleged relinquishment was in favour of the purchaser. In any case as the tenant's liability to pay the rent of the entire holding remained unaffected by his refusal to do so, and the landlord's right to recover the whole rent from the tenant was not affected either by the sale or by the refusal to pay rent for the transferred portion or by both taken together, an action in ejectment cannot lie in these circumstances.

JUDGMENT.—The holding in question in this suit originally belonged in its entirety to the defendant No. 3. He sold a portion of it to the defendant No. 2 in the name of the latter's mother, the defendant No. 1. The holding is found to be a non-transferable occupancy holding and, as we read the judgment of the learned Subordinate Judge in the lower Appellate Court, he has also found that, subsequently to the transfer of the portion of the holding, the defendant No. 3 refused to pay rent for that portion and tendered to the landlords the proportionate rent due in respect of the remainder of the holding, which the landlords accepted. The learned Subordinate Judge, in one part of his judgment, says this: "The plaintiff's first witness Kamini, who is the *naib* of the plaintiffs owning 5 annas and $7\frac{1}{2}$ *gandas* share, deposes that the defendants Nos. 3 and 4 refused to pay rent for the land in suit as it was sold

(1) 20 C. 590.

(2) 27 Ind. Cas. 61; 20 C. L. J. 52 (F. B.); 18 C. W. N. 971; 42 C. 172.

and that the defendant No. 3 paid rent for the lands other than the land in suit. The refusal to pay rent was due to the fact that the land had been sold." Then further on, the Subordinate Judge says: "The refusal to pay rent was due to the fact that there was a sale and the alleged relinquishment was in favour of the purchaser." From these passages, we gather, as we have said, that the learned Subordinate Judge accepted the evidence of the plaintiffs' *naib* that, after the transfer in question, the defendant No. 3 refused to pay rent for the land he had transferred. In that state of things, it was, of course, open to the landlords to decline to accept an apportionment of the rent and to decline to recognize any division of the holding. On the defendant No. 3 refusing to pay the entire rent of the whole holding, the landlords might have instituted a rent suit and so brought the holding to sale in execution of any decree they might have obtained. But, in our opinion, this was not the only course open to the landlords. We can see no reason why the landlords should not be at liberty, if they so chose, to accept from the defendant No. 3 the amount of rent tendered by him for the land he still held without prejudice to any right which they might have as proprietors in respect of the transferred portion. The learned Subordinate Judge in the Court of Appeal below has found on these facts that there was no surrender of the transferred portion in favour of the landlords. It seems to us, however, that only one conclusion is possible from the transfer coupled with the subsequent refusal to pay the rent of the transferred portion; clearly that amounted on the part of the defendant No. 3 to a disclaimer of all right, title and interest in the transferred portion. He had transferred his interest as tenant to the defendant No. 2, and as between him and the defendant No. 2 his interest as tenant was extinguished. As to the landlords he put an end to the relationship of the landlord and tenant by refusing to pay rent for this land. In our opinion the tenant, the defendant No. 3, by his own acts and conduct made it as clear as possible that he had no further interest in the land. The land is, therefore, at the disposal of the landlords, unless any third person can make out a good title to possession as against them. The present case is easily distinguishable from those cases where after transferring a portion of the holding the tenant continues in possession of the remainder and continues to pay, or, at any rate does not deny his liberty to pay the rent due in respect of the whole holding. In cases of that kind it is familiar law that there is no abandonment or surrender of the holding either as a whole or in part. But the present case is very different and the conclusion arrived at by the learned Subordinate Judge appears to us to be entirely inconsistent with the facts which he has found. On the materials before us the only conclusion possible is, as we have said, that the defendant No. 3 has ceased to have any interest in the transferred land. If that be so, what are the rights to the land as between the transferee and the landlords? *Prima facie*, the landlords are entitled to the land. The transferee shows no title from the landlord, his title is derived from the defendant No. 3 who had no power to create title good against the landlords. In the circumstances, we are of opinion that there is no answer to the landlords' suit. The result is that the decree of the lower Appellate Court must be set aside and that of the Court of first instance restored. The plaintiffs, the appellants before us who are co-sharers in the land to the extent of 6 annas $7\frac{1}{2}$ *gandas*, are entitled under the latter decree to joint possession to the extent of their share. The other co-sharers were made party defendants and no question is raised as to their share. The appellants are entitled to their costs throughout from the contesting defendants.

*Appeal allowed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 188 OF 1914.

January 7, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

POPOORU VENKATA NARASIMMA—JUDGMENT-DEBTOR—PETITIONER

*versus*

JAYANTI LAKSHMI NARASIHAM AND ANOTHER—DECREE-HOLDER AND PURCHASER—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI,*

SATISH CHANDRA *v.* AMIRUDDIN KHADIM

*r.* 89—*Execution sale, setting aside of, if permissible without application, oral or written—Civil Procedure Code* (*Act XIV of* 1882), *s.* 310 *A.*

A sale in execution cannot be set aside under Order XXI, rule 89 of the Civil Proceduro Code, 1908, without an application (oral or written) within 30 days.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Vizagapatam, in Civil Miscellaneous Appeal No. 9 of 1913, preferred against that of the Court of the District Munsif of Rajam, in Execution Appeal No. 219 of 1913 in Execution Petition No. 672 of 1912 (Original Suit No. 857 of 1910 on the file of the Court of the District Munsif of Vizagapatam).

Mr. *P. Somasundaram* for the Hon'ble Mr. *B. N. Sarma*, for the Petitioner.

Mr. *P. R. Srinivasa Aiyangar* for Mr. *H. Suryanarayana*, for the Respondents.

JUDGMENT.—A copy of the affidavit filed in support of the petition was not served on the other side.

Further the case of *Mathuji* v. *Kondaji* (1) has not been followed by this Court in Civil Revision Petition No. 415 of 1904 (Boddam and Sankaran Nair, JJ.), the decision in which case is subsequent to the decision in Civil Revision Petition No. 359 of 1902, where also it had been held that without an application (oral or written) within 30 days, a sale in execution could not be set aside under section 310-A, Civil Procedure Code of 1882 (Order XXI, rule 89).

The District Judge could not be said to have acted without jurisdiction or acted illegally in the exercise of his jurisdiction in deciding the question of limitation as he did, even if the above two decisions of this Court are erroneous.

No question under section 115, Civil Procedure Code, therefore, arises and we must and do dismiss this civil revision petition.

There will be no order as to costs.

*Petition dismissed.*

(1) 7 Bom. L. R. 253.

## CALCUTTA HIGH COURT.

RULE *Nisi* NO. 544 OF 1915.

November 23, 1915.

*Present*:—Mr. Justice Richardson and Mr. Justice Imam.

SATISH CHANDRA CHAKRAVARTTY —PLAINTIFF—PETITIONER

*versus*

AMIRUDDIN KHADIM - DEFENDANT— OPPOSITE PARTY.

*Bengal Tenancy Act* (*VIII of* 1885), *s.* 153—*Rent, suit for, for less than Rs.* 50—*Interest in land having conflicting claims thereto decided*—*Appeal, maintainability of.*

In a suit for rent for an amount less than Rs. 50 on the allegation that the plaintiff held the land under *A* and *B* and that the defendant was his sub-tenant, the defendant pleaded that he had the land under *B* and was not the plaintiff's sub-tenant. The first Court dismissed the suit and an appeal against it to the District Judge was dismissed as incompetent under section 153 of the Bengal Tenancy Act:

*Held*, that the appeal lay to the District Judge inasmuch as the decree decided a question relating to some interest in land as between parties having conflicting claims thereto. [p. 785, cols. 1 & 2.]

*Sita Nath Pal* v. *Kartick Gharmi*, 8 C. W. N. 434, followed.

*Dena Bandhu Nandi* v. *Nobin Chandra Kar*, 8 C. W. N. 437; *Ram Kanai Dass* v. *Fakir Chund Das*, 8 C. W. N. 438, referred to.

FACTS.—This was a suit for rent. Plaintiff's case was that he was the tenant of the land under *A* and *B* and that defendant was his sub-tenant. Defendant's plea, *inter alia*, was that he was the tenant of the land under *B* and was not the plaintiff's sub-tenant. The Munsif (who had summary powers under section 153, Bengal Tenancy Act) framed the following issues: "*first*, whether the plaintiff has got any title to the suit land; *second*, does the relationship of landlord and tenant exist between the parties; *third*, to what amount is plaintiff entitled?" As regards the *first* issue the Munsif found that plaintiff had not been able to prove his title to the land. The *second* issue was also decided in defendant's favour. The suit was accordingly dismissed. An appeal by the plaintiff was rejected by Mr. T. D. Cargell, District Judge, Mymensingh, by the following order: "I am of opinion that no appeal lies. The Pleader put up one ruling, *Sita Nath Pal* v. *Kartick Gharmi* (1), which is contradicted

(1) 8 C. W. N. 434.

by the following ruling, *Ram Mohan Mohish* v. *Badan Barai* (2). He has no other authority to produce. Rejected." Against this decision an application in revision under section 115, Civil Procedure Code, was made to the High Court and a Rule was issued.

Babu *Birendra Kumar De*, for the Plaintiff-Petitioner, cited *Sita Nath Pal* v. *Kartick Gharmi* (1). The interest to the land in suit is in conflict between the parties to the suit and the Munsif has decided against the plaintiff. The case of *Ram Mohan Mohish* v. *Badan Barai* (2) was decided by a single Judge. The head-note is also misleading. The judgment shows that the only question decided by the District Judge was whether the first Court was wrong in refusing to issue further process against a certain witness. So Mitra, J., held that no second appeal lay. The case of *Sita Nath Pal* v. *Kartick Gharmi* (1) has been referred to and explained in *Dena Bandhu Nandi* v. *Nobin Chandra Kur* (3) (Brett and Mitra, JJ.) *Vide* also Mitra, J.'s judgment in *Ram Kanai Dass* v. *Fakir Chund Das* (4).

Babu *Kali Kumar Chackrabutty*, for the Opposite Party.—There are no parties having conflicting claims to the land. The landlord set up by the defendant has not been made a party. The case of *Dena Bandhu Nandi* v. *Nobin Chandra Kur* (3) does not follow *Sita Nath Pal* v. *Kartick Gharmi* (1).

JUDGMENT.—This matter arises out of a suit for rent in which the amount claimed was less than Rs. 50. The suit was dismissed by the first Court and an appeal preferred to the District Judge was dismissed by him as incompetent under the provisions of section 153 of the Bengal Tenancy Act. The question is whether the decree of the first Court has decided a question relating to some interest in land as between parties having conflicting claims thereto. On the facts, the case appears to me to be indistinguishable from the case of *Sita Nath Pal* v. *Kartick Gharmi* (1). That case is mentioned certainly without disapproval in the subsequent cases of *Dena Bandhu Nandi* v. *Nobin Chandra Kur* (3) and *Ram Kanai Dass* v. *Fakir Chund Das* (4). The learned Pleader who appears for the opposite party in this Rule has not been able to show that the case has been dissented from or overruled. That being so, in my opinion we ought to hold, in accordance with the view then taken, that an appeal lay to the learned District Judge in the present case and that the appeal preferred to him should not have been dismissed as incompetent. The Rule must, therefore, be made absolute, the order dismissing the appeal must be set aside and the appeal heard by the District Judge in due course. Costs of this Rule will abide the result. We assess the hearing fee at one gold *mohur*.

*Rule made absolute.*

(2) 8 C. W. N. 436.
(3) 8 C. W. N. 437.
(4) 8 C. W. N. 438.



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MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 65 OF 1915.
January 12, 1916.
*Present*:—Mr. Justice Seshagiri Aiyar.
DURAISAMI UDAYAN AND OTHERS—DEFENDANTS—PETITIONERS
*versus*
KADIRSA ROWTHEN - PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 115—Limitation, point of—Judgment of Appellate Court not dealing with it—Material irregularity.*

The mere fact that a judgment of an Appellate Court does not deal with a point of limitation arising in a case, does not amount to a material irregularity in the disposal of the case so as to merit interference by a High Court in revision. [p. 786, col. 1.]

*Jagabandhu Biswas* v. *Srinath Chatterjee*, 18 Ind. Cas. 392, not followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Trichinopoly, in Appeal Suit No. 157 of 1914, preferred against that of the Court of the Additional District Munsif, Ariyalur, in Original Suit No. 394 of 1913.

Mr. *K. S. Ganesa Aiyar*, for the Petitioners.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.—This is a suit for refund of purchase-money, because in a subsequent litigation it was found that the defendant had no title to the property which he sold to the plaintiff. The Munsif was of opinion that the cause of action for the

CHANDRA KANTA GANGULY *v.* SAROJINI DEBI.

suit arose when the subsequent decision as to title was given and, holding that the suit was not barred by limitation, gave a decree on the merits against the defendants. The defendants preferred an appeal to the District Court. They raised, no doubt, in the grounds of appeal, the plea of limitation: but no affidavit has been filed before me to show that this objection was pressed before the District Judge and consequently I find no irregularity or illegality on the face of the judgment. Even otherwise, I am not prepared—although I go as far as it is possible in construing section 115 very liberally—I am not prepared to accept the decision in *Jagabandhu Biswas* v. *Srinath Chatterjee* (1), which seems to lay down that if a point of limitation arises in a suit and if the Appellate Court does not deal with it, it would amount to a material irregularity in the disposal of the case. I, therefore, dismiss this petition with costs.

*Petition dismissed.*

(1) 18 Ind. Cas. 392.

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CALCUTTA HIGH COURT.

RULE *Nisi* No. 904 OF 1915.

January 24, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

CHANDRA KANTA GANGULY AND OTHERS —DEFENDANTS—RESPONDENTS—PETITIONERS

*versus*

*Srimati* SAROJINI DEBI—PLAINTIFF—APPELLANT—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 10, O. XXV, r. 1—Security for costs of appeal, when to be demanded.*

There is no hard and fast rule that unless a plaintiff-appellant has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order against him for security for costs. [p. 787, col. 2]

*Khajah Assenoollajoo* v. *Solomon*, 14 C. 533, referred to and explained.

*Ramsing Bhagwan* v. *Balubai*, 5 Bom. L. R. 661, approved.

Rule in the matter of an appeal against the decree of the Subordinate Judge, Khulna, passed in Title Suit No. 27 of 1913, and dated the 11th March 1915.

FACTS.—The plaintiff, opposite party to this Rule, is the widow of one Nibaran Chander Ganguly. She brought a suit for a declaration that the defendant No. 1 was not adopted by her as a son to her deceased husband and that, if in fact any ceremony of adoption took place, it was invalid on the ground that it was not performed according to the Hindu *Shastras*. She also alleged in her plaint that a certain *ekrarnama* alleged to have been executed by her in favour of the natural father of the adopted son, defendant No. 2, by which the management of her husband's property was made over to him, was never executed by her but that she was induced to put her signature upon some blank papers on which fraudulently without her consent or knowledge the *ekrarnama* was written. The Subordinate Judge dismissed the plaintiff's suit, holding that the adoption was validly made and that the *ekrarnama* was executed by the plaintiff with full knowledge and understanding of its contents. In his judgment he observed *inter alia*:—"It is an admitted fact that Kantu Babu, Sasi Sekhar Babu and Hem Babu, who are *zemindars* of the village, have caused proceedings under section 110, Criminal Procedure Code, to be instituted against the second son of the defendant No. 2 and there is evidence to show that in the present suit they have sided with the plaintiff....."

"The witness No. 9 is Digbijoy Chakravarty, a first cousin of the plaintiff, under whose advice the present suit has been brought."....."The plaintiff caused a suit to be brought by the defendant No. 11 for this purpose and after the suit was compromised and a decree made in favour of defendant No. 1, the plaintiff has brought this suit with the help of some unscrupulous people."

The plaintiff preferred an appeal to the High Court against the decision of the Subordinate Judge. Thereupon the contesting defendants Nos. 1 and 2 (respondents in the appeal) on application to the High Court obtained a Rule upon the plaintiff-appellant to show cause why she should not furnish security for their costs in the Court below as well as in the High Court and why on her failure to furnish such security her appeal should not be dismissed. The main

allegation in the application was that the plaintiff had no immoveable property of her own and that her suit was not a *bona fide* but a vexatious suit by her in pursuance of a determined plan to harass the petitioners, with the assistance of and under the advice of Sashi Sekhar Roy and others, *zemindars* of the village.

Babus *Dwarkanath Chakravarty* and *Jotindra Mohan Chowdhuri*, for the Opposite Party, Plaintiff-Appellant.—The plaintiff is a *pardanashin* Hindu widow. She sued for a declaration that an alleged adoption was a fiction and an *ekrarnamah* by which the management of her husband's property was made over to the management of the father of the alleged adopted son was not executed by her. If the adoption is not proved and if the *ekrarnamah* is found to be not genuine, the widow will be the owner of her husband's property. True, she has no other immoveable property than the property she inherited from her husband, but that is no ground for asking her to give security for costs. Mere poverty has never been held by this Court to be a sufficient ground for asking for security; otherwise the doors of the Court will be closed against poor persons when they ask for relief against the wrongful or illegal acts of rich opponents. Here the widow is not a mere pauper, ostensibly she is the owner of her husband's property unless and until it is proved that an adoption of a son has been made and the *ekrarnamah* has been executed by the widow. These are the very questions which have to be decided in her appeal to this Court and before the appeal has been decided against her, she ought not to be regarded as having no immoveable property. Unless it is found that the appellant has no interest in the litigation and that she is a mere puppet in the hands of others, no order for security for costs should be made against her at this stage. Cites *Khajah Assenoollajoo* v. *Solomon* (1).

[HOLMWOOD, J.—It has been found by the lower Court that she is carrying on the litigation at the instigation and with the help of others and we must presume at this stage that that finding is correct.]

As a *pardanashin* lady she must take the help of others for the purpose of the litigation. The lower Court does not find that the lady has no interest in the litigation and the suit is being maintained by others to harass the petitioners. The widow has a very substantial interest in this litigation and the fact that she is being helped by others, who might be enemies of the petitioners, does not make the suit bad for maintenance or champerty. There is no ground for taking security from her; the only ground which could possibly be urged by the other side is that if the *ekrarnama* is found to be genuine and the adoption true, then the widow is poor, having no immoveable property of her own. Such a ground has never been held to be a sufficient ground for taking security under Order XLI, rule 10.

Babu *Tarakeshwar Pal Chowdhury*, for the Petitioners, cited *Ramsing Bhagwan* v. *Balubai* (2).

JUDGMENT.—This is a Rule calling upon the opposite party to show cause why she should not furnish security for the costs of the petitioner here and in the Court below.

The case is one of a Hindu widow, who alleges that she did not enter into a certain *ekrarnamah* making over the management of her husband's property to the father of his adopted son. She likewise denies the adoption. The learned Judges who issued the Rule were, both of them, Hindu Judges and must have fully in their minds the position of a Hindu widow and the rulings protecting her interests.

It is argued before us that there is a hard and fast rule that unless the plaintiff has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order for security for costs. We do not think that any such hard and fast rule has ever been laid down. The nearest approach to it is a ruling of a Single Judge of this Court on the Original Side in the case of *Khajah Assenoollajoo* v. *Solomon* (1), and there the rule, which has been adopted in all the Courts in India as well as in England, that mere poverty is no sufficient ground to ask for security for the

(1) 14 C. 533.

(2) 5 Bom. L. R. 661.

costs of the suit, may be taken as clearly laid down; and it is then said it is otherwise, as was the case in the case cited, when he is not the real litigant but a mere puppet in the hands of others. That does not, in our opinion, mean that a person who has an ostensible interest in the property in suit is not a puppet in the hands of others and that you cannot ask for security. It must inevitably happen that in all cases of litigation fomented by third parties the ostensible plaintiff must have a claim which can *prima facie* be supported in Court, and in this case the widow, were she able to get rid of her alleged action in adopting the son and of the alleged *ekrarnamah* which she denies, would no doubt have a very substantial interest in the property. But there are specific allegations in the affidavit of the petitioner which are supported by the findings of the Court of first instance; and these specific allegations have not been traversed by the affidavit in reply. Now, in the case of *Ramsing Bhagwan* v. *Balubai* (2), it was clearly laid down that where "there is something more than mere poverty alleged and, so far as the Court below is concerned the respondents have succeeded in proving that allegation to its satisfaction, whether the Appeal Court will come to the same conclusion when it has heard the appeal is immaterial, but the respondents are entitled to ask the Court to bear the facts found by the lower Court in mind in deciding whether this is a first case for the exercise of the discretion" vested in the Court under Order XLI, rule 10; and in exercising that discretion in the case of a Hindu widow who denies an alleged adoption, it was further held that the Court may very well be guided by the provisions of section 380, now Order XXV, rule 1.

There are, therefore, two grounds for making this Rule absolute:—*Firstly* that although the widow may have a very large ostensible interest in the property of her husband she has been found to be a puppet in the hands of others and *secondly*, that apart from the property of her husband, which is substantially in suit, she has no other immoveable property which can be given as security and money security should, therefore, be asked for. Having regard to the allegations in the case we are willing to allow the lady either to deposit Rs. 600 (rupees six hundred only) to cover the costs of both Courts in cash or Government promissory notes or to furnish security of immoveable property to the satisfaction of the lower Court through some substantial surety within three months of the date of the order reaching the Court below or thirteen weeks from this date, whichever is earlier. With these directions the Rule is made absolute. The petitioner is entitled to his cost of the day—two gold *mohurs*.

*Rule made absolute.*

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## CALCUTTA HIGH COURT.

RULE *Nisi* No. 930 OF 1915.

January 31, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

HIRAMATI DASSYA—JUDGMENT-DEBTOR—PETITIONER

*versus*

ANNADA PRASAD GHOSH AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY.

*Jurisdiction—Transfer of proceedings which are without jurisdiction, if valid—Mesne profits exceeding pecuniary jurisdiction of Court decreeing suit, application for—Decreeing Court, jurisdiction of—Remedy.*

Proceedings in a Court which are without jurisdiction are not proceedings which can be transferred by a superior Court either under the old Code of Civil Procedure or the new. [p. 790, col. 2.]

*Shamsunder Saha* v. *Anath Bandhu Saha*, 6 Ind. Cas. 97; 37 C. 574; 14 C. W. N. 662, followed.

A Munsif, whose pecuniary jurisdiction was limited to Rs. 2,000, decreed a suit for recovery of possession of an immoveable property with mesne profits. The value of the suit with mesne profits claimed up to the date of the institution of the suit amounted to a gross valuation of Rs. 1,200, but the mesne profits *pendente lite* and thereafter up to the date of delivery exceeded his pecuniary jurisdiction:

*Held*, that the Munsif's decree for possession and mesne profits antecedent to suit must stand but as regards the assessment of mesne profits from the institution of the suit to the date of delivery of possession, the Munsif had no jurisdiction and that such an application for mesne profits filed in the Munsif's Court should be returned for presentation to the proper Court. [p. 790, col. 2.]

*Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose*, 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506, followed.

*Rameswar Mahton* v. *Dilu Mahton*, 21 C. 550, not followed.

Rule against the order of the District Judge, Khulna, in Miscellaneous Judicial Case No. 65 of 1915.

HIRAMATI DASSYA v. ANNADA PRASAD GHOSH.

FACTS of the case appear from the following petition of the judgment-debtor:—

"1. That the decree-holders opposite party instituted a suit, being Suit No. 44 of 1902, in the Court of the Subordinate Judge of Khulna against your petitioner and others for recovery of *khas* possession and for *wasilat* and valued the said suit at Rs. 1,200, *i. e.*, Rs. 800 being the market value of the land in dispute and Rs. 400 being the approximate value of mesne profits.

2. That the said suit was subsequently transferred to the Court of the 2nd Munsif of Khulna who was vested with powers to try cases valued up to Rs. 2,000.

3. That the learned Munsif dismissed the plaintiffs' suit with costs and against the said judgment and decree the plaintiffs preferred an appeal to the District Judge of Khulna, who decreed the plaintiffs' suit without costs and directed *wasilat* to be ascertained in execution.

4. That against the said judgment and decree of the learned District Judge your petitioner preferred an appeal from Appellate decree, being No. 2031 of 1905, to this Hon'ble Court but the said appeal was dismissed by their Lordships and the plaintiffs' suit was decreed.

5. That thereafter the plaintiffs instituted Execution Case No. 457 of 1908 in the Court of the 2nd Munsif of Khulna against your petitioner and others for ascertainment of mesne profits and notices were served upon your petitioner and other defendants.

6. That the other defendants in the said suit filed petitions of objections on the allegations that they had no right to or possession in the property decreed, and consequently they were not liable for the mesne profits, but the learned Munsif rejected the said petitions and made all of them liable for mesne profits.

7. That against the decision of the learned Munsif your petitioner preferred Appeal No. 72 of 1909 and the other defendants preferred Appeal No. 71 of 1909 to the District Judge of Khulna, but the learned Subordinate Judge who finally tried the appeal decided that the appellants in Appeal No. 71 of 1909 were not liable for mesne profits but only your petitioner, appellant in Appeal No. 72 of 1909, was liable for mesne profits of the plaintiffs-decree-holders.

8. That the plaintiffs-decree-holders preferred an appeal from order, being No. 120 of 1909, to this Hon'ble Court against all the defendants, but their Lordships held that your petitioner alone was liable to the plaintiffs-decree-holders for mesne profits.

9. That thereafter a Commissioner was appointed to investigate into the amount of mesne profits due to the plaintiffs-decree-holders and the Commissioner submitted his report that according to the decree-holders' identification of the disputed land the amount of mesne profits would be Rs. 10,841-7-9, and according to your petitioner's identification the mesne profits would be Rs. 764-1-0 only while according to the Commissioner the amount of mesne profits would be Rs. 3,[illegible]00-7-8.

10. That your petitioner filed petition of objection to the report of the Commissioner and your petitioner also filed an application to the effect that the amount of mesne profits cannot exceed Rs. 2,000 as the learned Munsif had no jurisdiction to try cases exceeding Rs. 2,000, but after hearing the Pleaders of the parties the learned Munsif came to the conclusion that he had no jurisdiction to decree more than Rs. 2,000 to the decree-holders.

11. That thereafter on 7th August 1915 the decree-holders filed an application to the District Judge of Khulna for transfer of the Case No. 457 of 1908 from the file of learned 2nd Munsif to the file of the 1st Subordinate Judge of Khulna, and the very day the learned District Judge passed an *ex parte* order transferring the said suit to the Court of the Subordinate Judge of Khulna.

12. That on the same day your petitioner appeared before the District Judge of Khulna after the above order was passed and after hearing both the parties the learned District Judge by his judgment dated 18th August 1915 affirmed his former order of transfer and the suit was transferred to the file of the Subordinate Judge of Khulna.

13. That being aggrieved by the orders of the learned District Judge, dated the 9th August 1915 and 18th August 1915, your petitioner begs to move your Lordships on the following amongst other

GROUNDS.

1. For that the learned District Judge

acted without jurisdiction in transferring the case from the file of the 2nd Munsif to the file of the Subordinate Judge of Khulna.

2. For that the plaintiffs having instituted their case in the Court of the Munsif having limited pecuniary jurisdiction, the learned District Judge acted without jurisdiction in transferring the case to the Court of the Subordinate Judge.

3. For that the order made by the learned District Judge for transfer of the case for mesne profits to the file of the Subordinate Judge is *ultra vires* and void.

Under the circumstances your petitioner most humbly prays that your Lordships will be pleased to send for the records, to issue a Rule and to set aside the said orders of the learned District Judge, dated 9th and 18th August 1915, or to pass such other or further orders as to your Lordships may seem fit and proper and your petitioner further prays for *ad interim* stay of the hearing of the case...."

Dr. *Sarat Chandra Basak* and Babu *Bipin Chandra Bose*, for the Petitioner.

Babus *Joges Chandra Roy* and *Amarendra Bhusan Ghose*, for the Opposite Party.

JUDGMENT.—We think that the proper way of dealing with this matter is to treat it precisely in the same manner as this Court treated a similar application in the case of *Bhupendra Kumar Chakravarti* v. *Purna Chandra Bose* (1). There is no question now that the Munsif had full jurisdiction to decide the original suit with mesne profits claimed up to the date of the institution of suit, which amounted to a gross valuation of Rs. 1,200. There is also no doubt that he had no jurisdiction to adjudicate upon mesne profits *pendente lite* and thereafter up to the date of delivery, inasmuch as those mesne profits are said by one party to amount to Rs. 3,000, and by the other to over Rs. 10,000, and the special pecuniary jurisdiction of the Munsif is limited to Rs. 2,000. Something, therefore, must be done to enable the decree-holder to have the full benefit of the decree so far as he is entitled to it; and the only question seems to be whether we should follow the procedure adopted by a Bench of this Court in the case of *Rameswar Mahton* v. *Dilu Mahton* (2), or the more recent decision to which we have already referred. That the order of the learned District Judge in the Court below transferring the case to the Subordinate Judge is incompetent there can be no doubt on the principle which is laid down in the case of *Shamsunder Saha* v. *Anath Bandhu Saha* (3). Proceedings which are without jurisdiction are not proceedings which can be transferred either under the old Code or the new. We cannot now say that the Munsif had jurisdiction to ascertain and decree mesne profits which are in excess of Rs. 2,000, nor can we remove from the cognizance of the Munsif the decree which has already determined the possession and mesne profits antecedent to suit. That must remain with the Munsif and must be confined to the limits of his pecuniary jurisdiction. But the proper course to follow with regard to the assessment of mesne profits from the institution of the suit to the date of delivery of possession is to direct the return of the plaint or application for mesne profits subsequent to suit for presentation to the proper Court, that is, the Court of the Subordinate Judge.

The Rule is, therefore, made absolute in these terms and the execution case will be returned at once to the Munsif's Court for carrying out the order.

We make no order as to costs.

*Rule made absolute.*

(1) 8 Ind. Cas. 34; 13 C. L. J. 132; 15 C. W. N. 506.

(2) 21 C. 550.

(3) 6 Ind. Cas. 97; 37 C. 574; 14 C. W. N. 662.

MEAH UZIR ALI SARDAR *v.* SAVAI BEHARA.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 358 OF 1912.

January 25, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

MEAH UZIR ALI SARDAR—PLAINTIFF—APPELLANT

*versus*

SAVAI BEHARA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code* (*Act V of* 1908), *s.* 107, *O. XLI --Remand—Appellate Court, power of—Party, addition of—Amendment of plaint—Ejectment, suit for—Landlord and tenant—Transferee of tenant's rights, if necessary party.*

In a suit for ejectment by a landlord against the tenants the transferee of the tenancy right from the tenants, who was rightly or wrongly admitted to their possession as tenants and under whom the tenants are holding as sub-tenants, is a necessary party. [p. 792, col. 2.]

There are possible cases of remand which are not included in Order XLI, Civil Procedure Code. [p. 792, col. 2.]

When an amendment of plaint is granted in appeal and when parties are added, the Appellate Court has the power of remanding the whole case without keeping it on its own file. [p. 793, col. 1.]

The general provision for remand in section 107, Civil Procedure Code, is not governed or limited by Order XLI alone but is subject to such conditions and limitations as may be prescribed in the rules and Orders. [p. 793, col. 1.]

*Nabin Chandar Tripati* v. *Pran Krishna Dey*, 20 Ind. Cas 39; 18 C L. J. 613; 41 C. 108, disapproved and distinguished.

Appeal against the decree of the Additional District Judge, Jessore, dated the 15th April 1912, reversing the order of the Subordinate Judge, first Court of that District, dated the 31st May 1911, and remanding the case to his Court for proceeding according to law.

FACTS.—The plaintiff-appellant brought a suit to eject the defendants from 19 plots of land in *Mauza* Solemanpur. The plaintiff, who was a joint proprietor of the estate to which this land originally belonged, came into exclusive possession of the land by partition in 1316 B. S. and soon after coming into possession he instituted this suit on the 13th May 1910. The land was granted to the predecessor-in-interest of the defendants as service tenure for bearing *palkis*. It was alleged that defendants refused to perform the service when called upon by the plaintiff and hence the suit.

The defendants admitted that the land was originally granted as a service tenure, but they contended that the proprietor subsequently resumed the service tenure and resettled the land with their predecessors-in-interest as *jamai* land and that they had been holding the land since then as their *jamai* land, that in 1309 B. S. they sold their *jamai* tenancy to one Mr. Macleod and then again took settlement from him as his under-*raiyats* and that since 1309 B. S. they had been holding the land as under-*raiyats* of Mr. Macleod. The contention of the defendants, therefore, was that the service tenure having been resumed and the land being re-settled with them, they had a transferable right in the land and the plaintiff had no right to eject them from it.

The Court of first instance decreed the suit, whereupon the defendants appealed to the District Judge who by his order, dated the 15th April 1912, reversed the decree of the first Court and remanded the case to it for rehearing after admitting certain documents into evidence, after allowing the plaintiff opportunity to adduce rebutting evidence relating to those documents if necessary and also after adding Mr. Macleod and another person as defendants. Against this decision the present appeal was preferred to the High Court.

Babus *Mohendra Nath Roy* and *Amarendra Nath Bose*, for the Appellant.

Mr. *H. D. Bose* (Counsel), Babus *Siva Prosanna Bhattacharjee* and *Tarakerswar Pal Chowdhary*, for the Respondents.

JUDGMENT.—This is an appeal from an order remanding a case in appeal. The plaint was filed so long ago as the 13th May 1910. The judgment of the Subordinate Judge in the Court of first instance is dated 31st May 1911 and the judgment now under appeal before us is dated the 15th April 1912. We are now at the end of January 1916. It is, in our opinion, very lamentable that this matter should be still undecided, more especially as, for the reason which we are about to give, there does not appear to have been any substance in the appeal.

It is contended, *firstly*, that inasmuch as the Court of first instance did not decide the case upon a preliminary point the order

of remand ought to have been made under Order XLI, rule 25, and that the Appellate Court should have kept the case on its own file. In this connection it is conceded that the irregularity cannot be given effect to unless the appellant was prejudiced by the procedure adopted; and in order to establish that he was so prejudiced, it is pointed out that two orders which are alleged to be erroneous in law were passed incidentally by the lower Appellate Court. The *first* was that three documents were admitted which had been rejected by the first Court as out of time, and the *second* was that the Judge has directed the plaintiff to add three persons as defendants before proceeding with the case.

Now curiously enough neither of these points has any substance in it. It is clearly found by the learned Judge in the Court of Appeal below that the documents were not out of time and his finding of fact entirely disposes of the question, and shows that the Subordinate Judge very improperly rejected these papers on one excuse on the 25th April 1911 and on another and wholly different excuse on the 26th April when a second attempt was made to file them. We need not go into details which are fully set out in the judgment of the lower Appellate Court.

As regards the *second* point we do not think that a somewhat confused sentence in the penultimate paragraph of the judgment was intended to mean that the burden of adding these defendants should be thrown upon the plaintiff. In another passage in the judgment the Judge clearly directed that they should be added and the case should proceed. We are clearly of opinion that Mr. Macleod was a necessary party. It is contended before us that the alleged landlord set up by persons whom the plaintiff seeks to eject need not be made a party to the suit, and certain judgments of the Judicial Committee are relied upon in which it is held that it is not necessary for the plaintiff in a suit for ejectment to make any one a party who is not in possession, merely because the defendant sets him up as his landlord. But these can easily be distinguished from the present case when it is found as a fact that there was a transfer of the tenancy right from the defendants to Mr. Macleod and as a fact that Mr. Macleod was rightly or wrongly admitted to the defendants' possession as tenants and that the defendants are holding under him as sub-tenants by paying him rent. Under the circumstances it is clearly not only necessary but to the interest of the plaintiff to get rid of Mr. Macleod.

As regards the other two persons Gobardhan and Indu whom the defendants put forward as their co-sharers, the adding of co-sharers as parties, when a retrial is necessary is a matter of discretion with the Court, and it is certainly to the interest of the plaintiff as well as to the interest of every one else that there should be some finality in this litigation and that all the co-sharers should be added.

This brings us to a reconsideration of the very first objection that the remand was incompetent in the form in which it is made. With all respect for the decision of the learned Judges in the case of *Nabin Chandar Tripati* v. *Pran Krishna Dey* (1), it may be pointed out that that decision differs from several previous cases by which we are bound and as the learned Judges declined to refer the question to a Full Bench, because they were of opinion that it did not directly arise, the case being disposed of on another ground, it is not, therefore, an authority for the very general proposition that there is no other possible case of remand which is not included in Order XLI. Now this very matter of amendment of a plaint in an Appellate Court with the necessary addition of parties is on the face of it a case which cannot possibly fall under Order XLI, rule 23 or rule 25. It is not a decision on a preliminary point, therefore, it may be said that the whole case cannot be remanded, but it is not a case in which certain issues can be framed and certain additional evidence can be taken under rule 25, for new parties having been added and the plaint having been amended the added defendants as well as the original defendants have a right to file fresh written statements and to have the whole case re-opened. It seems

(1) 20 Ind. Cas. 39; 41 C. 108; 18 C. L. J. 613.

to have been overlooked that in the new Code of Civil Procedure the Legislature has given this power of amendment to the Court of Appeal; and it is a necessary outcome of that power that the Court must have the power of remanding the whole case when an amendment of plaint is granted in appeal and when parties are added. There is a general provision in section 107, Civil Procedure Code, for a remand. The consideration which we have just pointed out must lead to the conclusion that that section is not governed or limited by Order XLI alone, but it is subject to such conditions and limitations as may be prescribed in the rules and Orders and the amendment of a plaint and addition of parties in a Court of Appeal is one of the conditions prescribed in the rules and Orders. Section 107, therefore, is just as much subject to that condition as it is to the conditions laid down in Order XLI.

We, therefore, hold, *firstly*, that this remand was not improperly made; *secondly*, that if it had been irregularly made it did not prejudice anybody; *thirdly*, that the District Judge would have been grossly wanting in his duty had he not admitted those three documents, and *lastly* that Mr. Macleod is a necessary party and that the Judge exercised a wise discretion in adding the alleged co-sharers Gobardhan and Indu.

The result is the appeal is dismissed with costs, three gold *mohurs*.

*Appeal dismissed.*

## PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 203 OF 1915.

January 8, 1916.

*Present:*—Mr. Justice Shadi Lal.

HUKAM SINGH—DEFENDANT—PETITIONER

*versus*

MAKHAN LAL—PLAINTIFF—RESPONDENT.

*Provincial Small Cause Courts Act* (*IX of* 1837), *s.* 25—*Suit for recovery of money—Document purporting to be receipt for amount, genuineness of, doubted—Revision.*

Where in a suit for recovery of money, the defendant put forward a document which purported to be a receipt for the amount, but the genuineness of which was doubted by the Small Cause Court:

*Held*, there was no error of law or procedure which justified the exercise of the revisional jurisdiction under section 25 of the Provincial Small Cause Courts Act. [p. 794, col. 1.]

Petition for revision, under section 25 of Act IX of 1887, of the decree of the Judge, Small Cause Court, Delhi, dated the 18th February 1915, decreeing the claim.

Bhagat *Govind Das*, for the Petitioner.

Rai Sahib Lala *Moti Sagar*, for the Respondent.

JUDGMENT.—The sole question in this case was whether the defendant had established the payment of Rs. 475 to the plaintiff, in addition to the sum of Rs. 200 which was admittedly paid to the latter by means of a cheque. To prove this allegation the defendant put forward a document, D-1, purporting to be a receipt for Rs. 675. Now, this receipt is in the English language, which the plaintiff admittedly does not know, and it was written by the defendant's brother. The plaintiff undoubtedly signed his name on the stamp, but that writing does not mention the amount received by him. There is, however, another writing in Deonagri characters, which does specify the amount, but the Judge, Small Cause Court, has expressed his doubts as to the genuineness thereof. I have examined both the writings and am not prepared to find affirmatively that they are by one and the same person.

The question, however, arises whether there is any adequate reason for my interference on revision. The Judge, Small Cause Court, has mentioned several matters which, in his opinion, militate against the defence set up by the petitioner, and after hearing arguments on both sides I am not

convinced that there is any error of law or procedure, which would justify the exercise of the revisional jurisdiction under section 25 of the Provincial Small Cause Courts Act.

I accordingly reject the application with costs.

*Revision rejected.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3631 OF 1914.

February 10, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

NIROD KRISHNA GHOSE AND OTHERS —DEFENDANTS—APPELLANTS

*versus*

*Maharaja Bahadur* SIR PRODUT KUMAR TAGORE—PLAINTIFF—RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), ss. 50, 105—Proceedings under s. 105—Presumption of fixity of rent, rebuttal of—Enhancement, liability for*—Jama wasil baki *papers of more than 70 years, admissibility of—Genuineness, presumption of—Evidence Act (I of 1872), ss. 90, 34.*

In a proceeding under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent, *jama wasil baki* papers of more than 70 years were produced to rebut the presumption arising under section 50 of the Bengal Tenancy Act from proof of payment of uniform rent for 20 years:

*Held*, that the *jama wasil baki* papers were admissible in evidence and their genuineness could be presumed under section 90 of the Evidence Act. [p. 795, col 1.]

*Held*, further, that the liability to enhancement was imposed not by the *jama wasil baki* papers but by the law which, in the absence of a presumption under section 50 or upon rebuttal of that presumption, imposed a liability to enhancement upon tenants. [p. 795, col. 1.]

*Dukha Mandal* v. *Grant*, 16 Ind. Cas. 467; 16 C. L. J. 24, followed.

Appeal against the decree of the District Judge, Faridpur, dated the 11th June 1914, affirming that of the Assistant Settlement Officer, Faridpur, dated the 10th March 1914.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with Babu *Amarendra Bhusan Ghose* for Babu *Peari Mohan Sikdar*), for the Defendants-Appellants.—This is an appeal against the decree of the lower Appellate Court in favour of the Maharaja. My clients, the tenants, pleaded that the tenancy is *mokarari* and filed rent receipts raising the presumption under section 50, Bengal Tenancy Act. To rebut the presumption which arises in their favour under section 50 of the Bengal Tenancy Act, the plaintiff produced *jama wasil baki* papers of the years 1236, 1267, 1269, and 1270, B. S., showing a different rent and realisation of that rent for the tenancy in question. The lower Appellate Court has held that these *jama wasil baki* papers are admissible under section 90 of the Evidence Act and relevant under section 32 of the Evidence Act, and that they are not covered by section 34 of the Evidence Act.

My contention is that these *jama wasil baki* papers cannot be admissible as independent evidence and that in any case, they cannot be relied upon as imposing a liability to enhancement of the rent paid by my clients, the defendants, under section 34 of the Evidence Act. *Jama wasil baki* papers may be admissible as corroborative, but not as independent, evidence of the fact therein stated. They are insufficient to rebut the presumption of the uniform payment of rent for more than 20 years,—see *Ram Lall Chuckerbutty* v. *Tara Soondari Burmonya* (1). These papers cannot be treated as independent evidence. The *jama wasil baki* papers are made at the end of the year and copied from other papers which are kept in the regular course of business. So, obviously under section 34 of the Evidence Act, these papers can never be treated as being sufficient evidence to charge the defendants with the liability of paying enhanced rent. *Jamabandi* papers of more than 70 years are admissible as evidence without any corroboration, but *jama wasil baki* papers are not original papers, *vide Dukha Mandal* v. *Grant* (2). These *jama wasil baki* papers have not the effect of rebutting the presumption which my clients can take advantage of under section 50 of the Bengal Tenancy Act.

Babu *Hara Prosad Chatterji*, for the Respondent, was not called upon.

JUDGMENT.—In a proceeding under section 105 of the Bengal Tenancy Act, for settlement of fair and equitable rent, the tenants relied upon receipts for 20 years to show uniform payment of rent as a basis for the presumption under section 50

(1) 8 W. R. 280.

(2) 16 Ind. Cas. 467; 16 C. L. J. 24

of the Bengal Tenancy Act. The landlord adduced evidence of *jama wasil baki* papers more than 70 years old, and the lower Appellate Court, upon a consideration of these papers with the other evidence, has held that they have the effect of rebutting the said presumption raised by the proof of uniform payment of rent for 20 years.

It is contended that these papers were not admissible as independent evidence and that in any case under section 34 of the Act they could not be relied upon as imposing a liability to enhancement upon the rent paid by the defendants. In the first place the papers are more than 70 years old and their genuineness can be presumed under section 90 of the Evidence Act and in the second place, they cover a very long period and the lower Court was within its rights in believing them to be genuine. The case relied upon by the lower Appellate Court, *Dukha Mandal* v. *Grant* (2), is in point and we think that it is not right to say that these papers have the effect of imposing any liability upon the tenants. Their effect is to rebut the presumption under section 50 of the Bengal Tenancy Act by showing that previous to the 20 years for which uniform payment of rent has been shown, there was realisation of different rates of rent. The liability to enhancement is imposed not by these papers but by the law which, in the absence of the presumption under section 50 or upon rebuttal of that presumption, imposes a liability to enhancement upon tenants.

In this view of the case, we think there is no substance in this appeal. We dismiss it with costs.

*Appeal dismissed.*

## MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 98 OF 1913 AND 19 OF 1915.

MEMORANDUM OF OBJECTIONS IN THE SAID ORIGINAL SIDE APPEALS NOS. 98 OF 1913 AND 19 OF 1915.

October 14, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN O. S. No. 98 OF 1913

NALAM VISWANATHAM—PLAINTIFF—APPELLANT

*versus*

THE OFFICIAL ASSIGNEE OF MADRAS.

DEFENDANT—RESPONDENT.

IN O. S. No. 19 OF 1915

THE OFFICIAL ASSIGNEE OF MADRAS —PLAINTIFF- APPELLANT

*versus*

CHIKKA PADMAVATHI AMMAL—

DEFENDANT—RESPONDENT.

*Presidency Towns Insolvency Act (III of 1909), ss. 46, 56—Fraudulent preference—Intention of insolvent—Natural and probable consequence of payment "Creditor," meaning of—Payment made "in ordinary course of business," whether can be preferential —Accommodation acceptor, liability of*

It is the duty of a Court to find out whether the intention to give preference to any one of the creditors was the substantial or dominant intention acting on an insolvent's mind when he made a payment. [p. 798, col. 2.]

When the natural and probable consequence of a payment is the preference of a particular creditor among numerous creditors, and when the policy of the Presidency Towns Insolvency Act is that the debtor's assets should be equally distributed among all creditors as much as possible, the payment by an insolvent debtor which has the natural effect of preferring a creditor must be deemed to have been made with the view and intention to prefer that creditor, whatever other views the insolvent may also have had in making that payment and whether those other views were more dominant or less dominant, more substantial or less substantial, than the view to give a preference. If there was legal duress in consequence of which that payment was made, then the view to prefer may be negatived. But a payment made to prefer a creditor, even though made in the ordinary course of business, is a preferential payment within the meaning of the Act. [p. 798, col. 2; p. 799, col. 1.]

*Brooke, Ex parte, Hassal, In re,* (1874) 9 Ch. App. 301; 34 L. J Bk. 49; 30 L. T. 03; 22 W. R. 394, followed.

In order to avoid a transaction as a fraudulent preference it is essential that the relation of debtor and creditor should exist between the parties to the transaction. [p. 799, col. 1.]

The terms "creditor" and "debtor" imply an existing obligation to be performed by one party towards the other. The person who on the happening of certain contingencies, which may or may not happen, will become entitled to enforce an obligation

then created against another person, cannot be called a creditor. [p. 799, col. 1 & 2.]

A surety or an accommodation acceptor is a contingent creditor entitled to prove under section 46 (1) of the Presidency Towns Insolvency Act, but he is not a creditor who can be fraudulently preferred under section 56. [p 800, col. 1.]

*Paine, In re, Read, Ex parte,* (1897) 1 Q. B. 122; 66 L. J. Q. B. 71; 75 L. T. 316; 3 Manson 309; 45 W. R. 190; *Blackpool Motor Car Company, Ltd., In re, Hamilton* v. *Blackpool Motor Car Company, Ltd.*, (1901) 1 Ch. D. 77; 49 W. R. 124; 8 Manson 193; 70 L. J. Ch. 61, dissented from.

*Mills, In re, Official Receiver, Ex parte,* 5 Morrell 55; 58 L. T. 871, followed.

One *N.* drew 8 *hundis* upon *V.* on the 12th January 1911 for Rs. 8,000 payable on the 13th and 25th March 1911. *V.* accepted these *hundis* to accommodate the drawer and the *hundis* were discounted in the Bank of Madras. In order to put *V.* in possession of funds to meet his liabilities as acceptor, *N.* drew 16 *hundis* for Rs. 21,682 in favour of *V.* between the 11th and 13th March and another in favour of his daughter *P.* for Rs. 5,000 on the 11th March. On the 30th of March *N.* was adjudicated an insolvent and the Official Assignee sued for a declaration that *N.* was guilty of fraudulent preferences in drawing these *hundis* and for directing the said *V.* to pay to the Official Assignee the sum of Rs. 10,500 realised on foot of 7 of the 16 *hundis* or in the alternative that *V.* should be directed to pay Rs. 5,500 and *P.*, the insolvent's daughter, be directed to pay the balance:

*Held,* (1) that there was a fraudulent preference of *P.* by the insolvent within the meaning of section 56 *(a)* of the Presidency Towns Insolvency Act, and she ought to be directed to repay the sum paid to her; [p. 797, col. 2.]

(2) that inasmuch as *V.* paid Rs. 5,500 into the Bank of Madras out of the monies realised by him in order to discharge himself of his liability to the Bank as acceptor, this sum could not be said to have been paid by *N.* to *V.* as if he was *N.*'s creditor, but in order to put *V.* in funds to discharge the liability undertaken for the benefit of *N.* and in order to prevent the contingency of *V.* becoming in future the creditor of *N.* and, therefore, no question of fraudulent preference arose in this case. [p. 800, cols. 1 & 2.]

Appeals from the judgment and order of the Hon'ble Mr. Justice Bakewell, dated the 30th September 1913, in the Insolvency Jurisdiction of this Court in Insolvency Petition No. 88 of 1911.

Messrs. *T. Ramachandra Rao* and *A. N. Sitarama Sastri*, for the Appellant in O. S. No. 98 of 1913.

Messrs. *Branson* and *Branson*, for the Respondent in O. S. No. 98 of 1913 and for the Appellant in O. S. No. 19 of 1915.

JUDGMENT.

SADASIVA AIYAR, J.—These three cases have arisen out of the same order passed by Mr. Justice Bakewell on a notice of motion taken out by the Official Assignee in the matter of the insolvency of Nalam Venkataratnam, who was adjudicated as an insolvent on the 30th March 1911. The notice of motion was taken out on the 21st April 1911. The prayers of the motion were for a declaration that the insolvent was guilty of fraudulent preferences in drawing 16 *hundis* for Rs. 21,682 in favour of Nalam Viswanatham Chetty between the the 10th and 13th March 1911 and a *hundi* in favour of Chikka Padmavathi for Rs. 5,000 on the 11th March 1911 and for directing the said Nalam Viswanatham to pay to the Official Assignee Rs. 10,500 realised on foot of 7 of the 16 *hundis* or in the alternative that he should be directed to pay Rs. 5,500, and Chikka Padamavathi should be directed to pay the remaining Rs. 5,000. Nalam Viswanatham and Chikka Padmavathi were the two respondents in this notice of motion. Padmavathi did not appear to contest the motion before Mr. Justice Bakewell, nor did she appear in the Appeal No. 19 of 1915 preferred by the Official Assignee against Mr. Justice Bakewell's order which omitted to fix her with any liability.

After full arguments, I think that the following facts are proved by the evidence in the case. Those facts are (*a*) "The insolvent had a running account with Viswanatham; they were in the habit of accommodating one another by accepting bills and the insolvent used to draw on his *mofussil* constituents in favour of Viswanatham in order to repay the sums due to the latter."

(*b*) On the 12th January 1911, the insolvent had drawn 8 *hundis* upon Viswanatham for Rs. 8,000 payable on the 13th and 25th March 1911. Viswanatham accepted these *hundis* for the accommodation of the insolvent, that is, though he had no monies of the insolvent in his hands, the *hundis* were discounted at the Bank of Madras. The insolvent was bound in the usual course of business to put Viswanatham in funds before the 13th and 25th March 1911 to meet Viswanatham's liabilities as acceptor to the Bank of Madras. It was partly with this view that the 16 *hundis* were sent between the 10th and 13th March by the insolvent to Viswanatham.

(*c*) Out of the Rs. 10,500 collected by Viswanatham, he paid Rs. 5,500 into the Bank of Madras so as to discharge himself of his liability to the Bank of Madras as an acceptor of the insolvent's *hundis*.

(*d*) The insolvent owed Chikka Padmavathi, his daughter, Rs. 5,000. Padmavathi and Nalam Viswanatham were relations. Padmavathi asked Viswanatham (on whom the insolvent drew an at sight *hundi* for Rs. 5,000 in Padmavathi's favour) to hold the Rs. 5,000 as her banker, Padmavathi herself endorsing the *hundi* in advance and sending it to Viswanatham. Nalam Viswanatham as soon as he received the *hundi* from Padmavathi debited himself with the Rs. 5,000 as received from Padmavathi and credited her with the Rs. 5,000. He afterwards on her requisition sent Rs. 4,500 and still had Rs. 500 left with him as her banker when this motion was taken out.

On these facts, the learned Judge held (1) that the payment of Rs. 5,500 to the Bank of Madras was not a fraudulent preference of Viswanatham.

(2) That the *hundi* drawn on Viswanatham by the insolvent in favour of the insolvent's daughter, who is not shown to have pressed for payment of her debt, was an undue preference.

(3) That as Viswanatham had not actually accepted the *hundi* drawn on him by the insolvent in favour of Chikka Padmavathi, so as to make himself liable thereon to her, that *hundi* can only be treated as an authority by the insolvent to Viswanatham to pay the Rs. 5,000 to his daughter and that authority having been revoked by the insolvency, Viswanatham's payment of Rs. 4,500 afterwards to Chikka Padmavathi was unauthorised and cannot bind the Official Assignee.

On the above conclusions the learned Judge directed Viswanatham to pay Rs. 5,000 to the Official Assignee with interest from 30th March 1911 and costs.

As already stated, the whole case is again before us in appeal, through the two regular appeals and the memorandum of objections filed against the order of the learned Judge.

I shall first dispose of Chikka Padmavathi's affair. The learned Judge has not referred to the letter Exhibit 14, written by Padmavathi to Viswanatham on the 13th March 1911. It is as follows: —"I have now enclosed herein one sight *hundi* for Rs. 5,000 drawn on 11th March 1911 on you by Nalam Venkataratnam (that is, the insolvent) to my order. Please receive it and credit to my account Rs. 5,000 as per aforesaid *hundi*, etc." It is in accordance with this letter that Viswanatham debited himself in his own accounts with Rs. 5,000 and credited Padmavathi with Rs. 5,000 as soon as he got Rs. 10,500 by the cashing of some of the *hundis*. It seems to me that, after he had so accepted the position of her debtor in accordance with her request, it cannot be said that she did not actually become his creditor or customer or that the insolvent had a right to revoke the authority to pay money to Padmavathi. There was no doubt a fraudulent preference of Padmavathi by the insolvent and Padmavathi could and ought to be directed to repay the sum of Rs. 5,000 to the Official Assignee. As Rs. 500 of her money is still with Nalam Viswanatham, he can and ought to be directed to repay Rs. 500 and Padmavathi should pay the remaining Rs. 4,500. But I do not think that Nalam Viswanatham is bound to repay the whole Rs. 5,000 for which, in accordance with the insolvent's and Padmavathi's request, he made himself liable to Padmavathi who gave up her claim against her father, treating the *hundi* drawn on Viswanatham as full satisfaction of that claim. Nalam Viswanatham as soon as he received the *hundi*, Exhibit V, endorsed upon it "credited and debited," Padmavathi having already endorsed it over to him, treating his acceptance as certain and asking him to credit the money in her favour. When Viswanatham, on receiving the *hundi* so endorsed by Padmavathi, kept it with him without sending it back to her as dishonoured and debited himself in his accounts as her debtor, he became irrevocably liable to her as the acceptor of the *hundi*.

Coming to the other item of Rs. 5,500, the learned Judge has held Viswanatham not liable for reasons to be gathered from these two sentences in his judgment: "As regards the payment to the Bank, the insolvent was bound to put Nalam Viswanatham in funds to meet the former's liabilities

to the Bank and Nalam Viswanatham was entitled to appropriate monies of the insolvent in his hands towards his outstanding accounts. These payments or appropriations were then made *in the ordinary course of business* and I do not think that any question of undue preference arises". It does not appear quite clear from these sentences whether the learned Judge intended to hold that, though Viswanatham must be deemed to be a creditor of the insolvent in respect of this Rs. 5,500, the insolvent was justified in asking him to repay himself out of the monies of the insolvent which might come to Viswanatham's hands and as it was in the usual course of business for Viswanatham to so appropriate monies of the insolvent towards that kind of debts, it would not constitute in law a fraudulent preference. I, however, take it that that is what the judgment of the learned Judge means. In this view, it is assumed that Nalam Viswanatham was a creditor of the insolvent in respect of the monies which Nalam Viswanatham owed to the Bank of Madras as accommodation acceptor for the insolvent. Taking this assumption as sound for the moment, I am not satisfied that it would not constitute an undue preference under the Statute by the mere fact that the payment to the creditor was made in the ordinary course of business. Section 56 of the Presidency Towns Insolvency Act says:—"That every payment made by any person unable to pay his debts in favour of any creditor, with a *view of giving that creditor a preference* over the other creditors, shall, if such person is adjudged insolvent, on a petition presented within three months after the date thereof, be *deemed fraudulent* and void against the Official Assignee". This section follows the words in the corresponding section 48 of the English Bankruptcy Act of 1883. Many English cases were quoted before us on the question of the meaning of the word "view" used in that Act which word, of course, indicates a mental state. Most of the learned udges in the English Courts (including the House of Lords) have laid it down for themselves that the doctrine of fraudulent preference, which had been elaborated by the Courts before the Bankruptcy Act of 1869, must still be looked to as guide for finding out whether the insolvent in making a particular payment had "the view" to give fraudulent preference and as some of those old cases had held that the "view" of the insolvent must be the substantial or dominant view in his mind in order to render it a fraudulent preference, we must even after the Act find out whether the intention to give preference was the substantial or dominant intention acting on the insolvent's mind when he made the payment. Further, as certain old cases had held that it would not be the substantial or dominant view to prefer, if the debtor had acted in the ordinary course of business or in fulfilment of a prior agreement or was performing a special contract and so on, such a payment in the ordinary course of business, etc., though it did prefer a particular creditor, was not made with a "view" to prefer him. With the greatest respect to those decisions, I do not feel myself bound by their authority and I have to construe the Indian Act according to the plain meaning of its terms. When the natural and probable consequence of a payment is the preference of a particular creditor among numerous creditors, and when the policy of the Act is that the debtor's assets should be equally distributed among all creditors, as much as possible, the payment by an insolvent debtor which has the natural effect of preferring a creditor must be deemed to have been made with the view and intention to prefer that creditor, whatever other views the insolvent may also have had in making that payment and whether those other views were more dominant or less dominant, more substantial or less substantial than the view to give a preference. Of course, if there was legal duress [see *Brooke, Ex parte, Hassal, In re* (1)] such as the arrest of the person or the attachment of the property of the insolvent in consequence of which that payment was made, then the view to prefer may be negatived. Mr. Justice Bakewell seems to have followed the English cases, which held that a payment made in the ordinary course of business though made to prefer a creditor

(1) (1874) 9 Ch. App. 301; 34 L. J. Bk. 49; 30 L. T. 103; 22 W. R. 395.

cannot be held to have been made with a view to prefer that creditor within the meaning of the section of the Insolvency Act. Excepting the case of the payments made under legal duress, I am not prepared to whittle away the plain beneficial policy of the Bankruptcy Act by metaphysically weighing the different problematical motives and intentions in the mind of the insolvent and finding out whether the view to prefer was the most dominant or substantial among those motives and intentions. Unless the insolvent gives evidence about his motives and his evidence i believed as to his dominant motive, the task is a hopeless one to find out his dominant motive As Mr. Justice Beaman says in *Sethna* v. *Kallianji Sangjibhai* (2): "It must always be an extremely difficult question in such cases to decide what was the dominant determinant in the insolvent's mind." The learned Judge then refers to "the too ready inclination to accept any pressure, even the most honest pressure, as sufficient to warrant the conclusion that the payment was not voluntary" and finally refers to later cases, showing that "the earlier doctrine is no longer good law as it certainly never was good psychology."

Having thus expressed my respectfully dissent from the learned Judge on the question of law on the strength of which he seems to have decided in favour of the appellant Viswanatham in the matter of Rs. 5,500, I think that the conclusion itself of the learned Judge, that Viswanatham cannot be made to repay that Rs. 5,500 to the Official Assignee, is correct. My reason is that the payment to Viswanatham cannot be treated as a payment to a creditor. As said in Halsbury's Laws of England, Volume 2, page 281, "In order to avoid a transaction as a fraudulent preference it is essential that the relation of debtor and creditor should exist between the parties to the transaction. The person for whose benefit the act.....is done must be a creditor of the person doing the act." Section 56 of the Presidency Towns Insolvency Act says that the payment should be in favour of a creditor. The word "creditor" is not defined by the Act. I take it that the word "creditor" means one that can compel the performance of an obligation by another person who is called the "debtor," the person lying under the obligation. In Wharton's Law Lexicon, "creditor" is said to be correlative to "debtor," and "debtor" is defined as "he that owes something to another". The obligation to pay money must, it seems to me, be existing in order to make a man a debtor though the time for the discharge of the obligation may be in the future. The person, who on the happening of certain contingencies, which may or may not happen, will become entitled to enforce an obligation then created against another person, cannot, in my opinion, be called a creditor. Creditor must, as I said before, be one to whom money or the equivalent of money is legally due, though it may become payable in future. The cases of *Paine, In re, Read, Ex parte* (3) and *Blackpool Motor Car Company Ltd. In re, Hamilton* v. *Blackpool Motor Car Company Ltd.* (4) were quoted to us for the proposition that a person who, though no money is due to him as an existing obligation, would have a right to prove in bankruptcy was a creditor of the bankrupt in the "sense" in which it is used in the section relating to fraudulent preference. Vaughan Williams, J., in the case of *Paine, In re Read, Ex parte* (3) says: "The Act contains no definition of the word 'creditor' and, therefore, to arrive at the meaning I must look at the history of the section". And then on a consideration of that history, the learned Judge arrives at the conclusion that a person, who though not a creditor is in essence or by construction a creditor or might become a creditor (or a prospective creditor) under certain contingencies was also included in the meaning of the word "creditor" in the section of the English Bankruptcy Act corresponding to section 56 of our Act. With the greatest respect to the learned Judges who were responsible for those two English decisions, (each of them deciding singly), I am not prepared to follow them, especially as the Court of Appeal in the case reported as *Mills, In re, Official Receiver, Ex parte* (5) clearly held that a person who was

(2) 19 Ind. Cas. 57 at p. 59; 15 Bom. L. R. 113.

(3) (1897) 1 Q. B. 122; 66 L J. Q. B. 71; 75 L. T. 316; 3 Manson 304; 45 W. R. 190

(4) (1901) 1 Ch. D. 77; 49 W. R 124; 8 Manson 193; 70 L. J. Ch. 61.

(5) 5 Morrell 55; 58 L. T. 871.

only a surety for the insolvent (and to whom, therefore, the insolvent was under a legal obligation to see that he is not pursued by the creditor for the money borrowed by the insolvent) was not a creditor within the section relating to fraudulent preference. No doubt section 46, clause (3), says that "All debts and liabilities, present or future, certain or *contingent*, to which the debtor is subject,...or to which he may become subject, before his discharge, shall be deemed to be debts provable in insolvency." And clause (4) says: "An estimate shall be made by the Official Assignee of the value of any debt or liability provable as aforesaid which, by reason of its being subject to any contingency or contingencies,...does not bear a certain value." A surety or an accommodation acceptor is no doubt a contingent creditor who is entitled to prove under section 46 (1). The question is whether he is a creditor who can be fraudulently preferred under section 56. As I said, very eminent English Judges have differed on this point when construing corresponding sections of the English Acts. Lord Esher, M. R., says in *Mills, In re Official Receiver Ex parte* (5): "Now Greenwood" (the surety) "is not a creditor at all. The case is therefore, *not within the words of the section.*" Fry, L. J., says: "The Statute appears to me to be very plain. It avoids a payment to a creditor with a view to give *such* a creditor a preference. *Greenwood was a surety and not a creditor at all.*" I am inclined to agree with the opinion in *Mills, In re Official Receiver Ex parte* (5). Viswanatham as an accommodation acceptor for the insolvent was not, therefore, a creditor of the insolvent though he was a debtor of the Bank and the sum of money, Rs. 5,500, belonging to the insolvent cannot be said to have been paid by the insolvent to Viswanatham as if he was the insolvent's creditor, but in order to put Viswanatham in funds to discharge Viswanatham's own liability to the Bank undertaken by him for the benefit of the insolvent and in order *to prevent the contingency of Viswanatham becoming in future the creditor of the insolvent* by being obliged to pay that Rs. 5,500 to the Bank out of Viswanatham's own moneys. I regret that I am unable to agree with Beaman, J., [*Sethna* v. *Kallianji Sangjibhai* (2)] that it is such a "self-evident" proposition that a surety or an accommodation acceptor is a "creditor", the learned Judge quoting *Paine, In re, Read, Ex parte* (3) in his favour as an unnecessary authority while ignoring *Mills, In re Official Receiver Ex parte* (5). I, therefore, hold that no question of fraudulent preference arises in this case.

In the result, I would modify the order of the learned Judge by confining Viswanatham's liability to repayment of the Rs. 500 and interest from 30th March 1911, with the like interest.

The memorandum of objections filed by the Official Assignee will be dismissed with costs. Padmavathi will pay the costs of the Official Assignee in Appeal No. 19 of 1915. Viswanatham will get his costs of Appeal No. 93 of 1913 from the estate. The Official Assignee will also be entitled to recover all his costs from the estate.

NAPIER, J.—I agree. I have no doubt that the term "creditor" means a *creditor prior to the payment*, and that we have not to look to any financial transaction or any financial position arising out of the payment or subsequent to it. I am quite clear that Nalam Viswanatham was not a creditor in respect of those accommodation bills. It is not suggested that there is anything in the Negotiable Instruments Act which makes him a creditor and, with the greatest deference to the high authority in *Paine, In re, Read, Ex parte* (3), I cannot give the word the extended construction suggested there. I am fortified in my opinion by the clearly expressed language of the Court of Appeal in *Mills, In re Official Receiver Ex parte* (5), I agree with my learned brother also that the words "with a view of giving that creditor a preference" have received, in some cases, in England a construction so narrow as to defeat the object of the section, and I am not prepared to accept the view that if the payment was made in the ordinary course of business it could not be a statutory fraud. There is, however, no necessity to discuss this question as I have held that Viswanatham was not a creditor, but I wish to guard myself against being supposed to agree with what appears to be the view of the learned Trial Judge on this point.

*Order modified;*
*Memo. of objections dismissed.*

## CALCUTTA HIGH COURT.

PRELIMINARY OBJECTION IN ORIGINAL CIVIL SUIT No. 484 OF 1914.

March 17, 1915.

*Present*:—Mr. Justice Greaves.

ALI HAFFIZ AND OTHERS—PLAINTIFFS

*versus*

ABDUR RAHMAN AND ANOTHER—DEFENDANTS.

*Civil Procedure Code (Act V of 1908), s. 92, O. I, r. 3*—Mutwalli, *suit for removal of—Alienee, if proper party—Procedure.*

In a suit under section 92, Civil Procedure Code, for the removal of a *mutwalli* on the ground that he has committed a breach of trust by alienating a part of the trust property, the alienee may be made a party, and if the Court decides against him, he may be declared in that suit to be a trustee of the trust property and directed to convey the property.

*Compania Sansinena De Carnes Congeladas v. Houlder Brothers & Co. Ltd.*, (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333, followed.

*Obiter.*—But against such an alienee no relief by way of a decree in ejectment can be given.

*Budh Singh Dudhuria v. Niradbaran Roy*, 2 C. L. J. 431 at p.434; *Budree Das Mukim v. Chooni Lal Johurry*, 33 C. 789 at p. 805; 10 C. W. N. 581, referred to.

Mr. *S. A. Ashgar* (with him Mr. *P. N. Chatterjee*), for the Plaintiffs.

Mr. *S. R. Das* (with him Messrs. *A. Rasul* and *Z. R. Zahid Suhrawardy*), for Defendant No. 2.

JUDGMENT.—In this suit the plaintiffs claim to remove defendant No. 1 from the *mutwallishp*, on the ground that he has committed a breach of trust by alienating a part of the trust property to defendant No. 2, who is alleged to have taken the property with the knowledge that it was trust property. Defendant No. 2 alleges that the property alienated is not trust property and that in any case he had no knowledge of any trust. A preliminary objection was taken on behalf of defendant No. 2 that he is not a necessary party and that he cannot be joined in the suit, which is one under section 92 of the Civil Procedure Code. In support of this objection two cases are relied on, namely, *Budh Singh Dudhuria* v. *Niradbaran Roy* (1) and *Budree Das Mukim* v. *Chooni Lal Johurry* (2). With regard to both cases I am quite in agreement with them in so far as they decide that relief such as is asked here against defendant No. 2, does not come within the

(1) 2 C. L. J. 431 at p. 434.
(2) 33 C. 789 at p. 805; 10 C. W. N. 581.





purview of section 539 of the Civil Procedure Code, Act XIV of 1882, which is now represented by section 92 of the present Civil Procedure Code, but I see no reason why, having regard to the provisions of Order I, rule 3, of the present Civil Procedure Code defendant No. 2 should not be made a party to the suit and, if my decision is against him, I see no reason why he should not in this suit be declared to be a trustee of the trust property and be directed to convey the property. I should add that I am fortified in the view that I have expressed by a consideration of the provisions of Order XVI, rule 4 of the English Procedure Rules: see *Compania Sansinena De Carnes Congeladas* v. *Houlder Brothers & Co Ltd.* (3), and the notes in the English Annual Practice for 1915 at page 221. Order I, rule 3, of the Civil Procedure Code is very similar in terms, in fact almost identical with Order XVI, rule 4, of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in Order XVI, rule 4, by the English Judges may well be considered in construing the provisions of Order I, rule 3. I accordingly overrule the preliminary objection.

*Objection disallowed.*

(3) (1910) 2 K. B. 354; 79 L. J. K. B. 1094; 103 L. T. 333.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 21 OF 1913-14 OF ALLAHABAD DISTRICT.

November 22, 1914.

*Present*:—Mr. Tweedy, S. M., and Mr. Holms, J. M.

BHAIRON RAM—PLAINTIFF—APPELLANT

*versus*

*Musammat* SIDHANNA—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), s. 22—Widow—Remarriage—Right in holding, if subsists—Hindu Widows' Remarriage Act (XV of 1856), s. 2, applicability of.*

A widow succeeding her husband under section 22 of the Agra Tenancy Act, 1901, has only an interest in the occupancy holding till her remarriage and section 2 of Act XV of 1856 does not apply to the interpretation of this section. [p. 802, col. 1.]

GOTTUKKULA SURAPA *v.* GOTTUMKKULA VENKAYYA.

* Second appeal from the order of the Commissioner of Allahabad Division, dated the 23rd March 1914, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment under section 58 of Act II of 1901.

JUDGMENT.

HOLMS, J. M.—(*November* 17, 1914.)—The Commissioner has omitted to notice that the order of the Board of 18th November 1909 on Petition No. 3 of 1908-09 referred to a case in which the widow succeeded to an occupancy holding under the provision of section 9 of the former Rent Act, XII of 1881. The provision of that section was general, that the right should devolve as if it were land. Mr. Porter, the Member of the Board, referred to several decisions of the Allahabad High Court to the effect that section 2 of the Remarriage of the Hindu Widows Act XV of 1856, did not apply to castes in which remarriage of Hindu widows was lawful before that Act was passed. I have looked up the main authority, *Harsaran Das* v. *Nandi* (1), and the reason for this interpretation was due to the preamble of the Act by which section 2 was interpreted. In the present case, however, the widow succeeded under the provisions of section 22 of the present Tenancy Act of 1901, and there is a definite condition that the widow has only an interest in the occupancy holding till her remarriage. The special reasons which led the High Court to limit the application of section 2 of the Act of 1856 have no application to the interpretation of this section and I cannot apply the Board's ruling of 1909 to the present case.

I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

TWEEDY, S. M.—I concur.

*Appeal allowed.*

(1) 11 A. 330; A. W. N. (1889) 77.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 98 OF 1913.

December 7, 1914.

*Present*:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

GOTTUKKULA SURAPA RAJU—PLAINTIFF—APPELLANT

*versus*

GOTTUMKKULA VENKAYYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Hindu Law—Alienation, suit to set aside—Minors—Limitation, running of—Alienation by managing member and mother as guardian of minor for necessity, validity of—Interests of minor—Court, duty of.*

In a suit to set aside an alienation by the guardian of minor brothers in a joint Hindu family limitation begins to run from the date of the elder brother attaining majority. [p. 803, col. 1.]

Where an alienation is made by an elder brother after attaining majority and by the mother as guardian of the minor and the sale is found to be for a *bona fide* family purpose, the transaction is valid even though the mother is unnecessarily joined in the deed. [p. 803, cols. 1 & 2.]

*Seshagiri Aiyar, J.*—The decision of the Privy Council in *Mata Din* v. *Ahmad Ali*, 13 Ind. Cas. 976; (1912) M. W. N. 183; 34 A. 213 (P. C.); 16 C. W. N. 338; 11 M. L. T. 145; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49, is only authority for the position that a minor is not bound by acts done by persons who presume to act on his behalf without any power to do so. But when the alienation is made by a person who is competent to represent the minor, the sale cannot be vitiated because somebody else who has no right to do so has joined in the execution. [p. 803, col. 2.]

Where an executant covenants to convey all the interest of which he is then possessed, the fact that the various capacities in which that interest vests in him are not specifically referred to in the conveyance, will not affect the right of the purchaser. [p. 803, col. 2.]

Therefore, where a brother was competent to sell family property for justifiable purposes, the non-mention of the fact that he executed the conveyance as a managing member will not render the deed any the less effective. [p. 803, col. 2.]

What the Courts have to look to in such transactions is that the interests of the minor have been properly represented. If that requirement is satisfied Courts will be slow to set aside an alienation. This rule is subject to the exception that it is not open to every one to intermeddle with the estate of the minor on the ground that he is acting for the minor's benefit. [p. 804, col. 1.]

Second appeals against the decrees of the District Court of Godavari at Rajamundry, in Appeal Suits Nos. 153 and 75 of 1911, preferred against those of the Court of the District Munsif, Amalapuram, in Original Suits Nos. 167 and 163 of 1910.

Mr. *Ramesam*, for the Appellant.

Mr. *Narasimha Rao*, for the Respondents.

JUDGMENT.

SPENCER, J.—In respect of the alienation of the plaintiff's mother as guardian of her minor sons with which Second Appeal No. 99 of 1913 is concerned and the alienation by the same individual as guardian of her minor sons under Exhibit II in Second Appeal No. 98 of 1913, we find that the matter is governed by the Full Bench decision in *Doraisami* v. *Nondisami Saluvan* (1), which decided that limitation begins to run from the date of the elder brother attaining majority.

With regard to the other alienation under Exhibit I effected by the elder brother after attaining majority and by the mother as guardian of the minor plaintiff, I have had the advantage of perusing the judgment which my learned brother has written and I agree with him in thinking that the sale by the manager of the undivided family which has been found to be for a *bona fide* family purpose was binding on the family and that the mere fact of the plaintiff's mother joining in the deed, though unnecessary, did not detract from the validity of the transaction. No question of limitation arises in the case. Under these circumstances both the appeals fail and are dismissed with costs.

SESHAGIRI AIYAR. J.—The sale-deed in question was executed by the brother of the plaintiff, who was then of age and the manager of the joint family, and by plaintiff's mother as his guardian. The Courts below have found that the sale was effected to enable the brother to meet the necessary expenses of the family. The finding is not disputed in second appeal. Therefore, if the brother alone had executed the document, there can be no question that the alienation will be binding on the plaintiff. Mr. Ramesam argues that as the mother has joined in the execution of the deed as guardian of the plaintiff, the sale is a nullity and that plaintiff is entitled to recover his share of the property. Very strong authority is required for upholding such a contention. Mr. Ramesam with his usual fairness recognised the anomaly which the acceptance of his contention would involve, but stated that on the decided cases his client is entitled to a decree.

The decision of the Judicial Committee in *Mata Din* v. *Ahmad Ali* (2) does not help the appellant. In that case, certain persons who were not entitled to act as guardians under the Muhammadan Law alienated property belonging to the minor. The Privy Council pointed out that the *de facto* guardian although he may assume responsibilities "cannot clothe himself with legal power to sell" property. The question whether, if the sale was for legal necessity, it would bind the minor, was left open. This decision is only authority for the position that a minor is not bound by acts done by persons who presume to act on his behalf without any power to do so. But when the alienation is made by a person who is competent to represent the minor, the sale cannot be vitiated because he has asked somebody else who has no right to do so to join with him in the execution of the document. It has to be remembered that the mother is the guardian of the person of her minor son, and apparently it was *ex abundanti cautela* that she joined in the sale-deed. It was argued that as the brother did not purport to act in his capacity as manager, his acts will not bind the minor. It was pointed out by the Judicial Committee in *Bijraj Nopani* v. *Sreemutty Pura Sundary Dasee* (3) that where an executant covenants to convey all the interest of which he is then possessed, the fact that the various capacities in which that interest vests in him are not specifically referred to in the conveyance will not affect the right of the purchaser. The principle of this decision applies to this case. It was competent to the brother to sell family property for justifiable purposes, and he has done so. The non-mention of the fact that he executed the conveyance as a managing member will not render the deed any the less effective. Mr. Ramesam relied upon the decision of the Judicial

(1) 21 Ind. Cas. 410; 25 M. L. J. 405; 14 M. L. T. 401; 38 M. 118.

(2) 13 Ind. Cas. 976: (912) M. W. N. 183; 34 A. 213 (P. C.): 16 C. W. N. 338; 11 M. L. T. 145; 9 A. L. J. 215; 15 C. L. J. 270: 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49.

(3) 24 Ind. Cas. 296; 41 I. A. 191 (P. C.); (1914) M. W. N. 679; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1313; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 363; 42 C. 56.

Committee in *Balwant Singh* v. *Rockwell Clancy* (4). In that case the vendor claimed an absolute right in the property sold. In the suit by his brother, it was found that he had only a joint interest with the plaintiff. Then the alienee sought to justify the alienation to him on the ground that the vendor as the manager of the family was competent to execute the sale-deed. It was pointed out that as the brother expressly claimed a right in the property to the exclusion of the plaintiff, he cannot be said to have represented the plaintiff in this transaction. In the present case, the brother arrogated no such right to himself. Reliance was also placed on an unreported decision of this Court in Second Appeal No. 2475 of 1912.* All that was decided in that case was that the period of limitation was 12 years under Article 144 and that Article 44 did not apply. As no question of limitation arises in this case, it is not necessary to say what the proper Article will be under similar circumstances. After all what the Courts have to see is that the interests of the minor have been properly represented. If that requirement is satisfied, Courts will be slow to set aside an alienation. This rule is subject to the exception that it is not open to every one to intermeddle with the estate of the minor on the ground that he is acting for the minor's benefit. That would be encouraging unauthorised interference with an infant's property. The present case steers clear of this difficulty. The brother who is entitled to protect the minor's rights was a party to the deed. The minor's personal guardian also joined in it, although it was not necessary for her to do so; and it has been found that the sale was for proper and binding purposes. On no principle of law or equity can such a transaction be set aside.

*Appeals dismissed.*

(4) 14 Ind. Cas. 629; (1912) M. W. N. 462; 34 A. 296; 11 M. L. T. 344; 9 A. L. J. 509; 15 C. L. J. 475; 16 C. W. N. 577; 14 Bom. L. R. 422; 23 M. L. J. 18; 39 I. A. 109.

*See 27 Ind Cas. 695—*Ed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3502 OF 1913.

January 12, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

*Sheik* DOULATUDDIN—PLAINTIFF—APPELLANT

*versus*

DHANIRAM CHHUTIA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Contract Act (IX of 1872), s. 65—Contract of sale—Vendor, lunatic—Purchaser, right of, to refund of consideration money paid—Specific Relief Act (I of 1877), ss. 38, 41, applicability of—Equitable relief.*

A person who by payment of consideration money entered into an unenforceable contract for the purchase of property with another who was of unsound mind at the time of the contract, is not entitled to a refund of the money paid, either under the provisions of section 65 of the Contract Act or sections 38 and 41 of the Specific Relief Act or on principles of equity. [p. 805, col. 2.]

*Mohori Bibee* v. *Dharmodas Ghose*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.), distinguished.

*Thurstan* v. *Nottingham Permanent Benefit Building Society*, (1902) 1 Ch. D. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135, followed.

Appeal against the decree of the District Judge, Assam Valley District, dated the 23th July, 1913, reversing that of the Munsif, Golaghat, dated the 31st January 1912.

FACTS of the case appear from the judgment.

Babu *Probodh Chandra Rai*, for the Appellant.—The defendant took Rs. 2,000 from my client and made a contract for the sale of the land in suit. The contract might not be enforceable, it might be void. But there is no reason why he should not refund the money which he took from my client. He cannot in equity keep the property which he contracted to sell as well as the consideration money. He must have either the one or the other, but cannot have both. He is bound to restore the money at any rate,—see section 65 of the Contract Act and section 41 of the Specific Relief Act. Even on equitable grounds, my client has got a right to a decree for refund of the money which he has paid.

Babu *Hemendra Kumar Das*, for the Respondents.—The contract here is not only void but was made with a person who was

not competent to contract at all under the provisions of the Contract Act. So no restitution can be claimed by the appellant. If a lunatic on getting a certain sum of money enters into a contract, he cannot be compelled to refund the money. He might have squandered the money, and if he is now compelled to refund it, his estate will suffer. The case of *Mohori Bibee Dharamodas Ghose* (1) supports my contention: see also *Boiddonath Dey* v. *Ram Kishore Dey* (2), *Doorga Charan Shaha* v. *Ram Narain Doss* (3) and *Dattaram* v. *Vinayak* (4). Section 41 of the Specific Relief Act can have no application, because my client is not seeking a cancellation of the contract. In this case there was no contract at all in the eye of the law.

Babu *Probodh Chandra Rai*, in reply:—In the case of *Mohori Bibee* v. *Dharamodas* (1), the money-lender knew that he was dealing with an infant. Here there is no finding that my client did know that the defendant was a lunatic. It might be that there was no contract under the law, but certainly there was an agreement and when that agreement could not be enforced, the consideration which the other party got for the agreement ought to be refunded, so that the parties will be restored to the position in which they were before this transaction.

JUDGMENT.—This was a suit by the plaintiff for compelling the defendant to execute a valid sale-deed in respect of certain properties. The defendant, it is said, on the receipt of the consideration money of Rs. 200 executed a sale-deed in favour of the plaintiff which was not registered by the registering officer on account of some defects. Subsequently, it is said, the plaintiff asked the defendant to register a proper deed but he refused. The suit was, therefore, for compelling the defendant to give a valid deed of sale or to refund the consideration money. The Munsif gave a decree. The lower Appellate Court has set aside that decree holding that the defendant was, at the time of the contract, of unsound mind. It is contended in second appeal before us that upon the finding the plaintiff was entitled to a decree for the refund of the money paid. Reliance is placed, in support of this contention, on section 65 of the Contract Act which provides that when an agreement is discovered to be void, any person who has received any advantage under such agreement is bound to restore it, or to make compensation for it, to the person from whom he received it. That section has been construed by their Lordships of the Judicial Committee in the case of *Mohori Bibee* v. *Dharmodas Ghose* (1) to proceed on the basis of the agreement or contract, mentioned therein, having been between parties competent to enter thereinto. If that be so, then section 65 has no application because upon the finding the defendant was of unsound mind at the time of the agreement. Then reliance is placed upon sections 38 and 41 of the Specific Relief Act. These sections, we think, have also no application because there is neither cancellation of any document nor rescission of a contract. These statutory provisions, therefore, are of no avail to the plaintiff.

Then reliance is placed upon equity. Equity is also against him because upon the finding the defendant was of unsound mind. It has been held that "a Court of Equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which as against that person the Legislature has declared to be void." See the case of *Thurstan* v. *Nottingham Permanent Benefit Building Society* (5). The plaintiff, therefore, cannot obtain any relief.

In this view of the case, we dismiss the appeal but without costs in this Court.

*Appeal dismissed.*

(5) (1902) 1 Ch. D. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T. 35; 18 T. L. R. 135.

(1) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 20 I. A. 114 (P. C.).
(2) 10 B. L. R. 326*n*; 13 W. R. 166.
(3) 10 B. L. R. 327*n*; 13 W. R. 172.
(4) 28 B. 181; 5 Bom. L. R. 916.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 634 OF 1912.

February 8, 1916.

*Present*:—Mr. Justice Chevis.

SHER ZAMAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KARM BAKHSH AND OTHERS, REPRESENTATIVES OF GULAB KHAN, DECEASED—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Alienation—Awans of Fattehjang Tahsil, right of, to bequeath property to prejudice of reversioners.*

A sonless Awan proprietor of the Fattehjang Tahsil is, not by custom, entitled to bequeath his property to the prejudice of his reversioners. [p. 806, col. 2.]

Second appeal from the decree of the Divisional Judge, Attock Division, dated the 25th January, 1912, reversing that of the Munsif, 2nd Class, Fattehjang, dated the 16th October 1911, dismissing the claim.

Mr. *Muhammad Iqbal*, for the Appellants.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—Karm Dad, a *Bhudal* of the Fattehjang Tahsil, executed a Will by which he left one-half of his property to his sister's sons and the other half to his widow. Karm Dad had no sons. On his death the property was mutated according to the Will. Gulab Khan, a collateral in the sixth degree, brought a suit for a declaration that the Will should not affect his reversionary rights. Other reversioners were impleaded as defendants, but some of them at their own request were subsequently joined as plaintiffs. The first Court dismissed the suit holding that the Will was valid. Of the plaintiffs Gulab Khan alone appealed to the Divisional Judge, who held that the Will was invalid and gave all the plaintiffs a decree. The defendants in whose favour the Will stands have preferred a second appeal to this Court, but of the plaintiffs only Gulab Khan has been made a respondent. It is evidently by an oversight that the other plaintiffs in whose favour the decree of the learned Divisional Judge stands have not been made respondents. It is, however, too late to add them now as limitation has long ago expired.

The first question for consideration is whether *Bhudals* are *Awans* or *Rajputs*. In the first Court the question of their being *Rajputs* seems not to have been contemplated. The parties are described as *Bhudal Awans* in the revenue papers, and the plaintiffs described themselves in the same manner in the plaint. The Divisional Judge, however, states that *Bhudals* are *Rajputs*, and this is very possibly correct for they are so described both in the Customary Law of the Rawalpindi District and in the Gazetteer of that District and also in Ibbetson's Census Report. Still we see that the plaintiffs were content to pose as *Awans* in the first Court and I doubt whether the Divisional Judge was well advised in taking up the question of their being *Rajputs*. But assuming the parties to be *Awans*, the question still remains whether Karam Dad had the power to make the Will in favour of his sister's sons. Counsel for the appellants owns that there are no reported cases of alienations by sonless *Awans* of the Fattehjang Tahsil and he also owns that no instances in point relating to that Tahsil have been produced in evidence, nor can he point to anything in the Customary Law of the Attock District, to which the Fattehjang Tahsil now belongs, in his favour. He merely pleads that Karam Dad being an *Awan* of the Western Punjab District the presumption should be in favour of the validity of the Will. It may be admitted that in many cases it has been found that *Awans* in the Western part of the Punjab have greater powers of alienation than ordinary agriculturists, but at the same time the general custom of the Province is against alienation to the prejudice of the reversioners, and it is for the defendants to prove that the Will is valid by custom. Whatever may be the custom amongst *Awans* of other Tahsils such as Talagang, Attock and Rawalpindi, I am unable to find any proof of a custom amongst *Awans* of the Fattehjang Tahsil whereby a sonless proprietor is entitled to bequeath his property to the prejudice of his reversioners. Counsel for the appellants admits that his clients have never pleaded a

right to succeed as sister's sons apart from the Will.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.
RULE *Nisi* No. 1081 OF 1915.
January 26, 1916.
*Present:*—Mr. Justice Beachcroft and
Mr. Justice Mullick.
*In the matter of Rani* JAGDAMBA KUMARI—DEFENDANT—APPELLANT
*versus*
*Raja Sri* NIL KANTH NARAYAN SINGH—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of* 1908), *O. XLI, r.* 6, *surety under—Surety, if can be discharged on death of decree-holder—Security—Continuing guarantee—Contract Act (IX of* 1872), *s.* 130.

A surety under Order XLI, rule 6, of the Civil Procedure Code, 1908, must be taken to have accepted all natural risks and is not entitled to be discharged on the death of the decree-holder for whom he has stood surety pending appeal. [p. 808, col. 2.]

Such a suretyship is not a continuing guarantee within the meaning of section 130 of the Contract Act. [p. 808, col. 2.]

No arrangement between a decree-holder and his surety entered into after the execution of the security bond can have any effect on the absolute undertaking by the surety to be responsible for any mesne profits, that might be found due to the judgment-debtor, to the extent of the amount of the security on the reversal of the decree. [p. 808, col. 2.]

Rule in the matter of appeal from Original Decree No. 1911 against the decree of the Sub-Judge, Hazaribagh, passed in Suit No. 122 of 1908, dated the 18th September 1911.

FACTS of the case appear from the judgment.

Babu *Dwarkanath Chakravarti* (with him Babu *Chandra Sekhar Prasad Singh*), for the Petitioner, the Surety.—This Rule was obtained by my client. The plaintiff brought a suit for recovery of possession and obtained a decree. He applied for possession in execution and he got possession on my client standing surety for him to the extent of one lakh of rupees by hypothecating his own properties. If the decree of the Court below is set aside in appeal by the High Court and the judgment-debtor is restored to possession, the profits which have been appropriated by the plaintiff must have to be given back to the judgment-debtors and for these the surety would be liable. The plaintiff has died and his son has been substituted in his place in the appeal. My client has not as much confidence in the son as he had in the father. He has a right under the law to retire when he chooses. The security he gave was a continuing guarantee, and there is no reason why he should not be allowed to retire from the obligation of the security bond.

Babu *Jogesh Chandra Roy* (with him Babu *Naresh Chandra Singh*), for the Appellant, Opposite Party.—If the surety is now discharged and if the appeal preferred by my client be ultimately decided in his favour so that he is restored to possession, how could the mesne profits which have accrued during the possession of the Raja be realised by my client? The petitioner stood surety to the extent of one lakh of rupees and is bound to that extent, whether his principal is dead or alive. Decree was allowed to be executed and his principal was given possession of the property on the petitioner's furnishing security to the extent of one lakh. Under the security bond, he is bound to make good to the judgment-debtor this one lakh of rupees, if the mesne profits which would be due to the judgment-debtor in case the appeal is decreed exceed that amount. If the security is now discharged the plaintiff, the Raja, must give up possession to the judgment-debtor or he must furnish another security until the appeal is disposed of. Under Order XLI, rule 6, Civil Procedure Code, a security bond continues in force until the appeal is disposed of and there is no clause in the Civil Procedure Code about the discharge of the surety before the disposal of the appeal.

Babu *Dwarkanath Chakravarti*, in reply:—As my client had faith in the Raja, so he stood surety. But at present he has no trust in the son who has already begun works of destruction, so why should he remain surety still? Under section 130 of the Indian Contract Act, a continuing guarantor can withdraw at any time he pleases from the security. You cannot compel a surety to continue as such against

his wishes and make him liable for future loss. My client is liable for any loss up to the present moment, but after he has applied to be discharged, his liability ceases. The fundamental basis of a suretyship is mutual trust between the principal and the surety and where there is no such trust between the Raja's son and the petitioner, his suretyship is out of the question.

JUDGMENT.

BEACHCROFT, J.—Raja Nil Kanth Narain Singh brought a suit against *Rani* Jagdamba Kumari, the widow of the late Raja Sarada Narain Singh, for declaration of his title to and recovery of possession of Gadi Srirampur, a valuable estate in the District of Hazaribagh. He got a decree, against which the Rani filed an appeal and applied for stay of execution pending the hearing of the appeal. This Court made an order on the 6th February 1912 that execution should be allowed to proceed upon the Raja's giving the security to the extent of one lakh of rupees for the payment of any mesne profits that might thereafter be found due to the Rani. Certain other undertakings were given by the Raja, which are immaterial for the purposes of the present Rule. A surety was found in the person of Babu Harnath Singh, the present petitioner; he executed a surety bond on the 3rd April 1912 and the Raja was duly put in possession of the estate.

Raja Nil Kanth Narain Singh has since died and been succeeded by his son Wazir Narain Singh. The present Rule was obtained by Harnath Singh, who applies to be discharged from his suretyship and asks that the properties which he gave as security may be released.

The ground on which the application is made is that though the petitioner had confidence in the capacity and honesty of the late Raja he has no such confidence in his son, and, therefore, is unwilling to continue to be surety for him.

The application is opposed both by the Rani and by Wazir Narain Singh.

It is conceded on behalf of the petitioner that he is liable under his bond up to the present time, but that he cannot be made liable for any future acts, as this is a case of continuing guarantee which may at any time be revoked by the surety: section 130 of the Contract Act.

It is clear that if effect were to be given to this contention it would be necessary to at once replace the Rani in possession of the estate, unless the present respondent in the appeal could furnish other security similar to that given by Harnath Singh. The course would lead to manifest inconvenience in case the appellant succeeded in her appeal, which, it is expected, will be ready for hearing within a month. If, however, the petitioner is entitled to be discharged from his suretyship, any inconvenience to the parties which might result from giving effect to the rights, cannot be considered in adjudicating upon them. And I do not think the opposite parties need to rely on any argument based on convenience. They are on much surer ground than that.

In my opinion section 130 of the Contract Act has no application, for there was not a continuing guarantee within the meaning of the section. The consideration was one and indivisible, it was the handing over of the estate to the Raja. The Court was bound under Order XLI, rule 6 to require security and it was obviously never the intention of the Court that execution having been allowed to proceed the appellant should at any moment be in danger of losing the security. The surety when he offered himself must be taken to have accepted all natural risks. He cannot be allowed to set up the position that he did not anticipate the Raja's death.

An attempt was made on behalf of the petitioner to show that he only undertook his suretyship on condition that the Raja took his advice in connection with the management of the estate. There was such a clause in a contract between the Raja and the petitioner, dated the 25th January 1915, but that is long after the execution of the security bond and no arrangement between the Raja and the petitioner can have any effect on the absolute undertaking by the surety to be responsible for any mesne profits, that might be found due to the Rani, to the extent of one lakh of rupees.

I would, therefore, discharge the Rule with costs, two gold *mohurs*, to each of the opposite parties.

NALLAYA KOUNDAR *v.* SADAYA KOUNDAR.

MULLICK, J.—I agree. There was in this case no continuing guarantee as to future transactions within the meaning of section 130 of the Contract Act and the case comes within the principle laid down in *Lloyd's* v. *Harper* (1).

*Rule discharged.*

(1) (1880) 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452.

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1521 OF 1914.

September 14, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Napier.

NALLAYA KOUNDAR—PLAINTIFF—APPELLANT

*versus*

P. N. SADAYA KOUNDAR *alias* APPAVU KOUNDAR—DEFENDANT—RESPONDENT.

*Madras Estates Land Act (I of 1908), s. 38—Landlord and tenant—Grounds for reduction of rent.*

A tenant is not entitled under section 38 of the Madras Estates Land Act to a reduction of rent in cases where it cannot be shown that the failure to supply water has taken place while the rent was as high as the present figure.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 40 of 1913, preferred against that of the Deputy Collector, Namakkal, in Summary Suit No. 43 of 1912.

Mr. *N. S. Rangaswami Aiyangar*, for the Appellant.

Messrs. *S. Ramaswami Aiyar* and *T. V. Muthukrishna Aiyar*, for the Respondent.

JUDGMENT.—This is a suit under section 38 of the Madras Estates Land Act by a tenant for reduction of rent on the ground that there has been a permanent failure of supply of water from the irrigation works on which the land was dependent. The plaintiff had been in occupation of various plots of these lands for periods going back as far as 25 years in the case of some plots. He bought all these lands in their present condition and he has never known them to be irrigated by any tank at all. The other evidence in the case shows that the tank has

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not been known to irrigate these lands, certainly for 40 years back, which probably means within living memory. During the whole of this period, the rent now sought to be reduced has been paid without demur. There is no evidence that there has been any failure of water supply from the tank during the period at which the present rates of rent were being paid. Whatever construction is put upon the section as to the period of limitation within which the failure of supply must take place from the date of the suit brought, certainly it would be an extravagant construction to hold that a reduction can be obtained in a case where it cannot be shown that the failure of the water-supply has taken place while the rent was as high as the present figure. We think the appeal fails and whatever remedy the tenant may have by other means, he has none under this particular section.

The second appeal is dismissed with costs.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2745 OF 1914.

May 10, 1915.

*Present*:—Sir Donald Johnstone, KT., Chief Judge.

GIAN CHAND—PLAINTIFF—APPELLANT

*versus*

CHANAN SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

*Regulation XVII of 1806, ss. 7, 8—Foreclosure—Demand—Technicalities, complying with, proof of.*

In a suit for possession on a mortgage under Regulation XVII of 1806 a plaintiff should be given full opportunity of showing that he has complied with all the technicalities provided under the Regulation. [p. 810, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 12th August 1914, affirming that of the Munsif, First Class, Gujranwala, dated the 29th October 1912, dismissing the plaintiff's claim.

Sardar *Kharak Singh*, for the Appellant.

Mr. *Ghulam Rasul*, for the Respondents.

SULUGU SURYANARAYANA NAYAKARAM v. GUNDABOLU BUTCHAIAH.

JUDGMENT.—In this case plaintiff sues for possession as owner of certain land on the basis of a mortgage-deed of the 2nd March 1894, under which, on default of payment of principal and interest within two years, the lands should be considered sold. The mortgagee caused on 18th April 1900 a notice to be served on the mortgagor under Regulation XVII of 1806. The notice was duly served but the mortgagor did not pay the money. The suit was brought on 15th May 1912; and it has been rejected by both the Courts below on the ground that the plaintiff has not succeeded in showing that before issue of notice he made a demand for his money. No issue was drawn on this point; and it seems to me that the first Court has certainly not given the plaintiff an opportunity of proving that demand was made. The law under the Regulation has been construed very strictly by this Court, every technicality being insisted upon, and in these circumstances it is all the more necessary that a plaintiff should be given full opportunity of showing that he has complied with all the technicalities. No doubt, defendant in his written statement did say that no demand had ever been made, but for some reason the Court framed no issue on the subject. This must have misled the plaintiff into thinking that no evidence was required. In these circumstances I remand the case under Order XLI, rule 25, Civil Procedure Code, in order that an enquiry may be made upon the issue:

Did plaintiff before applying for issue of notice under the Regulation make a demand upon the mortgagor for the mortgage-money?

*Case remanded.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2153 OF 1914.

December 10, 1915.

*Present*:—Mr. Justice Abdur Rahim and Justice Sir William Ayling, Kt.

SULUGU SURYANARAYANA NAYAKARAM—PLAINTIFF—APPELLANT

*versus*

GUNDABOLU BUTCHAIAH NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

*Fraud—Fraudulent transfer—Object of fraud accomplished—Transferor, whether can recover—Defrauded party recovering his share, effect of.*

Where a transfer of property is fraudulently sought to be effected but the object of the fraud is not accomplished either wholly or partially, then the person in whose hands the property is, is liable to give up the property to the transferor who effected the fraud, but not otherwise. [p. 812, col. 1.]

*Taylor* v. *Bowers*, (1876) 1 Q. B. D. 291; 34 L. T. 938; 46 L. J. Q. B. 39; 24 W. R. 499; *Petherpermal Chetty* v. *Muniandy Servai*, 35 I. A. 98; 5 A. L. J. 290; 7 C. L. J. 528; 18 M. L. J. 277; 12 C. W. N. 562; 10 Bom. L. R. 590; 14 Bur. L. R. 108; 4 M. L. T. 12; 4 L B. R. 266 (P. C.); 35 C. 551, followed.

The plaintiff effected a sale of a half share of certain lands which included his own share and that of his brother. At the time of partition between the plaintiff and his brother the share of the property sold was excluded and the plaintiff's brother was thus deprived of his share. He, however, recovered his share subsequently by a suit on discovering this fact. The plaintiff then brought this suit to recover his share from the vendee on the same state of facts:

*Held*, (1) that the object of the plaintiff's fraud was accomplished when the transfer was effected and the property excluded from the partition, and that the plaintiff could not, therefore, maintain this suit; [p. 812, col. 1.]

(2) that the fact that the defrauded party had recovered his share did not purge the plaintiff of his guilt and he was not entitled to recover his share. [p. 811, col. 2.]

Second appeal against the decree of the District Court of Ganjam at Berhampore, in Appeal Suit No. 51 of 1913, preferred against that of the District Munsif of Chicacole, in Original Suit No. 279 of 1912.

FACTS.—The plaintiff and 4th defendant are brothers. The plaintiff sold a piece of family property to a brother-in law on his reciting a fictitious consideration. Defendant No. 4 learnt of this after partition, brought a suit and recovered his share in the transferred property. Plaintiff brought the present suit to recover his share on the ground that the transfer made was to defraud creditors and, therefore, void and inoperative. The District Munsif gave a decree for the plaintiff on the ground that the transfer was a fraudulent one and set it aside. On appeal the District Judge (now Mr. Justice Kumaraswami Sastri) held that the plaintiff being a party to a fraud cannot be allowed to recover back his share in the property transferred by him to defraud his brother though the latter may have recovered his share. The present appeal is against that decree.

Mr. V. *Ramesam*, for the Appellant.

The Hon'ble Mr. *B. N. Sarma*, for the Respondents.

SULUGU SURYANARAYANA NAYAKARAM *v.* GUNDABOLU BUTCHAIAH.

JUDGMENT.

ABDUR RAHIM, J.—The plaintiff and the 4th defendant are brothers, the plaintiff being the older of the two. It appears that while the 4th defendant was absent in Hyderabad, the plaintiff effected a sale of a half share of certain lands, which included his own share and his brother's share, to the 2nd defendant, who is his brother-in-law and the son of the 1st defendant. At that time, the plaintiff, who had just attained majority, was living with his father-in-law and his brother-in-law. This was in 1900. In 1906 there was a partition of the property between the 4th defendant and the plaintiff, and in that partition, the share of the property sold to the 2nd defendant was excluded, that is to say, the 4th defendant was deprived of his share in the property in question. It appears that the 4th defendant afterwards discovered that the sale to the 2nd defendant by the plaintiff was a colourable and *benami* transaction, the object of which was to deprive the 4th defendant of his share, and he instituted a suit in 1911 to recover the property from the 2nd defendant. The plaintiff was also a party to that suit. He obtained a decree and recovered his share, it being found that the sale was a colourable transaction there being no consideration and having been effected with the object of depriving the 4th defendant of his share. While that suit was pending, the plaintiff instituted the present suit to recover his share on the same state of facts as pleaded by the 4th defendant in the suit in which he was the plaintiff. The fourth defendant got a decree in his suit. The question now is whether the plaintiff ought to be allowed to recover his share of the property from the 2nd defendant. The learned District Judge has held that he cannot succeed inasmuch as he was guilty of fraud in effecting the sale and his fraudulent purpose has been accomplished. It is argued, in the first place, on behalf of the appellant that the first part of the first issue has not been tried and until that is tried the question whether the plaintiff is entitled to recover or not, cannot be properly decided. The first part of the issue in question is whether the sale-deed executed by the plaintiff to the 2nd defendant was brought about by undue influence and misrepresentation of his father-in-law, first defendant in the suit. It is quite true that at the time of the sale, he had just attained majority and he was living with his father-in-law. But beyond these two facts there is nothing else to suggest on the evidence, so far as it has been brought to our notice, that there was really any undue influence.

Further, when the partition was effected in pursuance of the fraud, it is not alleged anywhere that he was still under undue influence of his father-in-law. This was in 1906. No evidence was adduced to show that the plaintiff continued to be under the influence of his father-in-law, even supposing that he was under such influence at the time of the execution of the deed of sale. Having regard to the evidence in the case and the nature of the pleadings, I do not think any useful purpose will be served by calling for a finding on the point.

Then remains the question of law which amounts to this: whether upon the facts of the case, it can be said that the fraud contemplated by the plaintiff was accomplished, either wholly or partly. If it was, there can be no doubt but that he is debarred by law from recovering the property. What is the object which the plaintiff had when he executed the deed of sale? It was to exclude this property from partition and thereby deprive the 4th defendant of his share. Therefore, when the partition was effected and the property was excluded from that partition, *prima facie* that object was fully carried out. I am rather inclined to think that the object was carried out even at an earlier stage when possession was given in pursuance of the deed of sale. However that may be, there can be little doubt that the object was fully carried out when partition was effected and this property was not included in the partition.

What is argued by Mr. V. Ramesam on behalf of the appellant is, now that the 4th defendant has in fact recovered the property, this is quite enough to entitle the plaintiff to recover his share also, because, by the very fact of 4th defendant recovering the property, the plaintiff's guilt is, as it were, purged. The cases on this subject are almost all, where a debtor seeks to defraud his creditor by nominal or fraudulent conveyances of his property. In those cases ordinarily the conveyance by

the debtor of his property would be merely an attempt to defraud and if the creditor in fact recovers his dues from the other properties of the debtor, it cannot be said that the object of defeating him, though contemplated by the debtor, was accomplished. Thus in those cases it was necessary to show that the creditor, as a matter of fact, was unable to recover his dues by reason of the fraudulent transfer. But the present, to my mind, is a case which stands on a different footing. There is no ruling that has been brought to our notice in which the object of the fraudulent transfer was to deprive another person of specific property. In a case like this, I should say that the object of the fraud is accomplished when the transfer is effected and everything is done to give effect to that transfer. Here all that was necessary was done to give effect to the transfer by which fraud was accomplished. The leading case on the point, as far as India is concerned, is that reported as *Pethcrpermal Chetty* v. *Muniandy Servai* (1). Their Lordships of the Privy Council accept as laying down the correct law the decision of the Court of Appeal reported as *Taylor* v. *Bowers* (2), where the general proposition is enunciated, that if the object of the fraud is not accomplished either wholly or partially, then the person in whose hands the property is, is liable to give up the property to the transferor who attempted the fraud. It is true their Lordships state in one place that the plaintiff, who sought to recover the property, was not carrying out any illegal transaction, but was seeking to put every one as far as possible in the same position as they were in before that transaction was determined upon. But that, I take it, is not laid down as an absolute and independent proposition unconnected with the question whether the fraud was carried out or not. The real test which is laid down here is what I have stated, namely, the plaintiff can sue so long as his fraud has not been carried out, but not after it has been carried out wholly or partially. Here I may point out that the 4th defendant was kept out of his property for a number of years. When he recovered the property by a suit, it is likely that he only recovered mesne profits for three years. That would go to show that he was not restored exactly to the same position as he was in before this fraud was perpetrated.

I may also refer to an observation of Lord Justice Mellish in the case of *Taylor* v. *Bowers* (2). There the Lord Justice lays down that if the creditor had in fact been defrauded, for instance, if he had been induced to assent to a composition by the fraud of the debtor, but if he afterwards discovered the fraud prior to the composition being carried out, it could be re-opened at his instance, but that the debtor could not, under such circumstance, be able to recover the goods which he had fraudulently transferred or attempted to transfer. There is very much like what has happened here. I think the second appeal should be dismissed with costs.

AYLING, J.—I agree. It cannot be said in this case that the fraud was not at least partially successful. Its immediate object was attained when partition was effected without the inclusion of this property. Our attention has not been drawn to anything in the evidence which would support the theory of undue influence even indicative of disparity of guilt between the plaintiff and the 1st defendant. I agree in the order proposed by my learned brother.

*Appeal dismissed.*

(1) 35 C. 551; 35 I. A. 98; 5 A. L. J. 299; 7 C. L. J. 528; 18 M. L. J. 277; 12 C. W. N. 563; 10 Bom. L. R. 590; 14 Bur. L. R. 108; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(2) (1876) 1 Q. B. D. 291; 34 L. T. 938; 45 L. J. Q. B. 39; 24 W. R. 499.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 741 OF 1914.

November 16, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KOTTAPALLI SUBBAMMA AND ANOTHER —DEFENDANTS NOS. 1 AND 3— APPELLANTS

*versus*

JATAVALLABHULA SUBRAHMANYAM —PLAINTIFF—RESPONDENT.

*Hindu Law—Widow—Alienation Surrender—Mortgage by widow—Subsequent surrender by widow of her estate in favour of reversioners, whether affects rights of mortgagee—Writer of document, whether can be treated as attestor—Transfer of Property Act (IV of 1882), s. 59.*

A widow cannot relinquish her widow's estate to the reversioners of her husband, so as to affect the validity of an alienation made by her before such relinquishment, which, though not binding on the reversioners, is binding upon her for life. [p. 815, col. 1; p. 816, col. 2.]

A widow has got the power to alienate her estate so as to enure during her life-time notwithstanding any event which may happen after the alienation. [p. 815, col. 2.]

Just as the survivorship doctrine and the son's-right-by-birth doctrine are made powerless against the equities and rights of attaching creditors and alienees for value, in the same way the surrender doctrine (which is not less artificial than the above two,) does not affect alienees for value, who are entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life. [p. 816, col. 1.]

*Sreeramulu* v. *Kristamma*, 26 M. 143; 12 M. L. J. 197; *Singaram Chettiar* v. *Kalyanasundaram Pillai*, 26 Ind. Cas. 1; 1 L. W. 687; (1914) M. W. N. 735, followed.

*Lakshman Bhau Khopkar* v. *Radhabai*, 11 B. 609; *Moro Narayan Joshi* v. *Balaji Raghunath*, 19 B. 809, dissented from.

The writer of a document may be treated as an attestor for the purposes of section 59 of the Transfer of Property Act. [p. 814, col. 1.]

*Radha Kishen* v. *Fateh Ali Ram*, 20 A. 532; A. W. N. (1898) 148, followed.

Where in a suit brought on a mortgage-bond executed by a Hindu widow in favour of the plaintiff, it appeared that the widow surrendered after the execution of the mortgage her life-interest in the mortgaged property orally to her husband's reversionary heir, also a defendant in the case but the deed of surrender was executed after the institution of the suit:

*Held*, that the surrender was intended to defeat the plaintiff's claim to bring to sale the widow's life-interest in the property, and was not binding on him. [p. 816, cols. 1 & 2.]

Second appeal against the decree of the District Court of Godaveri at Rajahmundry, in Appeal Suit No. 138 of 1913, preferred against that of the Court of the District Munsif, Rajahmundry, in Original Suit No. 572 of 1911.

FACTS.—The plaintiff is a mortgagee from the 1st defendant, a Hindu widow. Defendant No. 3 is a reversioner to her husband's estate. After the mortgage and while a suit to enforce it was pending, she surrendered her life-interest in the mortgaged property to the 3rd defendant. Both the lower Courts held that the mortgage was not for purposes binding on the reversioners and gave the plaintiff a decree, holding that the mortgage was only valid for the life-time of the 1st defendant. Against that decree the reversioner, *i. e.*, the 3rd defendant appealed to the High Court.

Mr. *B. Narasimha Rao*, for the Appellants.—The effect of the surrender is an obliteration of the life-estate of the widow and the decree affirming the mortgage right for the life-time of the widow, after the obliteration of such interest, is illegal.

Mr. *K. S. Ganesa Iyer*, for Mr. *G. Venkataramiah*, for the Respondent.—The widow has, after the creation of the mortgage, only an equity of redemption in her life-interest and the reversioner cannot take anything else by the surrender.

### JUDGMENT.

SADASIVA AIYAR, J.—The defendants Nos. 1 and 3 are the appellants. The suit was brought on a mortgage-bond executed to the plaintiff by a Hindu widow (the 1st defendant). The bond is dated 15th May 1902. On the 16th February 1913, the 1st defendant executed the surrender deed, Exhibit I, in favour of her husband's reversionary heir (the 3rd defendant). This suit was brought on the 20th September 1911, and it was during the pendency of the suit that this relinquishment deed Exhibit I was executed. The suit was posted for trial for the 16th February 1913. Then there were 5 more adjournments and the 6th adjourned hearing date was 7th February 1913. Then the defendants made a request for another adjournment to 7th March 1913 and between these two dates (7th February 1913 and 7th March 1913) the surrender deed was executed in favour of the next male reversioner, the 3rd defendant, by the widow, the 1st defendant, on the 16th February 1913. In the written statement, dated 25th October 1911, however, para-

graph 5, there is an allusion to a surrender by the 1st defendant to the minor 3rd defendant. The surrender mentioned in the written statement must, therefore, relate to an alleged prior oral surrender. The date of that oral surrender is not mentioned in the written statement, which was filed more than a month after the suit was filed. That the surrender, whether oral or written, was deliberately intended in order to defeat the plaintiff's claim to bring the life-interest of the 1st defendant in the property to sale for recovery of the plaintiff's mortgage amount cannot, in my opinion, be disputed and was not seriously disputed by the appellants' learned Counsel. The lower Courts held that the surrender could not defeat the right of the plaintiff to get a mortgage decree for sale of the 1st defendant's life-interest, as the transfer of that interest by way of security to the plaintiff had taken place in 1902 while the alleged oral surrender was at the end of 1911 and the written surrender deed, Exhibit I, was in 1913.

Mr. P. Narasimha Rao, the learned Counsel for the appellants, has raised two contentions in the memorandum of second appeal. The *first* contention is that the mortgage document itself was invalid as it has not been proved that it was attested by two persons who saw the executant execute it. This contention, however, was not pressed at the arguments before us and there is nothing in it, as the writer who is also an attestor [see *Radha Kishen* v. *Fateh Ali Ram* (1) as to treating the writer as an attestor for the purpose of section 59 of the Transfer of Property Act] and another attestor have proved the actual execution of Exhibit A.

The *remaining* contention might be stated in the words of the 6th to 9th grounds of the appeal memo. as follows: —

"6. The lower Courts were wrong in holding that the plaintiff could have a decree against the life-estate of the 1st defendant notwithstanding relinquishment in favour of the next reversioner, the 3rd defendant, which has the effect of extinguishing her estate in the eye of the Hindu Law."

"7. The lower Courts erred in holding that the relinquishment conveyed only the 1st defendant's equity of redemption."

"8. The lower Courts should have held that relinquishment is equivalent to civil death and that under Hindu Law the next reversioner takes the entire estate unfettered by any invalid alienations made by the widow."

"9. The mortgage having been found to be not binding on the reversioners and the relinquishment having been found to be valid, the lower Courts should have held that the 3rd defendant was entitled to the estate in his own right as if the widow had died and the plaintiff's suit should have been dismissed."

In *Sreeramulu* v. *Kristamma* (2), a Hindu widow after having sold one of her husband's properties adopted a son. The son sued to recover the property from the possession of the purchaser on contentions very similar to those raised by the 6th to 9th grounds of appeal above set out. Just as Mr. Narasimha Rao contended before us that by the surrender the widow's estate as such ceased to exist and was not available to the plaintiff-mortgagee any longer for the purpose of his security, so it was contended in that case that by the adoption the adoptive mother's estate as widow-heir of her husband came to an end and could not be availed of by the prior purchaser from her to advance a claim on his part to remain in possession during the widow's life-time. Sir Bashyam Aiyangar, J. (at page 148), begins the discussion of the question by stating that the question was really one of first impression and presented great difficulty. Then he quotes authorities for showing that a Hindu widow-heir has an absolute right to the fullest benefit in her husband's property for her life and that she has a personal right therein which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life "or, speaking more accurately, for the term of widowhood." Next, he says that if the alienation was not for any necessary purpose, it will still carve out in favour of the alienee an estate during her widowhood which cannot

(1) 20 A. 532; A. W. N. (1898) 148.

(2) 26 M. 143; 12 M. L. J. 197.

be defeated by a subsequent adoption. He treats it as clear though he does not say so in as many words) that her widowhood was not come to an end by the adoption and that it lasts till her death, unless, of course, she remarries and Act XV of 1856 applies. At page 155 he says: "A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her life-time, and except of course in the rare case of a remarriage, this will be ensured by the conclusion herein arrived at, even when an adoption takes place subsequent to the alienation." Then the conclusion finally arrived at was that notwithstanding the adoption which put an end to her right as heir in all her husband's property, that is, though the adopted son inherited the adoptive father's property so as to put an end to the widow's right as heir, the property he so inherited could not include the rights already alienated by the widow, the effect of the alienation lasting during her life-time. Mr. Justice Davies fully concurred in that view. In the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (3), Wallis, C. J., and Hannay, J., made the following observations: "In this state of things, the defendants contended that the effect of the proceedings in the suit above mentioned was to vest the equity of redemption of the mortgaged properties in the mortgagee, at any rate for the life-time of the widows or the survivor of them. This contention is raised in paragraph 6 of the defendants' written statement and is covered by the issues, but is not dealt with by the Subordinate Judge, whether from oversight or because it was not strongly pressed before him. It appears to afford a conclusive answer to the present suit, as it seems clear that a widow cannot by relinquishing her widow's estate to the reversioner affect the validity of the alienations made by her before such relinquishment which, though not binding on the reversioner, were binding on her for life. The result is that, during the life-time of the surviving widow, the equity of redemption remains vested in the defendants as the assignees of the mortgagor and that the present suit is premature."

(3) 26 Ind. Cas. 1; 1 L. W. 687; (1914) M. W. N. 735.

Mr. B. Narasimha Rao contended that these observations were *obiter dicta* and that even if they were not, they were made without the learned Judges' having had the benefit of a discussion of that question by the learned Vakils, who argued that case. I cannot treat the observations as *obiter*, as the decision in that case which dismissed the plaintiff's suit and reversed the lower Appellate Court's decree was fully rested on those observations. Again, I cannot hold on the strength of the report of the arguments in an unauthorized report of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (3) that Messrs. Rangachariar and Muthia Mudaliar who appeared for the appellants in that case did not argue the question. Mr. Narasimha Rao then relied upon the case of *Ramakrishna* v. *Tripurabai* (4), in which Chandavarkar, J., criticises Sir Bashyam Iyengar's judgment in *Sreeramulu* v. *Kristamma* (2), and dissents therefrom. That learned Judge preferred to follow the decisions of his own High Court, the decisions in *Lakshman Bhau Khopkar* v. *Radhabai* (5) and *Moro Narayan Joshi* v. *Balaji Raghunath* (6) both on the ground of *stare decisis* and also as being the sound Hindu Law. On the ground of *stare decisis* I would similarly prefer to follow the opinions of four learned Judges of this Court in preference to the current of Bombay decisions and as regards the Hindu Law also, I would hold that a widow has got the power to alienate her estate so as to enure during her life-time notwithstanding any event which may happen after the alienation. [See *Segu Chidambaramma* v. *Sareddi Hussainamma* (7).]

As I ventured to state in a recent Full Bench case the true and more ancient Hindu Law is, in my opinion, being gradually restored in many respects by the decisions of the Privy Council. We have seen that the rule of survivorship introduced by modern medieval Hindu Law and the rule of the sons having a legal right to question the

(4) 1 Ind. Cas. 647; 10 Bom. L. R. 1029; 33 B. 88.

(5) 11 B. 609.

(6) 19 B. 809.

(7) 30 Ind. Cas. 101; (1915) M. W. N. 577; 2 L. W. 952; 29 M. L. J. 546; 18 M. L. T. 394.

GOPISETTI NARAYANASAMI NAIDU GARU *v.* MUTHYALA VENKATRATNAM.

debts and alienations of their father have been altered in favour of alienees and creditors for value by the decisions of the Privy Council. The artificial medieval doctrine of a widow having no full power of alienation and the consequent doctrine superimposed by the Bengal lawyers on this doctrine, namely, the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (this second doctrine having been adopted for South India also by the Madras High Court), cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely, so as to defeat the claims of alienees for value who, as Sir Bashyam Aiyangar, J., said in *Sreeramulu* v. *Kristamma* (2), were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life except in the rare case of remarriage. Mr. Narasimha Rao argued that as remarriage puts an end to her estate so as to affect even her prior alienees, a surrender should also have the same effect. But remarriage puts an end to her widowhood while surrender or adoption does not put an end to her widowhood. (I wish to state, however, that I reserve my opinion even on the question whether her remarriage, though it puts an end to her widowhood, will affect the right of the alienee to enjoy the alienated interest during her life-time, though section 2 of Act XV of 1856 literally construed is in support of Sir Bashyam Aiyangar's opinion). If the survivorship doctrine and if the son's-right-by-birth doctrine are made powerless against the equities and rights of attaching creditors and alienees for value, I do not see any reason why the surrender doctrine (which is not less artificial than the above two) should be made to affect alienees for value.

Mr. Narasimha Rao conceded that a widow who makes a surrender to the reversioner can stipulate for a right to be maintained out of the husband's property during her life-time, and this shows that she does not become civilly dead by the surrender nor does she cease to retain the status of widowhood.

In the result, I would dismiss the second appeal with costs.

NAPIER, J.—I agree. The theory that change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is, in my opinion, so contrary to equity and good conscience that it should not be accepted by Courts of this country, whatever the ancient Hindu Law on the subject was. The proposition entails a defeasance of an assignee's title by a collusive alienation made with intent to benefit third parties by subsequent assignment [*vide Challa Subbiah Sastri* v. *Palury Pattabhiramayya*(8)], and by a collusive accelleration made with intent to defraud such assignee. It operates not only against the property which she has inherited but also against property acquired out of savings and added to the inheritance, but subsequently alienated. It affects persons not governed by the personal law of Hindus, and might injure minor assignees or alternatively their guardians who acted in perfect good faith. There is no reason or principle why alienations for life already made should not enure, and the rest of the estate merge into the reversion and I decline to accept any contention of the reversioners' right beyond this. The appeal will be dismissed with costs.

*Appeal dismissed.*

(8) 31 M. 446.

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## MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 609, 610 AND 612 OF 1912.

November 11, 1915.

*Present*:—Mr. Justice Phillips.

GOPISETTI NARAYANASWAMI NAIDU GARU, RECEIVER OF NIDADAVOLE AND MEDUR ESTATES —PLAINTIFF—PETITIONER IN ALL

*versus*

MUTHYALA VENKATRATNAM AND OTHERS—DEFENDANTS—RESPONDENTS IN C. R. P. No. 609 OF 1912

CHINNA SILARU SAHIB—DEFENDANT—RESPONDENT IN C. R. P. No. 610 OF 1912

AND

MUHAMMAD AJEEM SAHIB—DEFENDANT—RESPONDENT IN C. R. P. No. 612 OF 1912.

*Limitation Act (IX of 1908), Sch. I, Art. 182—Execution petition—Return for amendment—No re-presentation—Step-in-aid.*

*Musammat* JANNAT *v.* ABDULLA.

An execution petition which has been returned by a Court for amendment but not re-presented, is an application which will give a fresh starting point for limitation.

*Narayanaswami Naidu* v. *Gantayya*, 32 Ind. Cas. 691; (1915) M. W. N. 865 and *Ramanadan Chetti* v. *Periatambi Shervai*, 6 M. 250, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the District Munsif of Narasapur, in Execution Petitions Nos. 609, 610 and 608 of 1912, in Small Cause Suits Nos. 262, 177 and 270 of 1900, respectively.

FACTS.—The petitioner in these petitions obtained certain Small Cause decrees against the respondents in 1900 and had been presenting execution petitions to Court to save limitation, the last of such petitions having been returned for amendment. He failed to re-present the petitions so returned in Court, but within three years of those petitions filed fresh execution petitions. The District Munsif dismissed the new petitions as barred by time. The decree-holder thereupon preferred these civil revision petitions to the High Court.

Mr. *P. Nagabhushanam*, for the Petitioner :—The execution petitions are clearly in time. The previous petitions which have been returned for amendment, though not re-presented, still save limitation. *Vide Narayanaswami Naidu* v. *Gantayya* (1) and *Ramanadan Chetti* v. *Periatambi Shervai* (2).

The Respondents were unrepresented.

JUDGMENT.—It has been held by this Court in *Narayanaswami Naidu* v. *Gantayya* (1) and *Ramanadan Chetti* v. *Periatambi Shervai* (2) that an execution petition returned for amendment but not re-presented, is an application which will give a fresh starting point for limitation. The present execution petition is, therefore, not barred by limitation and must be restored to file and disposed of in accordance with law.

*Petitions allowed.*

(1) 32 Ind. Cas. 691; (1915) M. W. N. 865.
(2) 6 M. 250.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 619 OF 1910.

June 22, 1915.

*Present*:—Mr. Justice Chevis and Mr. Justice LeRossignol.

*Musammat* JANNAT AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

ABDULLA—PLAINTIFF—AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—Succession*—Bhatti Rajputs *of* Mauza *Kum*, Tahsil *Pind Dadan Khan—Assent of father to mutation, when binding on son.*

In matters of succession, *Bhatti Rajputs* of *Mauza* Kum, Tahsil Pind Dadan Khan, are governed by agricultural custom and not by Muhammadan Law, [p. 818, col. 2.]

Where in a suit for declaration that a certain mutation shall not affect the plaintiff's reversionary rights, it appeared that the plaintiff's father gave his assent to the mutation not because the parties had been observing Muhammadan Law in the past, but because he wished it to be followed in the future: *Held*, that his assent could not be held to be a *bona fide* assent so as to be binding upon the other members of the family. [p. 819, col. 1.]

Second appeal from the decree of the Divisional Judge of the Ludhiana Division dated the 16th May 1910.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—The pedigree-table given in the body of the judgment of the lower Appellate Court is lacking in some respects, so we append to this judgment a complete and corrected pedigree-table of the parties concerned with this case.

The dispute in this case concerns the property of Ismail, son of Ahmad Din, who died on the 30th June 1907. By the mutation which followed on his death his widow *Musammat* Jannat secured three shares, his sisters *Musammat* Khadija and *Musammat* Ruqia secured between them 20 shares whilst one share was allotted to Muhammad, uncle of Ismail.

The present suit is brought by Abdulla for a declaration that this mutation, which would seem to be based on Muhammadan Law and contravenes the provisions of agricultural custom, shall not affect his reversionary rights. The first Court dismissed the suit on two grounds; *first*, because the plaintiff's father had assented to the mutation, and *secondly*, because the family of the parties is governed by Muhammadan Law. The District Judge on appeal

reversed this decree, found that the parties had in the past observed not Muhammadan Law but custom at any rate in the matter of succession, and decided that the consent of the plaintiff's father did not bind his son so as to preclude him from maintaining this suit.

The defendants have come to this Court in further appeal and on their behalf four main contentions are sustained.

*First*, it is urged that this property was obtained by Ahmad Din by gift from Ala-ud-Din and that consequently even if the parties follow custom, the plaintiff is not entitled to the decree he seeks because after *Musammat* Jannat, widow of Ismail, *Musammat* Khadija and *Musammat* Ruqia, sisters of Ismail, will be entitled to the succession as daughters of the original donee Ahmad Din. In support of this proposition the learned Counsel for the appellants cites *Gurdit Singh* v. *Musammat Prem Kuar* (1).

His *second* contention is that plaintiff consented to the mutation, now disputed, at the time when it was sanctioned and he is now estopped from questioning it.

The *third* point urged on behalf of the appellants is that even if the parties are bound by custom rather than by personal law, the plaintiff's father consented to the terms of the mutation and still approves of them, and that his *bona fide* consent binds his son. In this connection a reference is made to *Habib Khan* v. *Muhammad* (2), *Shib Ram* v. *Shib Singh*(3), *Kaman* v. *Muhammad Ali* (4), *Labhu* v. *Musammat Nihali* (5), *Lakha Singh* v. *Jota Singh* (6) and *Devi Dial* v. *Utam Devi* (7).

*Finally* it is contended that as a matter of fact the family of the parties in the past has observed Muhammadan Law, that mutation has not been made in the past in favour of female sharers solely from disinclination to bring their names upon a public record but as a fact they have been paid regularly their share of the produce to which their shares under Muhammadan Law entitled them.

The learned Divisional Judge has considered in detail the mutations occurring in the family since the death of Ahmad Din and has shown that on no one occasion is there any trace that the succession took place according to Muhammadan Law. We too have considered all those mutations and we find ourselves in complete agreement with the conclusion of the learned Divisional Judge that as a fact the family in the past has observed not personal law, but a custom which appears to us to be indistinguishable from agricultural custom. It appears from the *patwari's* evidence that the parties are *Bhatti Rajputs* who about the year 1835 left their ancestral home in Pind Dadan Khan Tahsil and settled in this village of Kum in Ludhiana Ala-ud-Din and Sharf-ud-Din were the two individuals who were responsible for this migration. Ala-ud-Din acquired this land by virtue of his religious lore, and from a *robkar* of the Deputy Commissioner, dated 1848, it appears that on the death of Ala-ud-Din one-fifth of his property was given to Ahmad Din, who was a nephew of Ala-ud-Din and also the husband of *Musammat* Aisha, daughter of Ala-ud-Din. Had the parties at that time observed the principles of Muhammadan Law, the gift or the bequest to Ahmad Din of one-fifth of the estate of Ala-ud-Din would have contravened those principles.

In support of his contention that gifted property returned to the donor's family only on the disappearance of the whole family of the original donee the learned Counsel for the appellants has quoted *Gurdit Singh* v. *Musammat Prem Kuar* (1), but it seems to us that the head-note of that decision is wider than is justified by the actual finding in the case. In that case all that was decided was that the daughter of the last holder of the donated property was an heir of the last holder and that her right was a bar to the reversion of the gifted property to the family of the donor. In this case the sisters of the last holder Ismail are, it is true, the daughters of Ahmad Din, the original donee, but in the present case they cannot be regarded in their character of daughters of the original donee. They must be considered solely as the sisters of Ismail, the last male

(1) 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909; 3 Ind. Cas. 604.
(2) 16 Ind. Cas. 46 ; 68 P. R. 1912; 194 P. W. R. 1912; 210 P. L. R. 1912.
(3) 78 P. R. 1908; 138 P. W. R. 1908.
(4) 59 P. R. 1904.
(5) 7 P. R. 1905; 66 P. L. R. 1905.
(6) 35 P. R. 1907; 14 P. L. R. 1908.
(7) 37 P. R. 1907; 120 P. L. R. 1907.

holder, and it is very doubtful whether sisters are ever heirs under agricultural custom. In view, however, of our finding that the family of the parties has in the past observed custom and not Muhammadan Law, this point is not of great importance.

On the point whether the plaintiff consented to the mutation in dispute we find that the evidence is very meagre and at the same time not very conclusive or clear. The plaintiff's own father alleges that at the time of mutation plaintiff assented to it and he proceeds to say that plaintiff was present but he corrects himself and states he is not sure; but it is not clear whether he meant to say that he was not sure that plaintiff was present or that he was not sure whether plaintiff consented. The witness, moreover, is not very disinterested because he is a defendant and is desirous of establishing Muhammadan Law in his family in regard to future cases of succession, although in the past custom has been followed. We do not find it proved that plaintiff gave his assent to the mutation in dispute.

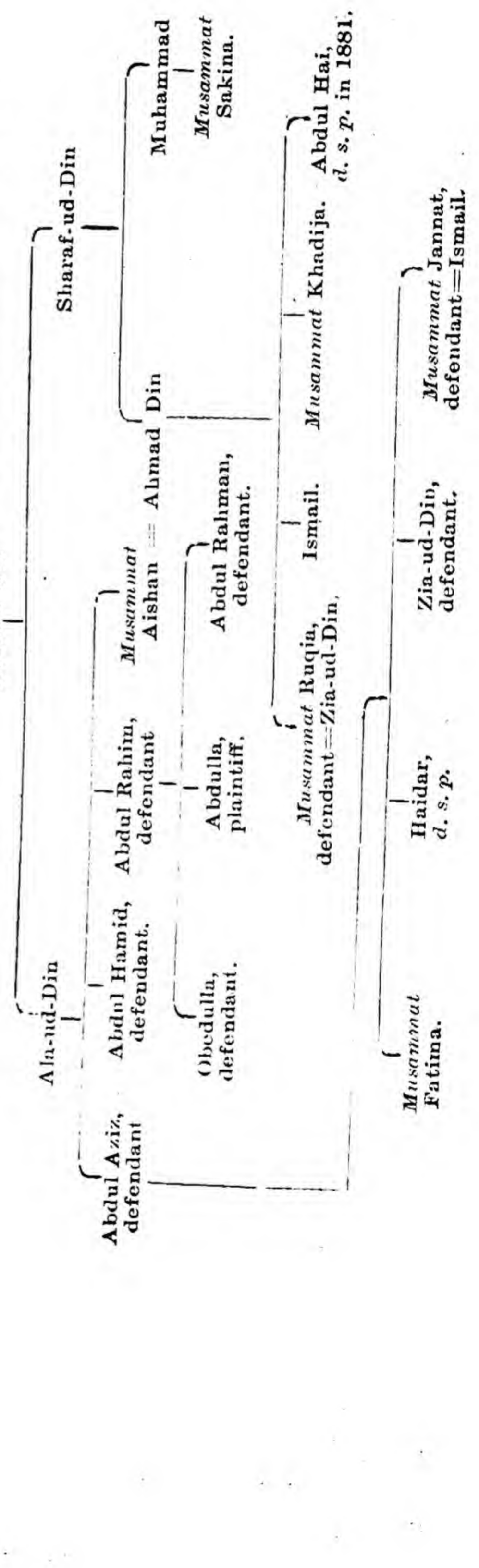
There remains the argument that if the parties follow custom the assent of the father binds the son.

The decision in these cases turns on the *bona fides* of the father. If the father's assent has been given, as in this case, not because the parties in the past have observed Muhammadan Law but because the father wishes to follow it in the future, his assent cannot be called a *bona fide* assent and he cannot by accepting a rule for himself render that rule binding upon the other members of his family.

Our finding then is that in the past the family has observed custom, not personal law and that the mutation now in dispute does not affect the rights of plaintiff as a reversioner. There is a cross-objection as to costs, which we dismiss and we dismiss this appeal leaving parties to pay their own costs throughout.

*Appeal dismissed.*

Pedigree-table appended to the judgment in Civil Appeal No. 619 of 1910.



ABDUL KADYA BEARI *v.* SHABYODE KUNHI AHMED.

## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 936 OF 1912.

November 30, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri.

ABDUL KADYA BEARI—PLAINTIFF No. 2 —PETITIONER

*versus*

SHABYODE KUNHI AHMED—DEFENDANT—RESPONDENT.

*Summons—Collector's refusal to serve, whether ground for dismissing suit—Defendant residing in Aminidivi Island—Method of service—Procedure.*

A refusal of a Collector to serve the summons is not a sufficient reason for dismissing a suit.

Where a defendant was at first residing in British India but at the time of the suit was residing in the Aminidivi Island:

*Held*, that the service should be effected by affixing the summons to his last known place of residence in British India and by registered post.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Mangalore, in S. C. S. No. 767 of 1911.

Mr. *K. P. Lakshmana Rao*, for the Petitioner.

JUDGMENT.—The District Munsif dismissed the suit on the ground that summons had not been served on the defendant owing to the refusal of the Collector to serve it.

The defendant is residing in the Aminidivi Island which forms part of the Northern group of the Laccadive Islands.

The question as to service of summons and notices to residents of the Island was considered by their Lordships the Chief Justice and Mr. Justice Seshagiri Aiyar in Civil Miscellaneous Petition No. 3058 of 1914 (the question having arisen as to service of the notice of this petition), and it was directed that the notice should be effected "by affixing the summons to the last known place of residence in British India and by registered post."

I am of opinion that this course might also be followed in serving the summons in the suit itself. The mere fact that the Collector refuses to serve the summons is not a sufficient ground for dismissing the suit.

I set aside the decree of the District Munsif and direct that he do proceed with the suit according to law having regard to the above observations.

Costs will abide and follow the result of the suit.

*Petition allowed.*

MADHOO MAL *v.* MUHAMMAD ZAKARIA.

## PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2529 OF 1914.

February 10, 1916.

*Present*:—Sir Donald Johnstone, KT., Chief Judge.

MADHOO MAL AND ANOTHER—DECREE-HOLDERS—APPELLANTS

*versus*

MUHAMMAD ZAKARIA AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

*Execution—Decree awarding personal remedy in case sale-proceeds of mortgaged property do not suffice—Interpretation of decree—Execution Court, duty of—Jurisdiction.*

In a suit on a mortgage a Court passed an order for a preliminary decree and decided *inter alia* that in case sale of the property mortgaged should not suffice to liquidate the decretal debt with costs and interest the defendants should be held personally liable for any deficiency. The decree drawn up however, contained the words "shall be at liberty to apply for a personal decree":

*Held*, that the words in the decree must be interpreted in conformity with the judgment to mean "shall be at liberty to apply for execution of the decree against the defendants personally", and that the Court on the execution side had no power to go into the question whether the defendant was personally liable or not but was bound to execute the decree as it stood. [p. 820, col. 2; p .821, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 3rd August 1914, dismissing the application for execution of decree.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—In my opinion the lower Court has fallen into a peculiar error. On 23rd July 1913 it passed an order for the preliminary decree of the same date, and it seems to me clear on perusal of that order that it intended to decide *inter alia* that, in case sale of the property mortgaged should not suffice to liquidate the decretal debt with costs and interest, both defendants should be held personally liable for any deficiency, subject, in the case of defendant Muhammad Zakaria, to the law of insolvency, that defendant having become an insolvent. No doubt the decree uses the words "shall be at liberty to apply for a personal decree," but it is a printed form and the words must be interpreted, in conformity with the judgment, to mean "shall be at liberty to apply for execution of this decree against defendants personally." This

being so, the lower Court on the execution side had no power to go into the question whether defendant Abdul Ahad was personally liable or not. I am not concerned with the question of the justice or correctness of the order of 23rd July 1913 aforesaid; I must take it as it is.

I accept the appeal and set aside the lower Court's order and direct it, as an execution Court, to proceed to execute the decree against Abdul Ahad personally, together with subsequent interest and costs, including appellants' costs in this Court.

*Appeal allowed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 131 AND 132 OF 1915.

December 28, 1915.

*Present*:—Mr. Justice Coutts Trotter.

K. M. U. R. ULAGAPPA CHETTY —DEFENDANT NO. 2—PETITIONER

*versus*

RAMANATHAN CHETTY AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 1—RESPONDENTS.

*Negotiable Instruments Act (XXVI of 1881), s. 9—Holder in due course—Promissory note, suit on—Endorsement in plaintiff's name, absence of—Suit, maintainability of.*

A person cannot sue upon a promissory note which has not been endorsed to him.

*Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*, 31 M. 534; 4 M. L. T. 341, not followed.

*Arunachala Reddi* v. *Subba Reddi*, 17 M. L. J. 393; 3 M. L. T. 7, followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif of Pattukotai, in S. C. S. Nos. 1065 and 1067 of 1914.

Mr. *S. R. Muthuswami Aiyar*, for the Petitioner.

Mr. *T. V. Gopalaswami Mudaliar*, for the Respondents.

JUDGMENT.—I think that the decision in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* (1) is in conflict with that in *Arunachala Reddi* v. *Subba Reddi* (2) and the authorities therein referred to. Apart from authority I am very strongly of opinion myself that the case in *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* (1) cannot possibly be supported, as it amounts *pro tanto* to a repeal of the Negotiable Instruments Act. I, therefore, think that the present suit was unsustainable, being a suit on a promissory note which had not been endorsed to the plaintiff, and I must hold that the District Munsif was wrong in decreeing the plaintiff's suit. I allow the petition and dismiss the suit with costs here and in the Court below. Civil Revision Petition No. 132 of 1915 follows, but there will be no order as to costs in that case.

*Petitions allowed.*

(1) 31 M. 534; 4 M. L. T. 341.

(2) 17 M. L. J. 393; 3 M. L. T. 7.

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1150 OF 1911.

June 23, 1915.

*Present*:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

MOTA SINGH—PLAINTIFF—APPELLANT

*versus*

BISHEN SINGH AND OTHERS—DEFENDANTS —RESPONDENTS.

*Mortgage—Fixed period for redemption—Interest after that date, whether chargeable—Rate.*

In the absence of a covenant that interest shall cease to run after the expiry of the period fixed for redemption, the mortgagee is entitled to interest at the rate specified in the deed for the entire period during which the mortgage-money remains unpaid. [p. 822, col. 2.]

*Mohan Lal* v. *Mukim*, 114 P. R. 1901; 175 P. L. R. 1901, distinguished.

*Sardar Umrao Singh* v. *Sardar Thakar Singh*, 77 P. R. 1898, followed.

*Mathura Das* v. *Raja Narindar Bahadur*, 19 A. 39 at p. 49; 33 I. A. 138; 1 C. W. N. 52 (P. C.); 6 M. L. J. 214; 7 Sar. P. C. J. 88, referred to.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 7th July 1911.

Lala *Sangam Lal*, for the Appellant.

Pandit *Rambhaj Datta*, for the Respondents.

JUDGMENT.—The dispute in this appeal

relates to the liability of the mortgagor's representative to pay interest on two mortgage-deeds dated 2nd of October 1895 and 29th June 1896, respectively. The rate of interest stipulated in each deed is 15 per cent. per annum and the periods fixed for redemption are seven years and five years, respectively. The plaintiff contends that he is not liable to pay interest after the expiry of the stipulated periods while the mortgagee claims interest for the entire period during which the debt has remained unliquidated. The learned Divisional Judge has allowed interest at the agreed rate up to the date of the suit and at 6 per cent. per annum from that date till the date of redemption.

The plaintiff has preferred a further appeal against that decision, and after hearing arguments on both sides we are of opinion that there is no sufficient ground for interference with the judgment of the lower Appellate Court and that this appeal must be dismissed.

A perusal of the deeds shows that the stipulations fixing the periods for redemption were entered into in the interest of the mortgagee and that, to use the language of their Lordships of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (1), "it was not intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment." There is absolutely no reason why the mortgagor should continue to use the money of the mortgagee without incurring liability for the payment of interest, and the reasonable inference to be deduced from all the terms of the deeds is that the parties intended that the covenant as to interest should remain in full force up to the date of redemption. Any other interpretation is open to the objection which is so forcibly pointed out in the following observations of their Lordships of the Privy Council in *Mathura Das* v. *Raja Narindar Bahadur* (2):—

"The construction of the High Court ascribes to the parties an intention that, however payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken, and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription. It appears to their Lordships that though contracts are not unfrequently found to be of that imperfect nature, it is more reasonable to ascribe to the parties the intention of making a perfect contract, especially when such a contract is of a very common kind, and suitable to the ordinary expectations of persons entering into a mortgage transaction."

The judgment in *Mohan Lal* v. *Mukim* (3), relied upon by the appellant, proceeds upon the particular facts of that case, and we do not think it lays down any rule of general application. On the other hand, a Division Bench of this Court in *Sardar Umrao Singh* v. *Sardar Thakar Singh* (4) decided that, in the absence of a covenant that interest should cease to run after the expiry of the stipulated period, the creditor is entitled to interest at the rate specified in the deed for the entire period during which the mortgage-money remains unpaid. This judgment is in accordance with the exposition of law contained in *Mathura Das* v. *Raja Narindar Bahadur* (2), and the principle thereof is fully applicable to the present case.

Upon a consideration of the terms of the deeds and the law bearing upon the subject we hold that the view taken by the learned Divisional Judge is correct. We accordingly confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

*Appeal dismissed.*

(3) 114 P. R. 190 ; 175 P. L. R. 1901.
(4) 77 P. R. 1898.

(1) 20 A. 171 at p. 180; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. P. C. J. 273.
(2) 19 A. 39 at p. 49; 23 I. A. 138; 1 C. W. N. 52 6 M. L. J. 214; 7 Sar. P. C. J. 88 (P. C.).

KUNJAMANI DASI *v.* NIKUNJA BEHARY DAS.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 283 OF 19.2.

August 30, 1915.

*Present*:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richar lson.

KUNJAMANI DASI—PLAINTIFF—APPELLANT

*versus*

NIKUNJA BEHARY DAS—DEFENDANT—RESPONDENT.

*Trust—Endowment to deity* Shebaitship, *devolution of*—Shebait, *position of—Principles—Vested interest—Heir-at-law—Hereditary office—Hindu Law—Successive life-estates, if permitted in endowments.*

The position of a *shebait* is analogous to that of a Hindu female (widow, daughter, or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate. [p. 825, col. 2.]

When the founder of an endowment for a deity has given valid directions as to the devolution of the *shebaitship* upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder, provided the last *shebait* has not taken it absolutely; and when the office has so vested in them, upon the death of each member it passes by succession to his heir, subject to the principle that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution, cannot be applied so as to vest the *shebaitship* in persons who, according to the usages of the worship, cannot perform the rights of the office. [p. 825, col. 2.]

An heir-at-law, though in terms excluded from benefit under a Will, cannot be excluded from his general right of inheritance without a valid devise to some other person. [p. 825, col 2.]

*Obiter dictum.*—The rule in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*, 1 I. A. Sup. 47 at p. 66; 9 B. L. R. 377; 18 W. R. 359; 2 Suth. P. C J. 692; 3 Sar. P. C. J. 85, is applicable to an hereditary office and endowment quite as much as to other immoveable property and the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment. [p. 8.4, col. 2.]

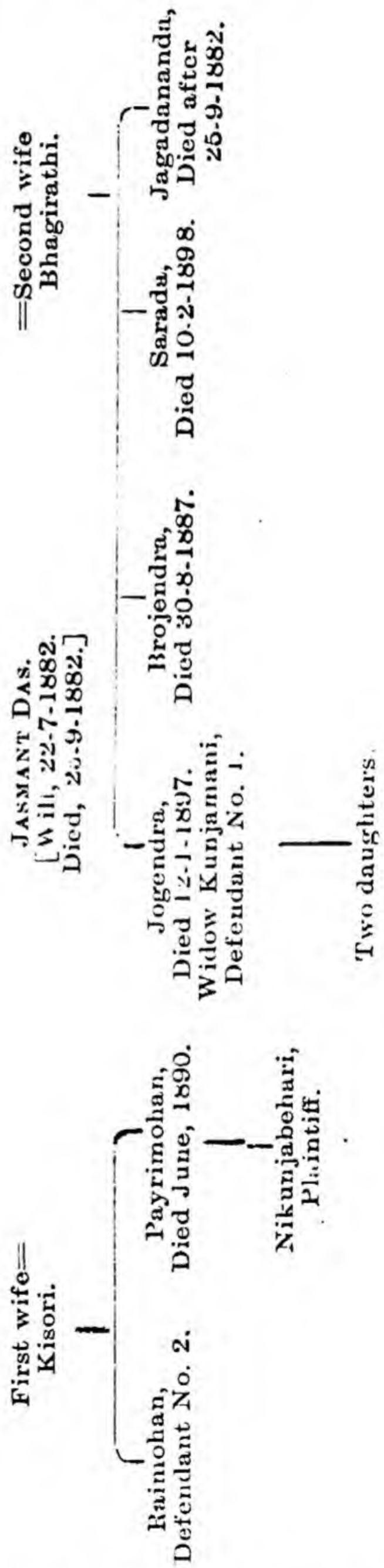
Appeal against the decree of the Subordinate Judge, Sylhet, dated the 1st April 1912.

Babus *Tarakishore Choudhury* and *Gopal Chandra Das*, for the Appellant.

Babus *Dwarkanath Chakrabutty* and *Kalikinkar Chakrabutty*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the first defendant in a suit for declaration that the plaintiff has a four annas share in the *shebaitship* of a deity, Syamsundar, established by his paternal grandfather and for confirmation or recovery of possession of the corresponding share of the properties of the endowment. The claim was contested by the widow of the step-brother of the father of the plaintiff. The Subordinate Judge held that the title of the plaintiff to the *shebaitship* was established and made a decree accordingly. On the present appeal, that decision has been assailed as founded on an erroneous construction of the Will of the founder. The relationship between the parties may be elucidated by the annexed genealogical table:—




Jasmant Das died on the 25th September 1882, and the question in controversy turns upon the true construction of the Will he

executed on the 22nd July 1882. The testator provided that all his properties would devolve on his family deity Syamsundar and his widow Bhagirathi would be executor in respect of the same. He further laid down that on the death of his widow, his youngest son Jagadanand and on the death of the latter, his son Brojendra would be successively installed in the office of executor, and all acts would be done under their management. The Will concluded that his sons by his first wife were disobedient and accordingly would not be appointed executors.

On the death of the testator, Bhagirathi proved his Will, but died before she could take out Probate. Meanwhile, Jagadananda also died. Probate was accordingly granted to Brojendra, who himself died not many years later on the 30th August 1887. Jogendra then took out Letters of Administration with copy of the Will annexed, but he died on the 12th January 1897, leaving a widow Kunjamani, the first defendant in the present suit, as also two daughters by her. Sarada died on the 10th February 1898, unmarried, like his brothers Jagadananda and Brojendra. Pyarimohan died in June 1890 leaving an infant son Nikunjabehari, who is plaintiff in this suit. Sarada had applied for Letters of Administration after the death of Jogendra, but he died before orders were passed. After this, applications were made for the same purpose by Raimohan, Kunjamani and others, but on the 3rd September 1902, this Court held that no Letters of Administration could be issued as the estate had been completely administered, and the only object of the rival applicants was to secure indirectly a decision upon the question of title to the *shebaitship*. In 1906, a suit was instituted by Kunjamani against Raimohan and some of the kinsmen of his father for declaration that she was the *shebait* of the deity Syamsundar. The Court held that she was *shebait* to the exent of an eight annas share and made a decree accordingly. Nikunjabehari had not been made a party in that suit and he consequently instituted the present litigation on the 26th September 1910 for declaration that he himself was interested to the extent of a four annas share in the *shebaitship*. This claim was unsuccessfully contested by Kunjamani in the Court below and the substantial question in controversy now is, whether the plaintiff has the title claimed.

We are of opinion that the effect of the Will was to constitute Bhagirathi, Jagadananda and Brojendra successive *shebaits* of the endowment, though they are described as executors in respect of the endowed property. The testator did not prescribe how the *shebaitship* would devolve after the death of Brojendra. In these circumstances, the devolution of the office of *shebait* follows the line of inheritance from the founder; in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a diffierent mode of devolution: *Rajah Muttu Ramalinga Setupati* v. *Perianayagam* (1); *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (2); *Janoki Debi* v. *Gopal Acharjia Goswami* (3); *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (4); *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5); *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (6); *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (7); *Sital Das Babaji* v. *Pertap Chunder Sarma* (8); *Sheo Prasad* v. *Aya Ram* (9); *Mohan Lalji* v. *Madhsudan Lala* (10). In this connection, we must bear in mind the observation of Sir Richard Couch in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5) that the rule in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (11) is applicable to an hereditary office and endowment quite as much as to other immovable property and that the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment [see also *Manorama Dassi* v. *Kali*

(1) 1 I. A. 209.

(2) 4 I. A. 76; 1 M. 235; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382.

(3) 10 I. A. 32; 9 C. 766; 13 C. L. R. 30; 4 Sar. P. C. J. 411; 7 Ind. Jur. 218.

(4) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350.

(5) 27 I. A. 69; 23 M. 271; 4 C. W. N. 329; 10 M. L. J. 29; 2 Bom. L. R. 597.

(6) 31 I. A. 203; 32 C. 129; 7 Bom. L. R. 765; 8 C. W. N. 809; 1 A. L. J. 585.

(7) 19 Ind. Cas. 337; 40 I. A. 97; 35 A. 283; 17 C. L. J. 612; 17 C. W. N. 741; 11 A. L. J. 548; 15 Bom. L. R. 606; (1913) M. W. N. 536; 14 M. L. T. 27.

(8) 3 Ind. Cas. 408; 11 C. L. J. 2.

(9) 29 A. 663; A. W. N. (1907) 210; 4 A. L. J. 565.

(10) 6 Ind. Cas. 77; 32 A. 461; 7 A. L. J. 430.

(11) I. A. Sup. 47 at p. 66; 9 B. L. R. 377; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 85.

*Charan Banerjee* (12); *Gopal Chunder Bose* v. *Kartick Chunder Dey* (13)]. What then is the result of the application of these principles to the case before us? The founder had nominated Bhagirathi, Jagadananda and Brojendra as successive *shebaits*, and had given no further direction as to the devolution of the office thereafter. Consequently, upon the death of Brojendra the *shebaitship* vested in Raimohan, Pyarimohan, Jogendra and Sarada, who were the heirs of the founder at the time. On the death of Pyarimohan the interest in the *shebaitship* vested in him passed to his son Nikunjabehari. Upon the death of Jogendra his interest devolved upon his widow Kunjamani. Upon the death of Sarada his interest in the office passed to his step-brother Raimohan. Consequently, at the date of the institution of the suit, Raimohan had a half share in the office, while Nikunjabehari and Kunjamani had one-fourth share each.

But it has been argued for the appellant that Bhagirathi, Jagadananda and Brojendra took successive life-estates in the office, with the result that the remainder at the death of the founder constituted a vested interest in the hands of his six sons. In this view, Nikunjabehari would get through his father Pyarimohan one-sixth share, while Jogendra would ultimately receive a half share by transmission to him of the interests vested in Jagadananda and Brojendra; Raimohan would thus have a third share by absorption of the interest of Sarada. We are of opinion that this contention is unsound and that the principle of vested interest while the actual enjoyment of the expected interest is postponed till the termination of the life-estate, as expounded by their Lordships of the Judicial Committee in *Rewun Persad* v. *Radha Beeby* (14), has no application to cases of the description now before us. No doubt, a *shebait* holds his office for life [*Rajeshwar Mullick* v. *Gopeshwar Mullick* (15)]; but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. [Cf. *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami* (16), where Subrahmania Ayyar, J., describes the spiritual head of a Mutt as a "corporation sole".] The position of a *shebait* is analogous to that of a Hindu female (widow, daughter or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate. When a Hindu female is thus in possession, she represents the estate completely and though her powers of disposition may be of a restricted character, no one else has a vested interest in the estate during her life-time. Similarly, when a founder has given valid directions as to the devolution of the *shebaitship*, as in the present case, upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder, provided the last *shebait* has not taken it absolutely; when the office has so vested in them, upon the death of each member of the group, it passes by succession to his heir, subject to the important qualification formulated by the Judicial Committee in *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (7), namely, that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution, cannot be applied so as to vest the *shebaitship* in persons who, according to the usages of the worship, cannot perform the rights of the office. We hold accordingly that on the death of Brojendra, the last *shebait* named by the founder, the office vested in the four sons of the founder then alive; and this, notwithstanding the fact that the founder intended to exclude his sons by his first wife, for as Willes, J., said in *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (11), the heir at law, though in terms excluded from benefit under the Will, cannot be excluded from his general right of inheritance without a valid devise

(12) 31 C. 166; 8 C. W. N. 273.
(13) 29 C. 716.
(14) 4 M. I. A. 137; 7 W. R. (P. C.) 35; 1 Suth. P. C. J. 172; 1 Sar. P. C. J. 327; 18 E. R. 651.
(15) 35 C. 226; 12 C. W. N. 323; 7 C. L. J. 315.
(16) 27 M. 435 at p. 442; 14 M. L. J. 105.

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to some other person. We may add that precisely the same result follows if we hold, on the authority of the decision of the Judicial Committee in *Tripurari Pal* v. *Jagat Tarini Dasi* (17), that the *shebaitship* vested absolutely in Brojendra, and, on his death, devolved on his heirs, namely, his four surviving brothers, Raimohan, Pyarimohan, Jogendra and Sarada. The decree made by the Subordinate Judge correctly determines the rights of the parties and as no question of limitation really arises on the evidence, that decree must be affirmed.

The result is that the appeal is dismissed with costs. We assess the hearing fee at ten gold *mohurs*.

*Appeal dismissed.*

(17) 17 Ind. Cas. 696; 40 I. A. 37; 40 C. 274; 17 C. L. J. 159; 17 C. W. N. 145; 13 M. L. T. 1; (1913) M. W. N. 34; 15 Bom. L. R. 72.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1543 OF 1914.

December 16, 1915.

*Present*:- Justice Sir William Ayling and Mr. Justice Phillips.

KAKI MUTYALU—DEFENDANT No. 3—APPELLANT

*versus*

KANIGOLLA SIVA RAGHAVAYYA—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court—New evidence, admission of, legality of.*

Where a lower Appellate Court admitted a document in evidence without recording any reasons as required by Order XLI, rule 27, Civil Procedure Code, and in the absence of an application for the admission of this evidence, and where no reasons were suggested in the Court of further appeal for the failure to produce the said document in the Court of first instance:

*Held*, that the admission of the document in evidence was illegal.

Second appeal against the decree of the Court of the Subordinate Judge, Bezwada, in Appeal Suit No. 166 of 1913 (Appeal Suit No. 448 of 1913 on the file of the District Court of Kistna), preferred against the preliminary

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decree of the Court of the District Munsif, Ellore, in Original Suit No. 556 of 1912.

Mr. *B. Narasimha Rao*, for the Appellant.

Mr. *S. Desikachari*, for the Respondent.

JUDGMENT.—The appellant points out that Exhibit J, on which the decision of the lower Appellate Court very largely proceeds, has been admitted by the Subordinate Judge contrary to the provisions of Order XLI, rule 27, of the Civil Procedure Code.

No application is on record for the admission of this document in the Subordinate Court: no reasons for its admission have been recorded as required by clause (2) of the rule above quoted: and the respondent's Vakil is unable to suggest even now any reason to explain the plaintiff's failure to produce this document in the original Court, or any ground which would have justified the lower Appellate Court in receiving it.

The judgment of the lower Appellate Court reverses that of the District Munsif.

We must set aside the decree of the Subordinate Judge and remand the appeal for re-hearing and disposal according to law.

*Appeal allowed*; *Case remanded.*

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 127 OF 1914.

January 22, 1916.

*Present*:—Justice Sir P. C. Banerji, KT., and Mr. Justice Piggott.

KUNJ BEHARI LAL—PLAINTIFF—APPELLANT

*versus*

SARJU PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. V, r. 17—Service of summons—Fixation of summons on door when person to be served is temporarily away and is traceable—Service, if proper.*

Where a serving officer finds the person to be served with the summons to be away temporarily from home and knows where he is, it is not good service if he thereupon does no more than fix the summons to the outer door of his house. [p. 827, col. 1.]

*Sakina* v. *Gauri Sahai*, 24 A. 302; A. W. N. (1902) 68, followed.

First appeal from an order of the District Judge, Azamgarh, dated the 7th May 1914.

LALJI SAHU *v.* SHAMLAL.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—This is an appeal against an order refusing to set aside an *ex parte* decree passed in appeal against the appellant. The appellant alleged that notice of the appeal had not been duly served on him, and accordingly applied to have the *ex parte* decree set aside. It appears from the affidavit of the serving officer that the notice issued by the Court to the appellant was taken to a place called Chhavni Sahwal; that the appellant was not there at the time but had gone for four days to Azamgarh; that thereupon the process-server affixed the notice of appeal to the outer door of the house in which the appellant resided. It is urged that this was not proper service within the meaning of Order V, rule 17, of the Code of Civil Procedure. In the case of *Sakina* v. *Gauri Sahai* (1) it was held by a Bench of this Court that where a serving officer finds a defendant to be away temporarily from home and knows where he is, it is not good service if he thereupon does no more than fix the summons to the outer door of the house. That was a case very similar to the present. The serving officer stated that he had learnt on enquiry that the party to be served was not present in the house but had gone to Seana. Without further attempt to serve the summons personally the serving officer affixed it to the outer door of the house in which the defendant resided. This was held not to be proper service within the provisions of the Code of Civil Procedure. The present case is indistinguishable from the case to which we have referred, and we must hold that the service made on the appellant was not proper service within the meaning of the Code. We accordingly allow the appeal, set aside the *ex parte* decree passed against him, and direct the court below to re-hear the appeal as against the appellant. Costs of this appeal will be costs in the cause.

*Appeal allowed.*

(1) 24 A. 302; A. W. N. (1902) 68.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 2092 AND 2292 OF 1911.

January 6, 1916.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

LALJI SAHU AND OTHERS—DEFENDANTS—APPELLANTS IN No. 2092

GULJAN MAHTO AND OTHERS—APPELLANTS IN No. 2292

*versus*

SHAMLAL—PLAINTIFF—RESPONDENT IN BOTH.

*Rent, right to collect—Limitation Act (IX of 1908), Sch. I, Art. 140—Usufructuary mortgagee of* mokararidar, *rights of—Death of* mokararidar, *effect of.*

The suit of the grantor of a *mokarari* for life to evict the *zerbharnadar* (usufructuary mortgagee) of the grantee after his death is not governed by Article 140 of the Limitation Act. [p. 829, col. 1.]

The right to collect rents of a property must be based not only on possession of the property but also upon title. [p. 829, col. 1.]

A *zerbharnadar* of a *mokararidar* for life, who holds over after the death of the *mokararidar*, is entitled to collect the rents that accrued due before a final notice to quit has been served upon him by the grantor of the *mokarari*. [p. 829, col 1.]

*Beni Pershad Koeri* v. *Dudhnath Roy*, 27 C. 156; 26 I. A. 216; 4 C. W. N. 274, referred to.

Appeal against the decree of the Judicial Commissioner, Chota Nagpur, dated the 31st of March 1911, affirming that of the Munsif and Deputy Collector, Hazaribagh, dated the 1st of July 1910.

Babu *Sushil Madhab Mullick*, for the Appellant.

Babus *Brojo Lal Chakravarty* and *Jamini Mohan Mookerjee*, for the Respondent.

JUDGMENT.—These appeals arise from decisions of the Judicial Commissioner of Chota Nagpur, dated the 31st March 1911, confirming decisions of the Deputy Collector of Hazaribagh.

The facts of the cases are briefly these. The plaintiff sued two tenants for rent on the basis of a title as *zerbharnadar* in the lands in suit. The *zerbharna* was granted by one of those *mokarari* holders whose original lease was word for word in the form dealt with in the Letters Patent Appeals Nos. 2 to 15 of 1914. The *mokararidar* died fifteen years before the institution of the suits. The suits are for rent of the years 1963, 1964 and 1965. The plaintiff claims to have purchased at a sale in execution of a mortgage decree the interest of the *zerbharnadar* on the 3rd August 1906. His title is, therefore, the

title vesting in the *zerbharnadar* holding under the heirs of the original *mokararidar* after that *mokararidar's* death.

The lower Courts agreed in decreeing the suits on the ground that though the grant to the *mokararidar* might be resumable and though on resumption of the *mokarari* lease the *zerbharna* would become void, there had in fact been no resumption and the *zerbharnadar* was still in possession during the years in suit.

On appeal to this Court Mr. Justice Richardson and Mr. Justice Newbould pointed out that the lower Appellate Court had treated the case as if the only question for consideration was the question of possession. A remand was, therefore, made for findings on the following issues: "*Firstly*, whether the land was or was not a tenure which the Maharajah as a superior landlord was entitled to resume; and *secondly*, whether, if so, the Maharajah has resumed the land and put an end to the tenure if not in the year 1905 then in the year 1907." The learned Judicial Commissioner has upon this order of remand recorded findings, *firstly*, that the Maharajah was certainly entitled to resume the *mokarari* lease but that he had not made any resumption in 1905 and that it was nobody's case that he had made any resumption in 1907.

We are asked to disregard these findings of fact on the ground that they do not decide the point in issue. It is urged on the authority of the case of *Beni Pershad Koeri* v. *Dudhnath Roy* (1) that a grant for a life becomes void on the death of a grantee and that, therefore, the *zerbharnadar* in this case had no title upon which he could ask the *ryots* to pay rent, and *secondly*, on the authority of the case of *Tillessuree Kooer* v. *Asmedh Kooer* (2) that the plaintiff in a suit for rent is required to show not only possession but also a valid title upon which that possession is based. It is clear that this was the argument in the minds of Mr. Justice Richardson and Mr. Justice Newbould when they remanded these appeals. They required the plaintiff to show not only that he had possession but also that he had title. We are required to consider the case from that point of law.

Taking first the decision of the Judicial Committee quoted above, it appears to us that from the date of the death of the *mokararidar* the *mokarari* grant became void. The question arises, what was the position of his successors who held on for fifteen years after his death. They were not holding in adverse possession for they asserted no adverse possession. They asserted only that they continued to be tenants. They must be presumed to have been tenants. The question is, what was the nature of their tenancy. On the analogy of section 106 of the Transfer of Property Act, we may regard them as lessees without leases in respect of whom the presumption arose that they were tenants holding a yearly tenancy terminable by six months' notice, or we may regard them as tenants on sufferance liable to be ousted at a moment's notice. Even though this chapter of the Transfer of Property Act does not apply to agricultural leases we still have to consider whether there has been any determination of their tenancy. We accept as final the decision of fact of the Judicial Commissioner that there was no determination in 1905. On that finding the defendants-appellants are clearly liable to the respondents for the rents of 1963 and 1964. But in recording the decision that it is not the case of either party that there was a determination of the tenancy in 1907, the Judicial Commissioner appears to have ignored the notice which he has found as a fact was issued in August 1907, directing the *zerbharnadar* to vacate the property before the close of 1964.

In support of his right to collect the rents of 1965, the learned Vakil for the respondents urges, *firstly*, that the right of the Maharajah to terminate the tenancy was barred by limitation if not under Article 139 then under Article 140, *secondly*, that the question of the finality of the notice issued by the Maharajah to the *zerbharnadar* in 1907 has not been sufficiently gone into by the lower Appellate Court to justify a decision thereon by this Court, and *lastly*, that under section 68 of the Chota Nagpur Tenancy Act no tenant can be ejected save upon a decree by the Deputy Commissioner, and that in the absence of such a decree the present *zerbharnadar* had a right to hold on to his tenancy and collect rents as a tenant.

With regard to the question of limit-

(1) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274.
(2) 24 W. R. 101.

ation it is sufficient to say that the *zerbharnadar's* tenancy was not determined until the notice was served on him. That notice was served in 1907. It cannot be suggested that the prescribed period of limitation had elapsed between that date and the date of the suit. Article 139 does not bar the suit. Nor can the Maharajah by any stretch of the imagination be regarded as a remainderman or a reversioner or a devisee so as to bring his claim to evict the *zerbharnadar* under Article 140 of the Limitation Act.

The question of limitation is decided against the respondent. We are satisfied that the respondent's right to collect rents must be based not only on possession but also upon title. If it is shown that he was merely a trespasser upon the property, the tenants cannot be called upon to pay rent to him.

The question whether his possession was that of a tenant or of a trespasser, depends upon the validity and finality of the notice to quit served upon him in 1907. Let us consider *first* the validity of that notice. On the death of the original *mokararidar* the *mokarari* was void. The *zerbharna* was also void. The *zerbharnadar* was a tenant holding over upon sufferance. In equity he was entitled to a reasonable notice. Six months' notice is without question a reasonable notice. He received six months' notice to quit. On the expiry of 1964 he became a trespasser upon the property. On the question of the finality of this notice, it is urged for the respondent that the materials on the record are insufficient for a definite conclusion. We have no hesitation in saying that they are ample. That the notice was served is proved. It is for the respondent to show that it was waived. It is clear from the judgment of the Deputy Collector and from that of the Judicial Commissioner that the Rajah, far from waiving this no ice, did everything in his power by the taking of *kabuliats* and the institution of suits for rent to insist upon his right to enter upon the property. We are satisfied that the notice of 1907 was a final notice to quit, and that from the moment that notice was served, the respondent was a trespasser upon the property and had no right to claim rent from the *ryots* upon it.

The result is that the appeals must be dismissed in respect of the rents for 1963 and 1964. They must be decreed with regard to the rent for the year 1965. It must be held that from the beginning of the year 1965, the plaintiff-respondent had no title upon which he could demand rent from the *ryots* holding lands within the estate of which the respondent is *zerbharnadar*. Let decree be made in the terms for the rent claimed for 1963 and 1964 and for cesses.

In view of the difficult position in which the defendants appellants were placed, they must be exempted from liability for damages or costs. The decree will bear interest at six per cent. from to-day's date.

*Appeal partly decreed.*

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1472 OF 1913.

June 19, 1915.

*Present*:—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

INAYAT—PLAINTIFF—APPELLANT

*versus*

GANGA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 11—Abatement of appeal—Death of one respondent—Failure to bring his representative on record within time—Limitation Act (IX of 1908), s. 5—Sufficient cause—Ignorance of law—Appeal, whether abates as a whole.*

Ignorance of the law of limitation is not a sufficient cause for failing to bring a representative of a deceased party on the record within time. [p. 831, col. 1.]

*Hadu* v. *Lala*, 21 Ind Cas 951; 15 P. L. R. 1914; 16 P. L. R. 1914; 41 P. R. 1915; *Karam Chand* v. *Lehna*, 15 Ind. Cas. 708; 257 P. W. R. 1912; 1 P. L. R. 1912 Sup; 204 P. L. R. 1912, followed.

In order to support his claim for an extension of the time allowed by law for bringing on the record the legal representative of his opponent, an appellant must prove that he did not become aware of his opponent's death until such time as it was practically impossible for him to file an application within the expiry of six months from the date of death. [p. 830, col. 2.]

*Dadu* v. *Kadu*, 113 P. R. 1907, distinguished.

Where the interests of defendants-respondents are joint, and the decree cannot be reversed without the representative of the deceased respondent being brought on the record, the whole appeal must abate. [p. 831, col. 2.]

*Hadu* v. *Lala*, 21 Ind. Cas 951; 15 P. L. R. 1914; 16 P. W. R. 1914; 41 P. R. 1915; *Hem Kunwar* v. *Amba Prasad*, 22 A. 430; A. W. N. (1900) 136, followed.

INAYAT *v.* GANGA.

*Chandarsang* v. *Khimabhai*, 22 B. 718; *Bai Full* v. *Adesang*, 26 B. 203; 3 Bom. L. R. 736; *Upendra Kumar* v *Sham Lal*, 6 C. L. J. 715; 11 C. W. N. 1100; 34 C. 1020, referred to

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 18th April 1913.

Chaudhri *Nabi Bakhsh*, for the Appellant.

Mr. *Bahadur Chand*, for the Respondents.

JUDGMENT.—Inayat, the plaintiff in this case, sued for possession of certain land attached to the Kotliwala well in the village of Natharke in the Jhang District, alleging that it had been mortgaged by his father to Diwan Chand, the ancestor of the 20 defendants, and that the mortgage-debt had been discharged. He also claimed a declaration of his title as proprietor in the *shamilat* appertaining to the area alleged to have been mortgaged.

The first Court, finding that the mortgage set up by the plaintiff never had any existence in fact and that the defendants were in possession as owners, dismissed the suit.

The plaintiff appealed to the Additional Divisional Judge. It then transpired that Sukhu, one of the respondents who had been served with notice of the appeal on the 31st May 1912, had died before the appeal came on for hearing on the 8th April 1913. Ahmad, the agent of the plaintiff-appellant, first stated that Sukhu had died from one to one and a half months after the appeal was instituted. Makhan, the cousin of Sukhu, however, informed the Judge that Sukhu had died on the 2nd September 1912, or more than six months before the appeal came on for hearing.

Admittedly Sukhu left a minor son, named Ladhu, as his representative and it was, therefore, objected that as Ladhu had not been brought on the record, the whole appeal must abate. The Additional Divisional Judge heard arguments on 10th April 1913. On the following day Ahmad, the agent of the plaintiff-appellant, filed an application asking that Ladhu might be brought on the record. In this application he stated that he had learnt of the death of Sukhu long after the date of his death and that he was not aware that it was legally necessary to bring Sukhu's representative on the record.

This application was considered by the Additional Divisional Judge in his judgment dated the 18th April 1913. He remarked that it was clear that the appellant was aware of Sukhu's death, and held further that ignorance of the law of limitation was not a sufficient cause for failing to bring a representative on the record within time. For these reasons he allowed the objection of the respondents and dismissed the appeal.

The plaintiff has now preferred a second appeal to this Court. We are first asked by the Counsel for the appellant to hold that the ignorance of the appellant as to the death of Sukhu was a sufficient cause for not bringing his legal representative on the record within time, *Dadu* v. *Kadu* (1) being cited in support of this proposition. That was a case in which it was held that there were extenuating circumstances in respect of the delay and sufficient cause. In the present case, although apparently Sukhu was not living in his village of origin, which is the same as that of the plaintiff, at the time of his death, he was only 12 miles away in a colony *chak* where he was engaged in keeping a shop. If Sukhu died in September 1912, and the date of his death is not disputed, the probability is that the plaintiff was aware of it long before six months had elapsed. The statement of his agent that he was not aware of Sukhu's death until long after it had occurred, was not made until he had had the advantage of hearing the arguments and had thus become alive to the importance of the plea of ignorance of death. Even so, it was for the plaintiff to show that he had not become aware of Sukhu's death until such time as it was practically impossible for him to file an application within the expiry of six months from the date of death, but even now the date of his knowledge is not given and from the first statement recorded by his agent there can be little doubt that he had ample notice of Sukhu's death. We are unable, therefore, to find that in this case the plaintiff is entitled to any extension due to ignorance of facts.

(1) 113 P. R. 1907.

*Secondly*, as was pointed out in *Hadu* v. *Lala* (2), there is no authority to the effect that the ordinary law governing abatement should be departed from merely because a party says that he was not aware of that law, and *Karam Chand* v. *Lehna* (3) is an express authority that ignorance of the law is not a sufficient cause. We must hold then that so far as the representative of Sukhu is concerned the appeal was rightly held to have abated.

But the further question remains whether it should be held to abate as against all the other respondents. In this connection Counsel for the appellant has cited *Chandarsang* v. *Khimabhai* (4), *Bai Full* v. *Adesang* (5) and *Upendri Kumar* v. *Sham Lal* (6). *Chandarsang* v. *Khimabhai* (4) related to a case in which one of the defendants-appellants as well as one of the plaintiffs-respondents had died before the appeal came on for hearing before the lower Appellate Court which held that applications to bring representatives on the record were barred by limitation, and then dismissed the appeal as being defective for want of parties.

It was held by the High Court that the surviving defendants-appellants had a right to proceed under section 544 of the Civil Procedure Code, and that as regards the plaintiff-respondent the Court ought either to have held that the appeal abated as against him and proceeded as against the rest of the respondents, or should have placed the legal representatives on the record.

It is to be noticed that the High Court did not discuss the question of limitation, or explain why, although the suit was one for the possession of land, it was considered that appeal would only partially abate.

*Bai Full* v. *Adesang* (5) merely follows *Chandarsang* v. *Khimabhai* (4) without further explanation, and *Upendra Kumar* v. *Sham Lal* (6), though it cites *Chandarsang* v. *Khimabhai* 4) with approval, merely does so with regard to an appeal by a defendant-appellant. We are unable to accept the proposition that a partial abatement never involves the abatement of a whole appeal.

There are as is pointed out in *Hadu* v. *Lala* (2), many authorities, to which may be added *Hem Kunwar* v. *Amba Prasad* (7), to the effect that where the interests of defendants-respondents are joint, and the decree could not be reversed without the representative of the deceased respondent being brought on the record, the whole appeal must abate. We are not here in any way concerned with the facts discussed in *Hadu* v. *Lala* (2), but in the present case it is, we think, clear that the plaintiff's suit could not have proceeded at all unless Sukhu, in his capacity as a co-mortgagee, had been impleaded in the first instance, and that it would be useless now to give the plaintiff a decree which does not include Ladhu, who would still be entitled to hold the whole land in dispute.

We think that that lower Appellate Court was technically wrong in "dismissing" the appeal. We hold that it "abated" and modify the decree to that extent. But on its merits the appeal in this Court is dismissed and the appellant must pay costs.

*Appeal dismissed.*

(2) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.
(3) 15 Ind. Cas. 708; 204 P. L. R. 1912; 257 P. W. R. 1912; 1 P. L. R. 1912 Sup.
(4) 22 B. 718.
(5) 26 B. 203; 3 Bom. L. R. 736.
(6) 34 C. 1020; 6 C. L. J. 715; 11 C. W. N. 1100.
(7) 22 A. 430; A. W. N. (1900) 136.

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## PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 903 OF 1912.

November 11, 1915.

*Present*:—Mr. Justice Shadi Lal.

CHELA RAM—PLAINTIFF—APPELLANT

*versus*

ISHAR DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Property acquired with income of husband's estate, nature of—Test—Intention.*

The real test to determine whether the property acquired by a widow with the income of her husband's estate is her absolute property or forms an accretion to the estate, is to ascertain the intention of the widow. [p. 832, col. 1.]

Where, therefore, a widow, in her capacity as such, brought a suit for pre-emption of the land in dispute and having obtained a decree therefor paid the pre-emption price from the income of her husband's estate:

*Held*, that the mode of acquisition pointed to the conclusion that she did not mean to sever the land from the main estate and that, therefore, it became an accretion to her husband's property. [p. 832, col. 1.]

SARJU PRASAD v. KHUSHAL CHAUDHRI.

*Isri Dutt Koer* v. *Hansbutti Koerain*, 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459, referred to.

Second appeal from the decree of the District Judge, Multan, dated the 4th December 1914, affirming that of the Munsif, 1st class, Muzaffargarh, dated the 6th August 1914, dismissing the suit.

Mr. *Gokal Chand Narang*, for the Appellant.

Mr. *Chander Bhan*, for the Respondents.

JUDGMENT.—The Courts below have concurred in dismissing the suit of the plaintiff, and the cardinal point for determination in this second appeal is whether *Musammat* Dauli Bai was the absolute owner of the land in suit and was, therefore, entitled to make the gift in question. Now it is clear that the lady was in possession of her husband's estate on the usual widow's life tenure and it was in her capacity as such that she brought a suit for pre-emption of the land in dispute and got a decree therefor in 1901. The pre-emption price was paid by her from the income of her husband's estate.

On these facts I hold that the land acquired by pre-emption became an accretion to her husband's estate. It is plain that, though *Musammat* Dauli Bai paid the price out of the income over which she had an absolute power of disposal, she could not have maintained, and succeeded in, the pre-emption suit except in her capacity as a co-sharer by virtue of her holding the property of her husband.

The real test to determine whether the property acquired by a widow with the income of her husband's estate is her absolute property or forms an accretion to the estate, is to ascertain the intention of the widow. Now in the case before me the mode of acquisition referred to above is a circumstance which points to the conclusion that she did not mean to sever the land in dispute from the main estate [*vide, inter alia, Isri Dutt Koer* v. *Hansbutti Koerain* (1).]

Consequently I decide that the property became a part of the *corpus* of the original estate and that the alienation in question cannot be upheld. The appeal is, therefore, dismissed with costs.

*Appeal dismissed.*

(1) 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459.

## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1914-15 OF BASTI DISTRICT.

April 28, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

SARJU PRASAD—PLAINTIFF—APPELLANT

*versus*

KHUSHAL CHAUDHRI AND OTHERS—DEFENDANTS—RESPONDENTS.

*U. P. Land Revenue Act (III of 1901), s. 133 (3)—Partition—No appeal from partition proceedings—Mistake in partition proceedings, correction of—Appeal from confirmation of partition.*

In an appeal against the final confirmation of a partition, the Court can correct a mistake in the partition proceedings though no appeal was preferred against the partition proceedings, when a party had suffered a serious wrong by the mistake and when the incorrect entry was in no way justified by the *wajib-ul-arz*.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 21st July 1914, confirming that of the Collector, Basti, in a case of partition.

JUDGMENT.

CAMPBELL, J. M.—(*April* 12, 1915.)—I am unable to agree with the learned Commissioner. I think that he was fully justified in taking up an appeal against the final confirmation of a partition, when it was brought to his notice that a gross injustice had been caused to one of the parties in the preparation of the partition proceedings, even though no appeal had been lodged against those proceedings. The Commissioner's order shows that appellants have sustained a serious wrong by the incorrect preparation of the partition proceedings, and that it was in no way justified by the terms of the *wajib-ul-arz*; and I consider that the Board should interfere even at this late stage of the case.

I would set aside the orders of the lower Courts and order that the partition proceedings be amended by giving the appellants compensation for the *khudkasht* allowed to respondents, first from non-occupancy land, then (if necessary) from occupancy land, and finally (if necessary) from *khudkasht*.

As the appellant is largely responsible by his neglect for the delay in bringing this objection I would make parties bear their own costs, both before the Commissioner and in this Court.

HOLMS, S. M.—I agree.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1498 OF 1915.

December 17, 1915.

*Present*:—Mr. Justice Chitty and Mr. Justice Walmsley.

NASURUDDI KARIKAR AND OTHERS—PETITIONERS

*versus*

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 109—*Surety, fitness of—Immoveable properties, if to be considered—Relationship of surety, relevancy of.*

The sufficiency of a surety should be considered from a general view of his stability and the property which he holds; it should not be regarded simply from the point of view of the moveable property which he possesses.

*Semble.*—In a bad livelihood case the question of relationship of the surety with the accused has some relevancy in considering the fitness of the surety.

Babus *Manmatha Nath Mukerjee* and *Tarakeswar Pal Chowdhury*, for the Petitioners.

JUDGMENT.—In this case we do not think that the Deputy Magistrate was correct in looking only to the moveable properties of the proposed sureties. It is true that, under section 514, Criminal Procedure Code, so far as a surety's property is concerned, the bond can only be enforced by "attachment and sale of the moveable property belonging to such person." But that does not mean that the sufficiency of the surety is to be regarded simply from the point of view of the moveable property which he possesses. It is obvious that a man may possess Rs. 1,000 to-day when he passes a bond and get rid of it to-morrow when the bond is passed and have no property against which the Court can proceed. On the other hand, if he has immoveable property, though that cannot be attached under section 514, Criminal Procedure Code, it is nevertheless a much better safeguard. A man can always raise money on his immoveable property if it is not encumbered; and he would probably prefer to do that than go to jail in the event of his bond being forfeited. The sufficiency, therefore, of a surety should be considered from a general view of his stability and the property which he holds. With regard to the closing passage of the Deputy Magistrate's judgment in which he says that some of the sureties proposed are said to be incapable of checking the accused should he revert to his old course of life, we may point out that it is impossible to put an effective moral check upon a man. All that the Court can do is to forfeit any bond which may have been passed, in case the accused reverts to his old course of life. At the same time, the question of relationship may have some relevance, as pointed out by the Additional Magistrate in his letter to this Court. With these remarks, we set aside the order passed and remand the case to the District Magistrate for a further consideration of the sufficiency of the sureties offered in this case. The matter should be disposed of as soon as possible.

*Order set aside; Case remanded.*

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## PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 558 OF 1915.

January 17, 1916.

*Present*:—Sir Donald Johnstone, KT., Chief Judge, and Mr. Justice Rattigan.

BACHINTA AND ANOTHER—CONVICTS—APPELLANTS

*versus*

EMPEROR—RESPONDENT.

*Penal Code* (*Act XLV of* 1860), *ss.* 402, 399, *scope of—Determination to commit dacoity, if essential—Assembly for concerting plans, whether within the section—Approver's testimony, value of—Appeal from acquittal—Interference, when justified—Criminal Procedure Code* (*Act V of* 1898), *s.* 417.

Where in a trial for dacoity it was found that the accused had met together in order to discuss the possibility of committing a dacoity and had considered various suggestions with regard to looting several places but there was no evidence that the accused persons had assembled for the purpose of committing a dacoity or had made preparations for committing that offence:

*Held*, that they were not guilty of any offence under section 399 or section 402, Indian Penal Code. [p. 836, col. 2.]

The question of the value to be attached to the statements of an accomplice or approver must be decided in every case upon the particular and peculiar circumstances of that case. [p. 837, col. 1.]

In an appeal from an order of acquittal a High Court will not interfere merely because it is based at most on a doubtful weighing of facts. [p 836, col. 1.]

*Emperor* v. *Chattar Singh*, 7 P. R. 1904 Cr; 1 Cr. L. J. 731; 97 P. L. R. 1904; *Deputy Superintendent* v. *Amulya Charan Awan*, 22 Ind. Cas. 736; 18 C. W. N. 666; 15 Cr. L. J. 160, followed.

BACHINTA *v.* EMPEROR.

*Quære.*—Whether section 402 of the Penal Code postulates a determination to commit a dacoity, and an assemblage of five or more persons for the purpose of concerting plans for a dacoity yet remote or contingent is not within the meaning of the section? [p. 836, col. 2.]

Appeal from the order of the Special Magistrate, exercising enhanced powers under section 30 of the Criminal Procedure Code, Jullundur, dated the 27th May 1915, convicting the appellants.

Mr. *Morrison* and Pandit *Nanak Chand*, for the Appellants.

Mr. *B. Bevan Petman* (Advocate for the Additional Government Advocate), for the Respondent.

JUDGMENT.—On the night of the 23rd of January 1915 a successful dacoity was committed at *Mauza* Alawalpur in the Jullundur District and it is alleged that Banta Singh, one of the leading spirits among the dacoits, thereafter convened a meeting of his friends and a number of desperate characters from the neighbouring villages, who were to assemble at his hut in *Mauza* Sangwal on the night of the 25th January 1915. According to the evidence of Sundar Singh, the approver in this case, the following persons were present on the occasion:

(*a*) Ishar, Santoo sons of Uttam and Bhagtu (residents of Shibdaspur).
(*b*) Amar Singh, Thakar Singh, Kartar Singh and Bachinta and Udham Singh, (residents of Chakrala).
(*c*) Dhiana (resident of Jandiala).
(*d*) Gainda (resident of Lakhan-ki Bassi).
(*e*) Buta (resident of *Mauza* Jaid).
(*f*) Harnam Singh, Gopal Singh, Santa *Chamar*, Labhu, Santa Singh son of Buta Singh (residents of *Mauza* Sangwal).
(*g*) Dalip Singh (resident of *Mauza* Mustafapur).
(*h*) Banta Singh, Roor Singh and Jaura (residents of *Mauza* Sangwal).

According to the approver, various suggestions were made at the meeting for the commission of dacoities at different places, but for one reason or another every suggestion was disapproved of and the idea of dacoity was eventually given up. It was decided, however, that the party should proceed to the railway line near Sura Nassi Railway Station and there cut the telegraph posts and break the metal line; and it is alleged that Banta Singh and Roor Singh went to the village Sangwal and brought various implements such as *chhavis*, *sannis* and *hathauras* and a spade; and that the whole party then proceeded to the railway line where futile attempts were made to break the metals and to undo the iron nuts, as also to dig up one of the telegraph posts, but that their efforts being unsuccessful they gave up the whole thing as hopeless and decided to return to their houses.

Sundar Singh was arrested some time in February for his participation in the Alawalpur case and on the 3rd of that month he made a statement to the Police giving details regarding that dacoity, but in this statement he made no mention of the meeting at Banta Singh's hut. Inspector Behari Lal (P. W. No. 33) was at the time investigating a case concerning an attempt to commit dacoity at *thana* Bhogpur and in the course of his investigations he heard from Gurditta, one of the accused in that case, that a revolver had been given to Bachinta, Thakar Singh and Kartar Singh, three of the persons accused in the present case. Inquiry was accordingly made by the Inspector from these persons and they are said to have given him information relating to the occurrences on the night of the 25th of January. Sundar Singh is said to have informed the Police about the meeting at Banta Singh's hut and the attempt on the railway line on the 17th of February 1915, by which time, however, nearly all the persons alleged to have been present at the hut had been arrested by the Police. Subsequently Sundar Singh was given a promise of pardon and thereafter made a full statement which was recorded by M. Jamiat Singh, Magistrate, 1st Class, on the 11th of March. Of the persons said to have been present at Banta Singh's hut on the night of the 25th of January, Banta Singh, Roor Singh and Jaura absconded, but the other 17 whose names have been given above were tried by a Special Magistrate of the 1st Class (exercising enhanced powers under section 30 of the Criminal Procedure Code) for offences under sections 399 and 402, Indian Penal Code. The Magistrate, for reasons given in his lengthy and carefully considered judgment, convicted Ishar, Thakar

Singh, Kartar Singh, Bachinta and Dhiana under section 399, Indian Penal Code, and sentenced them each to seven years' rigorous imprisonment Santoo son of Uttam *lambardar*, Bhagtu, Udham Singh, Amar Singh, Gainda, Boota, Harnam Singh, Gopal Singh, Santu *Chamar*; Labhu, Santa Singh son of Buta Singh and Dalip Singh were acquitted.

Kartar Singh and Bachinta have appealed through their Counsel Mr. Morrison and Ishar through his Counsel Pandit Nanak Chand and Thakar Singh has preferred an appeal through the jail authorities. Dhiana has not appealed. On the other hand the Crown has preferred an appeal under section 417, Criminal Procedure Code, from the order of the Magistrate acquitting the persons whose names are specified above.

Before we proceed to deal with these appeals we must clear the ground by pointing out that there was no charge against the accused persons of any offence in connection with what occurred at the railway line near Sura Nassi Station. There is, no doubt, a great deal of evidence on the record as regards this transaction, and the so-called confessions of Ishar, Bachinta, Kartar Singh, Thakar Singh, Gopal Singh, Buta, Santa *lambardar* and Santu *Chamar*, so far as they are relevant at all to the present case, relate almost entirely to the attempt to break the line and to dig up the telegraph post and to damage the telegraph wires. But the approver in his evidence before the Court has distinctly stated that the object which the party had in view was merely to cause trouble and injury to Government, even though no gain accrued to them therefrom and Mr. Bevan Petman, on more than one occasion, laid stress on the fact that the attempt to break the railway line and to damage the telegraph wires was not alleged by the prosecution to constitute in any sense an attempt to commit dacoity. The learned Counsel stated that the evidence which related to this transaction was relevant solely for the purpose of corroborating the approver's statement that the various accused were together on the night when, according to the prosecution, they had assembled at Banta Singh's hut for the purpose of committing dacoity and had there made preparations for committing that offence. This explanation is fully borne out by the actual charges framed against the accused, but we must confess to a feeling of surprise that the most criminal act alleged to have been committed by Banta Singh and his party on the night in question should have been regarded by the prosecution as a mere passing incident, relevant only as a piece of evidence to prove that the different accused persons were actually in each other's company on that night. In point of fact it would not have been very valuable for the purposes of the charges as framed, as it might well be that persons who had not been present at Banta Singh's hut joined the party later on when proceeding towards Sura Nassi Station. The transaction connected with the attempt to break the railway line and to cut the telegraph wires was thus entirely independent of the offences charged against the accused and in respect of that transaction (which was punishable under section 126 of the Indian Railways Act, 1890, with a maximum sentence of transportation for life) the accused have not been tried. The sole question then for our consideration is, whether there is sufficient evidence on the record to prove that the convicts and the acquitted persons, or any of them, assembled at Banta Singh's hut for the purpose of committing dacoity (section 402, Indian Penal Code) or made preparations for committing dacoity (section 399, Indian Penal Code). Upon the view that we take of the case as thus stated it is unnecessary for us to differentiate between the appeals filed by the convicts and the appeal preferred by the Local Government under section 417, Criminal Procedure Code, but in order to avoid misapprehension we must here state that we unhesitatingly accept the principles laid down by two Division Benches of this Court in *Deputy Superintendent* v. *Amulya Charan Awan* (1) and *Emperor* v. *Bishen Singh* (2), and that in any event

(1) 22 Ind. Cas. 736; 18 C. W. N. 666; 15 Cr. L. J. 160.

(2) 22 Ind Cas. 987; 15 Cr. L. J. 203; 125 P. R. 1914; 27 P. W. R, 1914, Cr.

we could not have accepted the appeal by the Local Government. The Magistrate has fully and carefully considered the case as a whole and in particular against each individual accused person, and has given very reasonable grounds for his conclusions in each instance. Possibly (had we convicted at all) we might ourselves have taken a different view as regards a particular individual's complicity in the alleged crime, though we do not say that we should have done so. But as pointed out in the authorities cited, that in itself would not justify us in setting aside the findings of a Magistrate who had the great advantage, not possessed by us, of hearing the evidence and of seeing the witnesses, and in a very recent case the High Court of Calcutta held that it was no ground for setting aside an acquittal that it was based at most on a doubtful weighing of facts [*Emperor* v. *Chattar Singh* (3)].

We need not, however, pursue this subject further, as we are satisfied that there is no sufficient proof against any of the accused persons of the offences for which they were tried.

The approver, Sundar Singh, deposes that he, the three absconders (of whom one, Banta Singh, has we are informed since been hanged) and the accused persons met at Banta Singh's hut; that Jora (one of the absconders) at first suggested the burgling of a Pleader's house at *Mauza* Massania; that Banta Singh objected that the village was too far off; that Jora then suggested a *Brahmin's* house at *Mauza* Bal, but Dalip Singh pointed out that it was a big village of *Jats*; that Roor Singh suggested looting the *thana* and *kila* at Kartarpur, but Jora pointed out that they had only two pistols among them whereas there would be many rifles at the *thana* and *kila*; that Jora then proposed a dacoity at *Mauza* Naugajah; that Amar Singh (one of the accused) was sent to reconnoitre and returned shortly afterwards with the news that the villagers were all awake and that "it was not a proper place to loot." After this the idea of dacoity was abandoned and the party started off towards the railway line. The prosecution rely upon this story as told by the approver for the foundation of the charges against the accused persons, and urge that it establishes the fact that they all assembled at Banta Singh's hut for the purpose of committing dacoity and that they made preparations for that purpose. As at present advised, but without giving any definite decision on the point, we are inclined to hold that even if we accept the approver's story no offence under section 399 or section 402, Indian Penal Code, is thereby disclosed, inasmuch as there is no evidence that the accused persons assembled for the purpose of committing a dacoity or made preparations for committing a dacoity. The utmost that could be urged against them (assuming that their knowledge of the objects of the meeting went even so far) was that they met in order to discuss the possibility of committing a dacoity. As observed by Gour in his commentary upon section 402, Indian Penal Code, an assemblage of five or more persons for the purpose of concerting plans for a dacoity yet remote or contingent is not within the meaning of that section, which postulates a determination to commit a dacoity. But be this as it may, and we leave the question open, the fact remains that apart from the evidence of the approver, there is upon the record before us nothing to prove that the persons assembled in Banta Singh's hut discussed the question of dacoity, except a somewhat bald statement in the so-called confession of the convict Kartar Singh. He states that when about 18 or 20 had assembled in the hut, "Banta Singh sent a man, whom I do not know, to Naugajah ...(Banta Singh and Rur Singh) wanted to commit a dacoity at Naugajah and, therefore, they sent the man there to get some information as to whether the people were asleep or awake. That man came back from Naugajah within half an hour and said the people were alert. Banta Singh and Rur Singh did not consult us for going to Naugajah."

This is the sole piece of evidence which can be said to corroborate in any way the elaborate story told by the approver as to the discussion that took place in Banta Singh's hut, and even here we find Kartar Singh explicitly stating that the idea of dacoity emanated only from Banta Singh

(3) 7 P. R. 1904 Cr.; 1 Cr. L. J. 781: 97 P. L. R. 1904.

and Rur Singh and that no one else was consulted on the subject. This lack of corroboration is all the more remarkable when we find other accused persons coming forward, at an early stage of the investigation, to confess that they took part, willingly or unwillingly, in the attempt to break the railway line. In none of these "confessions" is there any mention of the discussion about dacoities at Banta Singh's hut.

We are not prepared to say that in no case should an approver's evidence be rejected as regards a particular incident simply because on that one point it happens to be uncorroborated, nor do we accept the contention that in every case, regardless of all other facts and considerations, an approver's evidence must be thrown aside as worthless unless it is corroborated by independent evidence of a trustworthy character. The question of the value to be attached to the statements of an accomplice or approver must be decided in every case upon the particular and peculiar circumstances of that case. In the present instance, however, we find it impossible to accept Sundar Singh's evidence as sufficient basis for convicting the accused persons, even though that evidence is to some extent corroborated in one detail by Kartar Singh's retracted confession. The facts in respect of which corroboration is in this case naturally to be expected are the essential facts upon which the charges are based. Did the accused persons assemble at Banta Singh's hut for the purpose of committing a dacoity? Did they there discuss the various proposals of which Sundar Singh speaks? And did they there make preparations for committing a dacoity? Sundar Singh alleges that they did, and Kartar Singh, in his retracted confession, so far corroborates him that he admits that Banta Singh and Rur Singh (two absconders) wanted to commit a dacoity, but he adds that no one else present was consulted as to that. On the other hand, Buta, Ishar, Thakar Singh, Gopal Singh, Santu *lambardar* and Santu *Chamar* in their confessions make no reference whatever to this part of the approver's story and this omission is significant when we remember that the approver himself made no reference to the occurrence when he first made his statement to the Police on the 3rd February 1915, and that the proceedings in Banta Singh's hut were, for the purposes of the present charges, by far the most important incidents that occurred on the night of the 25th January. Assuming that the persons who made confessions did so voluntarily and with a desire to tell the truth, we would naturally expect, if they had assembled to commit a dacoity, that they would have stated that they met for that purpose and that it was only when the idea of a dacoity had to be given up as hopeless, that the suggestion was made that the railway line should be broken in order "to injure and trouble Government".

We have it in evidence that Banta Singh had made himself somewhat notorious in *Mauza* Sangwal by his seditious "lectures" and we know that the party, finally at all events, decided to do something not for the purpose of robbery or gain to themselves but rather to cause loss and trouble to Government. It is, therefore, quite possible that the accused persons met at Banta Singh's hut not with any idea of committing dacoity but of listening to any suggestions that he might have to make of "troubling" Government, and that Sundar Singh's statement that in the first instance dacoities were discussed is merely a piece of elaborate embroidery. And even if we are to accept Kartar Singh's statement in his retracted confession, the utmost that can be said is that Banta Singh and Rur Singh were anxious to commit a dacoity and sent a man to find out whether Naugajah might safely be plundered, no other persons present in the hut being consulted on the subject. This statement certainly does not prove that the accused persons were met together with the object of committing dacoity or that they made preparations for committing that offence.

In the circumstances we must hold that the offences charged have not been proved against any of the accused persons and we accordingly accept the appeals of the convicts and acquit them. The appeal of the Local Government is necessarily rejected.

Dhiana, one of the convicts has not appealed, but the record is before us, and under the provisions of section 139, Crimi-

nal Procedure Code, we set aside his conviction and acquit him also.

In conclusion we would point out that the transaction connected with the attempt to break the railway line and to cut the telegraph wires is entirely distinct from the acts alleged to constitute the offences charged in the case now before us against the accused persons, and that our judgment is in no way concerned with the guilt or innocence of the accused persons, or any of them, in respect of that transaction.

*Convictions set aside.*

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ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 57 OF 1916.
January 31, 1916.
*Present*: Mr. Justice Piggott and
Mr. Justice Walsh.
*Musammat* ANANDI—APPELLANT
*versus*
EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), s. 302—Murder—Guilt to be established beyond doubt—Murder by poisoning—Proof—Conviction.*

In a murder case a Court has to be satisfied not of the probabilities but of the certainty beyond any reasonable doubt that the accused is guilty. [p. 841, col. 1.]

In a case of murder by poisoning with arsenic it was not shown that the accused had arsenic in her possession or that she gave anything to eat to the deceased:

*Held*, that the conviction for murder could not be maintained. [p. 841, col. 1.]

Criminal appeal against an order of the Sessions Judge of Kamaun, dated the 5th January 1916.

Mr. *M. L. Agarwala*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.

WALSH, J.—This is an appeal by an accused who has been convicted of murder and sentenced to death. The case is a typical one of a charge of secret poisoning which is sought to be established against accused person by a chain of circumstances, and it is one undoubtedly of grave suspicion against some one and of a certain amount of suspicion, if not grave suspicion, against the accused. On the whole we have come to the conclusion that the conviction cannot be supported. The learned Judge who tried the case has delivered an elaborate, very pains taking and admirably clear judgment. It is such an admirable composition that it seems almost sacrilege to tamper with it. In its arrangement, its careful and minute analysis of the evidence and in the fact that it goes from time to time into all points of doubt and difficulty as also the affirmative points which arise in favour of the defence, the judgment could, in our opinion, be hardly improved upon. It is only in respect of certain inferences which the learned Judge draws at the end of his judgment for the purpose of supplying certain gaps in the case for the prosecution that we feel bound to differ from him. Now three issues are set out by him at page 41 of the printed book: (1) What was the cause of the child's death; (2) Had the accused any motive for committing the murder and (3). Can it be considered proved beyond reasonable doubt having regard to the events of the afternoon of the 16th of April that she committed the murder? As to the *first* issue, he finds that the child died from arsenic poisoning. The main controversy on this topic was whether the cause of death was arsenic or cholera; but apart from the question of cholera there was also a controversy whether there was arsenic at all. Taking the view we do, it is unnecessary to deal with this issue in detail. It is sufficient to say that the question is one of doubt and difficulty, that the medical evidence was conflicting and that the Judge arrived at his final conclusion on this issue by adopting in great measure the theory of an expert who contradicted the eye witnesses and two other medical experts, who either attended the child before death or subsequently examined the body. There are two matters to which it is perhaps desirable to draw attention. It is quite clear that in the process of the preparation of the prosecution case three bottles had been discovered and were sent to the Chemical Examiner for purposes of analysis. It was pressed upon us very strongly by Counsel for the accused that the mistake which was made with regard to these bottles was a serious mistake affecting the evidence for the prosecution. That a mistake was

made there is no doubt and I shall refer to it in a moment. To our mind it does not affect the case for the prosecution, because no matter whether the contents of the bottles were harmless, the vomit of the child which was alleged to contain arsenic did contain the same. The mistake that was made was in describing the bottles as containing vomit when in fact they did not do so. It seems to us a pity that the Chemical Examiner, on receipt of these bottles and on discovering that they did not contain vomit as described, did not at once communicate with the persons from whom he received them pointing out that they did not answer the description. It is more the pity in this instance, because by his report the Chemical Examiner drew attention to the fact that no chemical test for aconite, which was one of the poisons he was considering, was available when a substance was mixed with the vomit. He himself says that he knew that the bottles did not contain vomit. Under these circumstances it was his duty either to return the contents for correct description or before analysis to communicate with the authorities with a view to have the description corrected. We have drawn attention to this matter with the view that this example may not be followed in similar cases on any future occasion. The other point with regard to the medical evidence is this. Speaking for myself with some experience of investigation of poisoning cases, I am astonished to find a total absence either from the report of the Chemical Examiner or from the medical evidence of any reference to the quantity of arsenic. Scientific precision may be and probably is impossible; but approximate exactitude can be reached. It is the invariable practice in a case of such importance—and if one case can be treated as more important than another it is a case of life and death—to state as precisely as possible in figures the amount of arsenic discovered in each subject submitted to analysis, and in the medical evidence at the trial to lay before the Tribunal such materials as exist tending to show what quantity constitutes a fatal dose or what number or quantity repeated in different doses may become fatal in persons of different constitutions and different ages and in the present case a child of two and half years. All we can say is that there is a total absence of any evidence of either kind in this case and we think as a matter of principle the attention of those who are responsible for the preparation of the case for the prosecution in such charges should be directed to this as soon as possible.

Turning now to the *second* issue, in our view the evidence was sufficient to establish malice on the part of the accused and even motive for murder. It is on the *third* issue that the case for the prosecution breaks down. It is admitted that no arsenic of any sort or kind and no attempt to possess herself of arsenic has been traced to the accused. Further, there is no evidence that at any material time the accused gave the deceased anything to eat or that their course of life was such that in the ordinary sequence of events she was likely to give the child something to eat. It is, of course, impossible to lay down as a matter of law that in a poisoning case either of these things must necessarily be proved. In my experience it is certainly extremely rare to find a conviction in which both of them were not proved. Still it may well be that mere possession of arsenic by the accused, even without anything tending to show that she gave anything to eat to the deceased, might be sufficient; or on the other hand if she had recently fed the child without it being shown that arsenic was in her possession, that may also be sufficient. But to our mind the absence of both the circumstances from the evidence is really vital. The learned Judge got over the difficulty in the first case, namely, the absence of proof that the accused had arsenic by saying thus:—"I do not believe that she could not have got some if she wanted it." That is applicable practically to everybody. It is no more applicable to the accused than it is to any body else. It is tantamount to say "assuming that she is guilty, in the absence of anything to the contrary there is nothing to show that she could not have obtained arsenic." In a criminal case it seems superfluous to add that the onus is on the prosecution. That onus is not discharged if it was seeking to prove that she was in possession of arsenic by

showing that she had a motive to get it. He gets over the second difficulty by a somewhat similar effort of imagination. The point in the case with regard to this, namely, as to what the child did before its death turns upon what happened between the time when the child was left in the house with the chain at the door by the father and somewhere about 5 o'clock when it was taken ill. The evidence about those two hours is a little obscure but substantially it is this:—The child was in the house where the accused and the child's mother both were and at some time or another it may have got outside. At the same time the mother was outside the verandah and at some time the child was in the company of and alone with the accused. The defence had endeavoured to show that the child was outside the house and in coming into contact with other persons obviously it might have received some deleterious thing from the other persons. The learned Judge rejected that evidence and then held that even if their evidence were accepted, there is nothing to show that the child might not have run into the house at 4 o'clock where he was given something to eat by the accused. So that on these two vital questions he arrives at a final decision by saying that there is nothing to show that she might not have arsenic in her possession and that there is nothing to show that the deceased might not have been given something to eat by the accused. In my view that form of finding is a form of finding which is not unlikely to occur from time to time in a Tribunal which at the same time is a Judge of law and a Judge of fact. Everybody performing a judicial function has carefully to guard himself against being insidiously prejudiced against an accused person because an attempt on the part of the latter to prove something unnecessary, but beneficial when successfully proved, breaks down. It formed for a long time in England one of the chief objections to a great remedial measure which became law in 1908 enabling the accused persons to give evidence on their behalf. It has been urged over and over again by experts in criminal law that if an accused person goes into the witness box and states too much or states something which can clearly be proved to be untrue, there is a danger that both the prosecution and the Jury might be diverted from the real point which the prosecution has to establish, because of assuming things against the defence as the defence has broken down on some unnecessary point, and this is just what the learned Judge seems to have done in this case. Not content to rest upon the absence of proof that the child had anything to eat from the accused, the defence tried to prove that there were persons about who might have given the child something to eat. In the opinion of the learned Judge they failed in this and it seems to him that their failure has lent an additional weight to the case for the prosecution. In my opinion it does nothing of the kind.

I want to point out, and I think it is desirable to point out in this matter, that the gap in the case for the prosecution is not a technical gap but a real and substantial gap. The case for the prosecution is that the child must have been given something to eat at 4 o'clock afternoon by the accused containing arsenic. The case for the prosecution is that the relations between the child's mother and the accused were unfriendly and that the child was discouraged from having communication with the accused as far as possible. The three persons, namely, the child, its mother and the accused were together for an hour or so in a small place and it is hard to believe the theory that the accused gave food to the deceased surreptitiously, secretly and wickedly. It would be absurd to suppose that she attempted to do it by force. If she had attempted force, of course, the child would have cried out and its mother's attention would have been drawn. It could not have been done by persuasion with arsenic in crude form. The child might conceivably be given arsenic in crude form up to a certain point, but the moment the child would come to realize its taste it must refuse to take it. It must, therefore, be in our opinion that the arsenic, if it was given at all, was given in some cake or sweet or in some form in some fluid. The hypothesis is that the little child of 2½ years, who was somewhat hale and hearty that afternoon, was given a cake or liquid or sweet to eat and that it was given insidiously, not only without the mother seeing this but also without the child saying anything to the mother. To our mind it is in the highest degree improbable, in view of the

relations on which the parties were, that the child could have eaten anything given by the accused without the mother being acquainted of the circumstance under which it was given. The learned Sessions Judge never entered into the discussion how it was given and how it could have been given without the mother's knowing about it, and he found that something was given to the child by the accused because there was nothing to prevent her from doing so. In my view the case cannot be better stated than it was stated by the Committing Magistrate when he was committing the accused for trial. He says that "it can safely be said that there is very great probability of the accused giving arsenic to the boy and thus causing his death. The evidence is wholly circumstantial and perhaps not very strong." But a Tribunal in a case of murder has to be satisfied not of the probability but of the certainty beyond any reasonable doubt, that is to say, doubt which would operate on the mind of a reasonable man; certainly it has to be satistied beyond any reasonable doubt that the accused is guilty. As it has not been shown that the accused had arsenic in her possession or that she gave anything to eat to the child, one cannot say that there is no room for doubt in this case. For these reasons I hold that the conviction should be quashed and the accused be released.

PIGGOTT, J.—I concur.

BY THE COURT.—The conviction of *Musammat* Anandi and the sentence of death passed under section 302, Indian Penal Code, are set aside and she is directed to be forthwith released.

*Conviction set aside.*

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PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1226 OF 1915.

January 21, 1916.

*Present*:—Mr. Justice Shadi Lal.

ABDUL AZIZ—PETITIONER

*versus*

EMPEROR—RESPONDENT.

*Punjab Municipal Act (III of 1911), ss. 114, 221—Notice to demolish building or execute "sufficient" repairs—Absence of specification—Illegality—Revision.*

A notice under section 114 of the Punjab Municipal Act must specify the portion of the building which in the opinion of the Committee is in a dangerous condition and should also mention the nature of the repairs required to be made. [p. 842, col. 1.]

Where, therefore, a Municipal Committee served a notice under section 114 of the Municipal Act on the petitioner mentioning the building and calling upon him to remove it or execute "sufficient" repairs to such portion of the building as was in a ruinous or dangerous condition and the petitioner was convicted for disobedience of such notice:

*Held*, (1) that the notice did not comply with the requirements of law; [p. 842, col. 1.]

(2) that the Chief Court could interfere on revision with the conviction which was bad in law. [p. 842, col. 1.]

*Pirthi Singh* v. *Emperor*, 22 Ind. Cas. 767; 2 P. W. R. 19 4 Cr.; 15 Cr. L. J. 191; 5 P. L. R. 1914; *Emperor* v. *Qadir Bakhsh*, 13 Ind. Cas. 203; 56 P. L. R. 1912; 9 P. W. R. 1912 Cr.; 13 Cr. L. J. 17; 3 P. R. 1912 Cr., followed.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Additional District Magistrate, Delhi, dated the 15th June 1915, affirming that of the Magistrate, First Class, Delhi, dated the 18th March 1915, sentencing the petitioner to pay a fine of Rs. 50.

Rai Sahib Lala *Moti Sagar*, for the Petitioner.

Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—The petitioner has been convicted, under section 219 of the Punjab Municipal Act, III of 191', for disobedience of a written notice issued to him under section 114, and has been sentenced to a fine of rupees 50. Now the legality of the conviction depends upon the determination of the question whether the notice complied with the requirements of law. Section 114 authorizes the Municipal Committee to require the owner of a building in a dangerous state either to remove the same, or to cause such repairs to be made to it as the Committee may consider necessary for the public safety. The notice after mentioning the building calls upon the petitioner to remove it or execute "sufficient" repairs to such portion of the building as is in a ruinous or dangerous condition. Now two objections are taken to the validity of this notice. In the *first* place, it is urged that it does not specify the portion of the building, which, in the opinion of the Committee, is in a dangerous

condition, and *secondly*, the nature of the repairs required to be made has not been mentioned therein.

In my opinion, these objections are valid. The judgment of the learned Chief Judge in *Parthi Singh* v. *Emperor* (1) is, *inter alia*, an authority for the view that the portion of the building, which in the opinion of the Municipal Committee is dangerous, should be specified. In regard to the *second* point, the ruling in *Emperor* v. *Qadir Bakhsh* (2) is on all fours with the present case. It is true that that judgment deals with the prosecution under the Cantonment Code, but section 94 of the Code is *in pari materia* with section 114 of the Municipal Act. Both the Acts use the words "such repairs" as the Committee may consider "necessary" and it will be observed that the notice in that case, which directed the owner to repair or demolish the house, was held to be bad.

In fact, the learned Counsel for the Crown frankly admits that the notice in question does not comply with the terms of the section, but he contends that as the Magistrate has convicted the petitioner, this Court should refuse to interfere on revision. This contention I am unable to accept. It is clear that the notice is the foundation of the conviction, and when the notice is bad in law, the conviction must fail.

Accordingly I accept the application for revision, and set aside the conviction and sentence. The fine, if paid, shall be refunded to the petitioner.

*Revision allowed.*

(1) 22 Ind. Cas. 767; 5 P. L. R. 1914; 2 P. W. R. 1914 Cr.; 15 Cr. L. J. 191.

(2) 13 Ind. Cas. 209; 3 P. R. 1912 Cr.; 56 P. L. R. 1912; 9 P. W. R. 1912 Cr.; 13 Cr. L. J. 17.

## CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 248 OF 1915.

January 21, 1916.

*Present*:—Mr. Justice Chitty and Mr. Justice Walmsley.

*Musammat* MUTESARI—COMPLAINANT

*versus*

NAND KUMAR SINGH—ACCUSED.

*Criminal Procedure Code* (*Act V of* 1898), *s.* 488—*Maintenance for illegitimate child, application for, dismissal of—Order, if final—Magistrate, jurisdiction of, to entertain another application.*

A Magistrate's order dismissing an application for maintenance under section 488 of the Criminal Procedure Code, 1898, is a final order so far as his Court is concerned and he has no jurisdiction to entertain a second application on the same facts. [p 843, col. 1.]

FACTS material to the report will appear from the following extracts from the letter of reference of the Sessions Judge of Sarang:—

"The facts of the case are, that on 5th October 1914 *Musammat* Mutesari made an application to the Sub-Divisional Officer of Sewan under section 488, Criminal Procedure Code, against Nand Kumar Singh for maintenance of her illegitimate child of whom she alleged that Nanda Kumar Singh was the father. After evidence was taken on both sides the Magistrate passed an order on the 12th of January 1915 to the following effect:—

'Arguments heard * * * * Accused has one witness only * * * * * * * Applicant lives or lived next door to Nand Kumar * * * Nand Kumar is her husband's elder brother. The defence is that she is of bad character and was turned out on that account two years ago. It is also pointed out that Nanda Kumar has a wife and children and is fifty years of age * * * * * * * *. Taking all the facts into consideration I am unable to award maintenance to the applicant on the evidence produced. The evidence is slender and the accused can hardly be said to have been the most likely person for the father. The cause is, therefore, accepted unless further evidence should turn up.'

Subsequently on the 12th July 1915 *Musammat* Mutesari filed a fresh application before the Sub-Divisional Officer of Sewan under section 488 against Nand Kumar Singh for maintenance of the same illegitimate child. The learned Sub-Divisional

Officer after taking further evidence passed an order on the 30th September 1915, directing Nanda Kumar to pay Rs. 9 a month maintenance under section 488, Criminal Procedure Code, with effect from the date of the original application. * * * In my opinion this order is illegal, because the learned Sub-Divisional Officer had in effect dismissed the previous application by his order dated 12th January 1915. (Mentioned above.) Thus he had no power to revive the application upon the same alleged facts.

The learned Sub-Divisional Officer in his explanation says that he had not disposed of the original application and had not come to a definite finding.

However, the law does not intend that an application of this kind should be kept hanging over a person's head for months in the hope of further evidence turning up.

Thus I am of opinion that the Magistrate's order of the 12th January 1915 must be held to be a final order and hence his subsequent order of 30th September 1915 is illegal, as he had no power to revive the original application.

For the above reasons I recommend that the order of the learned Sub-Divisional Officer be set aside."

Dr. *Dwarkanath Mitter* and Babus *Manindranath Banerjee* and *Baikuntha Nath Mitter*, for the Accused.

JUDGMENT.—We accept the reference for the reasons given by the learned Sessions Judge and set aside the order for maintenance dated 30th September 1915. We may refer in this connection to the cases of *Musammat Jamoti* v. *Gadalo Kamar* (1) and *Laraiti* v. *Ram Dial* (2). In our opinion, the order of the Sub-Divisional Magistrate of 12th January 1915 dismissing *Musammat* Mutesari's application for maintenance was a final order so far as the Magistrate's Court was concerned.

*Reference accepted.*

(1) 1 C. L. R. 89.
(2) 5 A. 224.

## PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 757 OF 1915.

November 19, 1915.

*Present*:—Mr. Justice Rattigan.

WARYAM SINGH AND OTHERS- CONVICTS—APPELLANTS

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Approver—Corroboration, nature of—Preparation to commit dacoity—Evidence of preaching sedition, relevancy of Penal Code (Act XLV of 1860), ss. 399, 402—Evidence Act (I of 1872), s. 114 (b).*

There should be direct and material corroboration of the statement of an approver who is of very bad character. [p. 845, col. 2.]

Where the charge is that the approver and his companions made preparations to commit dacoity and actually assembled together at various places for that purpose, the evidence that they preached sedition and excited the populace to mutiny does in no way corroborate his statement, though their doing so was also illegal. [p. 845. col. .]

The evidence tending to show that the co-accused or some of them were seen in the company of the approver at or in the vicinity of the places at which, he says, dacoities were to be committed, is not sufficient corroboration of his statement. [p. 845, col. 1.]

Appeal from the order of the Magistrate 1st Class, Ferozepore, exercising enhanced powers under section 30, Criminal Procedure Code, dated the 10th July 1915, convicting the appellants.

Mr. *Nand Lal*, for the Appellants.

The Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellants in this appeal which was preferred through Mr. Nand Lal, Advocate, are (1) Waryam Singh son of Bhag Singh, *Jat* of Math Bhaik in the Gujranwala District, aged 30; 2) Ishar Singh, *Jat* of Boionwala, Zira Tahsil, Ferozepur District, aged 23; (3) Kartar Singh, *Jat Motola*, Ludhiana District, aged 28; (4) Sardara, *Jat* of Singhanwala, Moga Tahsil, District Ferozepur, aged 30; (5) Waryam Singh son of Narain Singh, *Jat* of *Mauza* Bhikhi. Patiala State, aged 28.

In Criminal Appeal No. 846 of 1915 which was presented through the jail authorities, and is connected with the same transaction, the appellant is Bachan Singh, a *Jat* of *Mauza* Bhikhi in the Patiala State, aged 24.

All these appellants have been convicted under sections 399 and 402, Indian Penal Code, by Shahzada Sultan Asad Jan, Magistrate, 1st Class, exercising powers under section 30, Criminal Procedure

Code, and have been sentenced each to seven years' rigorous imprisonment with the exception of Kartar Singh, who has been sentenced to three years' rigorous imprisonment. In this judgment I shall deal with all the appeals.

The charge upon which the appellants were tried and convicted is to the effect that from the 14th to the 27th November (presumably though this is not stated) 1914, they "formed into a gang of more than five persons to commit dacoity and did make preparation to commit dacoity naturally at Singhanwala, Gidarbah and other places" and thereby committed an offence punishable under sections 399, 402 of the Indian Penal Code.

The trial began on the 17th June 1915; the defence closed on the 5th July and judgment was delivered on the 10th July 1915. The record is extremely bulky, no less than 80 witnesses having been produced on behalf of the prosecution alone, but as admitted by the learned Assistant Legal Remembrancer, who appeared to support the convictions, the whole case practically depends on the evidence of the approver, Jawala Singh (P. W. No. 74). This witness has given evidence at great length and for the purposes of the present case the greater part of his evidence is wholly irrelevant and does not in any way concern the charge upon which the appellants were tried. Jawala Singh is admittedly a person of the worst possible character and had suffered seven years' rigorous imprisonment for dacoity prior to his departure for Shanghai. At that place he came into contact with various sedition-mongers such as Gurdit Singh, Harnam Singh, Wir Singh and Nadhan Singh and eventually formed one of a company of about 80 persons who returned to India with Nadhan Singh, with the object of preaching sedition and exciting mutiny.

Among his co-passengers, he tells us--but there is no corroboration of his statement--, were two of the present appellants, Ishar Singh and Waryam Singh son of Bhag Singh. Nadhan Singh's party landed at Columbo and thence proceeded to Madras where they separated, some going to Hyderabad Deccan, others (including the approver) to Delhi. Thereafter the approver appears to have wandered about from place to place, talking sedition to various persons such as Dewa Singh (P. W. No. 31) and endeavouring to heat up recruits. The Police appear to have had their suspicions aroused about his intentions and he was, therefore, constantly on the move. He managed, however, to attend the meeting convened by Nadhan Singh for the 8th November at Moga. Nothing definite was done at this meeting and Nadhan Singh ordered the members to disperse and to meet him later on at a time and place to be subsequently fixed. After this the approver once again wandered about in an aimless fashion until a second meeting was held at Mehna. This too proved abortive and those present, being obviously tired of doing nothing, begged Nadhan Singh to fix a *pukka* date for the great gathering and not to continue the policy of adjourning meetings. They further asked his permission to commit dacoities in the meantime. Nadhan Singh appears to have been reluctant to grant this permission, but eventually told them that they must not commit dacoities on the public, though there was no objection to their looting Government treasuries and armouries, and robbing the Police of their rifles. The approver adds that Nadhan Singh suggested that it would be a good thing if they robbed the Police Station at Gidarbah of its rifles.

Up to this time it is clear from the evidence of the approver that the main object which he and his friends had in view was to excite a rebellion and that it was only after this meeting at Mehna that the suggestion was seriously propounded that dacoities should be resorted to in order to relieve them of *ennui*. I make this remark in this connection, because it is a point upon which the prosecution lay stress that the appellants were seen at various places in company with the approver, Nadhan Singh and other notorious persons. The approver alleges that appellants, himself and others were present on those occasions and at those places in order to commit dacoity, and in the ordinary course of things if these persons had previously been associated for no other purpose, it would be an argument of some weight in support of the prosecu-

tion that they were actually proved to be together in a band at places where (according to the approver) dacoities were to be committed. But it seems to me that this argument loses weight and that the so-called corroboration of the approver's story is really no corroboration at all, when we remember that the appellants are all returned emigrants and that admittedly they were, at all events originally, associated for the purpose of preaching sedition and exciting the populace to mutiny. This, no doubt, was a criminal object and as such punishable under the provisions of Act VIII of 1913, which have added sections to the Indian Penal Code making criminal conspiracy an offence. But the appellants have not been tried on that charge and what we have in the present case to see is whether there is any direct and material corroboration of the approver's statement that he and they made preparations to commit certain dacoities and actually assembled together at various places for that purpose.

According to the approver, after the meeting at Mehna he and eleven other persons, including Bachan Singh, the two Waryam Singhs and Sardara, appellants, started off on a campaign to commit dacoities. Their first intention was to rob the Police Station at Gidarbah, but this idea was abandoned. Sardara then suggested a dacoity at his own village, *Mauza* Singhanwala, but this suggestion was also given up. Next the plan of looting the shop of one Shiv Charan at *Mauza* Bhai Bagha was mooted, but had to be abandoned as it was found that the villagers had got wind of the contemplated attack and had shut up all their shops and houses.

Then the gang proceeded to *Mauza* Bhikhi in the Patiala State, but were dissuaded from committing dacoity there owing to the entreaties of Bachan Singh's and Waryam Singh son of Narain Singh's relations. After this the gang proceeded to Sangawala and thence to Motala where they were homed and fed by Kartar Singh, appellant, who suggested the idea of a dacoity at *Mauza* Rajyana. They proceeded to that place and reconnoitred the house that was to be robbed, but the dacoity never took place as the gang were told that evening that they had to meet the leaders of their party at Badoowal. They accordingly proceeded to the latter place and attended the meeting. The approver was here told off to collect members of the party for another meeting at Moga, and at Moga it was arranged that the party should proceed on the 25th to Mian Mir and there assist the native soldiers who had agreed to mutiny and to attack the Territorial regiments. After this meeting another was fixed at Ferozepore and the members were asked to wait at the latter place until the 30th, when it was expected that the Pathan regiment quartered there would revolt. While waiting there, the approver and certain other persons, including Waryam Singh son of Bhag Singh, decided to commit a dacoity at the Government treasury at Moga and proceeded to that place but were there arrested. Roda, one of the gang, was found on arrest to have a loaded revolver and some 41 cartridges on his person.

Such, briefly summarised, is the approver's story and what I have to decide is whether upon the record before me, there is sufficient corroboration of his statements relating to the preparations for the commission of the alleged dacoities to justify me in upholding the conviction of the various appellants. Obviously it would be in the highest degree unsafe to accept the mere statement of a person of Jawala Singh's character and antecedants as sufficient proof of the facts alleged by him, and unless his statements are independently corroborated, in material and relevant particulars, the appellants must be held entitled to the benefit of the doubt, which would then arise as to their guilt.

Now what is the corroboration to which the Magistrate refers in his judgment? Shortly stated it is, in the main, evidence tending to show that the appellants or some of them were seen in Jawala Singh's company at or in the vicinity of places at which he says dacoities were to be committed. Not one of the dacoities ever was committed and we have only the bare statement of the approver that they were contemplated, while, on the other hand, it is quite possible that these returned emigrants were wandering about in batches in order to carry out the original object of their association, which was to preach sedition and excite the people to rise in mutiny.

WARYAM SINGH *v.* EMPEROR.

Apart from the case of Waryam Singh son of Bhag Singh, with which I shall deal presently, it is not suggested that the appellants were seen in Jawala Singh's company under circumstances which suggested that the gang was about to commit dacoity.

The Magistrate has referred to the evidence of a large number of witnesses as supporting the statements of the approver against each of the appellants. I have carefully scrutinised this evidence but am unable to agree with the Magistrate's view of it. The witnesses, as I have already remarked, testify merely to casual meeting with the approver, who was accompanied by one or more of the appellants on the different occasions. The circumstances in which they saw the approver were of the most ordinary kind and did not in any way suggest that a dacoity was in contemplation. Thus for example Bishen Singh (P. W. No. 12), a *durzi* of Moga, says that on a certain occasion the approver came to his shop to get a shirt made and that Jawala Singh son of Narain Singh was in his company. On another occasion Jawala Singh, Nadhan Singh, Ishar Singh and others paid a visit to Harnam Singh (P. W. No. 19) of Ghal Kalan, stayed with him the night and left the next morning saying they were going to see a wrestling match. Then again Farid Bukhsh (P. W. No. 48) constable, stationed at Mour Railway Station, states that on or about the 18th November at 6-30 A. M. he saw ten or twelve persons passing the godown and suspected them and asked them who they were. They replied that they were a recruiting party. He states that among the persons whom he saw were Waryam Singh son of Narain Singh, Bachan Singh whom he knew before, Jawala Singh and Sardara Singh. The rest of the evidence is of a very similar character and cannot, in my opinion, be said to afford material and relevant corroboration of that part of the approver's story which relates to preparation for the commission of dacoity. The case against Ishar Singh and Kartar Singh is especially weak. As against the former we have the evidence of three persons, Harnam Singh (P. W. No. 19) who merely states that Nadhan Singh, Jawala Singh and five other persons among whom was Ishar Singh came to his village and stayed the night, Waryam Singh (P. W. No. 20) who corroborates Harnam Singh, and Ganda Singh (P. W. No. 17) who deposes that Ishar Singh and the two Waryam Singhs paid a visit to Nadhan Singh at *Mauza* Sula and stayed some days with him.

Kartar Singh is a returned emigrant and knew Jawala Singh previously. He admits that Jawala Singh and some of his friends came to see him on one occasion and that he supplied them with milk. The prosecution evidence is to the effect that he also let them have the use of a *kotha* outside the village and they were subsequently turned out of that *kotha* by Hazara Singh (P. W. No. 56). All this evidence is probably true, but I cannot see that it incriminates Kartar Singh in respect of the offences of which he has been convicted. The Magistrate lays stress on the fact that the *kotha* to which Kartar Singh took Jawala Singh and his friends was outside the village and he infers from this that Kartara knew who the members of the gang were. Kartara no doubt had that knowledge and he probably also knew that Jawala and his friends were sedition-mongers bent on exciting mutiny. There is nothing to show that his knowledge went further than this or that he had any reason to suspect that the party had assembled in order to commit a dacoity. The approver states that Kartara proposed the commission of a dacoity at *Mauza* Rajyana, but as to this we have the approver's statement alone.

As regards Sardara, it is clear from the evidence of the Assistant Surgeon Rahmat Ullah, who was called as a witness by the defence, that the appellant when admitted to jail on the 16th December 1914 was suffering somewhat severely from syphilis and that he had this disease upon him for probably five or six months prior to that date. The Assistant Surgeon states that Sardara could walk about but was quite unable to do anything active.

The only appellant against whom there is material corroboration of the approver's story is Waryam Singh, son of Bhag Singh. According to the approver some five or six persons including himself, Roda Singh and Waryam Singh son of Bhag Singh made up

their minds after the meeting at Ferozepore to loot the Government treasury at Moga; that they proceeded to Moga with this object in view but that on arriving there they heard of the fight in which the *zaildar* and the Sub-Inspector had been killed; that they thereupon decided to return to Ferozepore, but that he, Waryam Singh and Roda were arrested at the Station by the Police. There is ample evidence to show that this arrest did take place and that Roda when captured had on his person a loaded pistol and 45 cartridges.

As regards Bachan Singh, evidence has been given to the effect that after his arrest he pointed out a place outside *Mauza* Bhikhi, his village, where he had buried a revolver and that this revolver was found at the spot indicated. As a matter of fact probably most of the returned emigrants had revolvers in their possession, but it does not necessarily follow that Bachan Singh intended to use that revolver in any dacoity. I think his case is essentially different from that of Waryam Singh son of Bhag Singh, who was actually arrested at the spot where the dacoity was about to be committed in the company of a man who had a loaded pistol upon him.

Taking all the facts into consideration, I am of opinion that there is no sufficient proof of the approver's story as regards any of the appellants, except Waryam Singh son of Bhag Singh. Accordingly I accept the appeal of Waryam Singh son of Narain Singh, Bachan Singh, Kartar Singh, Sardara and Ishar Singh and acquit them. I maintain the conviction of Waryam Singh son of Bhag Singh and dismiss his appeal.

*Appeal of all but one accepted.*

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## PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1113 OF 1915.

November 12, 1915.

*Present:*—Mr. Justice Shadi Lal.

MOOL CHAND AND ANOTHER—CONVICTS—PETITIONERS

*versus*

EMPEROR—PROSECUTOR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 439—Complaint, non-mention of assault in—Conviction for assault, illegality of—Penal Code (Act XLV of 1860), s. 323.*

Where a complaint merely mentioned the fact of the accused having used abusive language but did not contain any mention of assault and the accused was convicted under section 323, Indian Penal Code:

*Held*, that the conviction was bad and liable to be set aside in revision. [p. 848, col. 1.]

Petition for revision of the order of the District Magistrate, Lahore, dated the 25th of February 1915, modifying that of the Magistrate, 1st Class, Lahore Cantonment, dated the 5th of November 1914, convicting the petitioners.

FACTS.—On 10th October 1914, at 10 A. M., the petitioners, Mool Chand and Milkhi Ram, along with one *Musammat* Hukam Devi were taken to the Cantonment Magistrate, Lahore, by a Police constable on the allegation that the petitioners were abusing *Musammat* Hukam Devi, and on being prohibited from doing so, they used improper language towards the constable also, and consequently they were liable to be dealt with under section 67 of the Cantonment Code. Before the Court they were accused of hurt and assault under sections 323 and 352, Indian Penal Code, and were ultimately convicted under section 323, Indian Penal Code.

On 12th October 1914, another complaint was brought against the petitioners by one Harji, tonga driver, on the allegation that on 10th October 1914, at 10 A. M., the petitioners engaged his tonga and on their returning from the Court they struck him when he demanded the fare from them. In this case also the petitioners were convicted and fined under section 323, Indian Penal Code. The petitioners applied for setting their convictions aside in both cases, on the grounds *inter alia* that there was no mention of any assault in the first report of the Police, and that when at 10 A. M. on 10th October 1914 they were taken to the Court by the Police constable, they could not have engaged the tonga of Harji complainant at that time. The Chief Court on revision set aside the conviction only in Hukam Devi's case by the following judgment.

Lala *Hukam Chand*, for the Petitioners.

JUDGMENT.—As regards the assault on the complainant Harji, the Magistrate has believed the evidence of the witnesses and there is no adequate reason for interfering,

in revision, with the finding of facts. The case brought by *Musammat* Hukam Devi stands, however, on a different footing. The complaint instituted by the Inspector of Police on her behalf merely mentions the fact of the accused having abused her, and does not contain the slightest allegation of the alleged assault. That being so the conviction under section 323, Indian Penal Code, cannot be upheld. I accordingly accept the application for revision so far as to quash the order of conviction in the aforesaid case and I direct that the fines, if paid by the petitioners, be refunded to them.

*Petition partly accepted.*

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## LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 261-B OF 1915.

November 29, 1915.

*Present*:—Mr. Justice Ormond.

MA SHEIN - PETITIONER

*versus*

KIM SEIN *alias* SAW CHAN SEIN—RESPONDENT.

*Buddhist Law, Chinese—Marriage, forms of—Presumption—Long cohabitation.*

Though there are usually six preliminary steps to a first class marriage in China, these forms are not indispensable and there is nothing to show that any particular ceremony is essential for a valid marriage under the Chinese Law.

If the parties cohabit for several years as man and wife, the presumption that there was a valid marriage must prevail.

*Ma Thein Shin* v. *Ah Shein*, 24 Ind Cas. 367; 7 Bur. L. T. 246, followed.

Review of the order of the 1st Class Township Magistrate of Mudon, dated the 7th April 1915, passed in Criminal Miscellaneous No. 5 of 1915.

ORDER.—The petitioner Ma Shein applied under section 488, Criminal Procedure Code, for an order for maintenance against her husband, the respondent Kim Sein. The respondent denied that petitioner was his wife, because neither his parents nor her parents gave him in marriage when he was young. The parties eloped when they were each 16 years of age and respondent took the petitioner to his father's house where they lived for one month as husband and wife. They then stayed a day or two in petitioner's parents' house. Respondent then went to school at Moulmein for three years and spent his holidays partly with his father and partly with the petitioner. During this period of three years respondent's step-mother gave petitioner a monthly allowance of Rs. 10. When respondent left school, the parties lived four months in respondent's uncle's house and then for about a year in petitioner's parents' house. About three years ago the parties got a divorce from the headman, but were reconciled that night and continued to live together as man and wife. About five months before her application, the petitioner became pregnant by the respondent. The respondent has now taken another wife. The parties are apparently well-to-do. The respondent's father is Chinese and his mother a Talaing.

The Magistrate dismissed the petitioner's application because there was no marriage ceremony as is required by Chinese Buddhist Law and he held that there was no valid marriage.

From the evidence, I think, it is clear that according to Burmese Buddhist Law there was a valid marriage, which has been sanctioned by the parents of both the parties. It may be open to question whether a foreigner who contracts a marriage in a British dominion, which is valid according to the law administered in that place, is entitled to repudiate the marriage on the ground that certain formalities were not observed which are requisite for a valid marriage according to his personal law as administered in the foreign country. But it is unnecessary to go into that question, because in Parker's Essay on Comparative Chinese Family Law which has been accepted as an authority in *Ma Thein Shin* v. *Ah Shein* (1), it is stated that though there are usually six preliminary steps to a 1st class marriage in China, those forms are not indispensable.

Assuming, therefore, that Chinese Buddhist Law is applicable to the case, there is nothing to show that any particular ceremony is essential for a valid marriage under that law. And the parties having cohabited for several years as man and wife, the presumption that there was a valid marriage must prevail.

I set aside the order of the Magistrate and direct that the petitioner's application be proceeded with and the amount of maintenance to be awarded to her determined.

*Order set aside.*

(1) 24 Ind. Cas 367; 7 Bur. L. T. 246.

ABDUL HAKIM GAZI *v.* PANCHI DASI.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1491 OF 1913.

February 10, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

ABDUL HAKIM GAZI—DEFENDANT No. 1 —APPELLANT

*versus*

PANCHI DASI AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Decree*—Ex parte *decree—Decree-holder auction-purchaser, purchaser from—Plea of* bona fide *purchase for value, raising of—Consent decree obtained by forging name of judgment-debtor in* solenamah, *effect of—Fraudulent consent decree, whether requires to be set aside—Consent decree, value of—Evidence Act (I of* 1872), *s.* 44.

A purchaser from a decree-holder auction-purchaser in execution of an *ex parte* decree cannot avail himself of the plea of *bona fide* purchase for value. [p. 850, col. 1]

*Satis Chandra Ghose* v. *Rameswari Dasi*, 31 Ind. Cas. 894; 22 C. L. J. 409, applied.

In a suit for the recovery of possession of a property on declaration of plaintiff's right as auction-purchaser in execution of a rent decree, it was found that in execution of a mortgage-decree by consent on a *solenamah* executed by the mortgagors and the mortgagee the same property was purchased by the mortgagee-decree-holder and sold to the defendant No. 1, and the plaintiff though made a party to the mortgage suit was no party to the decree by consent but his name was forged in the *solenamah*:

*Held*, that the plaintiff was in a stronger position than a mere *ex parte* judgment-debtor and the defendant No. 1 could not resist his title on the plea of *bona fide* purchase for value but must look to his fraudulent vendor for compensation. [p. 850, col. 1.]

*Held*, also, that the plaintiff being no party to the consent decree could attack it in his suit by virtue of section 44 of the Evidence Act and did not require to have it set aside. [p. 850, col. 1]

*Rajib Panda* v. *Lakhan Sendh Mahapatra*, 27 C. 11; 3 C. W. N. 660, followed.

*Golab Koer* v. *Badshah Bahadur*, 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197; *Sarbesh Chandra Basu* v. *Hari Dayal Singh*, 5 Ind. Cas. 236; 14 C. W. N. 45; 11 C. L. J. 346, distinguished.

*Held*, further, that the consent decree against the plaintiff was a nullity and did not require to be set aside as it would, if there were an *ex parte* decree against him after making him a party. [p. 850, col. 2]

A consent decree differs from a decree of Court in this, that no one is a party to the decree who has not willingly contracted to govern himself by the decree if *sui juris* and if he is not, the Court must have declared the decree contracted for him by his guardian to be for his benefit. [p. 850, col. 2]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 17th January 1913, confirming that of the Munsif, Satkhira, dated the 1st September 1911.

Babus *Sarat Chandra Ray Chowdhury* and *Dhirendra Krishna Roy*, for the Appellant.

Babu *Broja Lal Chakraberty* for Babu *Hara Prosad Chatterjee*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for recovery of possession of 13 plots of land measuring 20 *bighas* 14 *cottas* on declaration of the plaintiff's right as auction-purchaser thereto. Three persons Arif, Khater and Dhari called Dwarika in the record had a *jama* of Rs. 24. This was split up by partition recognised by the landlords and the *jama* of Rs. 16 fell to Arif and Khater and one of Rs. 8 to Dwarika. The plaintiff purchased these *jamas* at sales in execution for their own rent brought by the *malkis*. He purchased the smaller *jama* on the 16th February 1903 and the larger *jama* on the 21st July 1903. The whole *jama* had been mortgaged by way of conditional sale to one Jadab Sirdar, defendant No. 16, we are told in 1885, but there is nothing in the paper-book to show this and in 1903 the mortgagees sued the mortgagors and made the plaintiff a party. On the 5th May 1903, a *solenamah* was filed by all the mortgagors-defendants purporting to be also signed by the plaintiff. On the basis of this compromise the mortgaged property was put up to sale under a decree absolute made on the 9th April 1904, and purchased by the decree-holder at the auction sale. He sold the land to the defendant No. 1 by a private arrangement.

It has been found as a fact that the plaintiff did not sign the *solenamah* and was no party to the decree by consent. It is further found that the alleged signature of the plaintiff on the *solenamah* is a fraudulent imitation of his real signature and that the mortgagors incurred no liability under that decree, which had the effect of depriving the plaintiff of the property which he had purchased. The fraud was the fraud of the mortgagors. The Subordinate Judge has held that the plaintiff's title has not been affected by the sale and that he can recover.

The contentions of the defendant No. 1 in appeal are, *first*, that he is a *bona fide* purchaser for value under section 53 of the Transfer of Property Act and cannot be ejected, and *secondly*, that the plaintiff

cannot succeed without having the consent decree set aside and this cannot be done in the absence of the mortgagors. If the defendant No. 16 had no title to sell, the plaintiff must look to him for remedy.

As regards the *first* question the decision of this Court in *Satis Chandra Ghose* v. *Rameswari Dasi* (1) is a complete answer. The purchasers from decree-holders auction-purchasers in execution of an *ex parte* decree cannot avail themselves of the plea of *bona fide* purchasers for value. By the conduct of the mortgagors and mortgagees in forging the plaintiff's name in the *sole-namah*, he was in a stronger position than a mere *ex parte* judgment-debtor. Certainly the defendant No. 1 must look to his fraudulent vendor, defendant No. 16, for compensation and cannot resist the plaintiff's title.

As regards the *second* point the rule laid down in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (2) seems quite sufficient. The plaintiff being no party to the consent decree can attack it by virtue of section 44 of the Evidence Act and does not require to have it set aside.

It is *finally* suggested that the consent decree was not set up as a defence to this suit, because when the plaintiff brought his suit in the first instance in 1907 with a mere formal defect which compelled him to withdraw it with liberty to bring a fresh suit on the same cause of action this consent decree was then set up. The plaintiff clearly denies this; but even if it were true, of which there is no finding, the point not having been raised (for the written statement says that the plaintiff's denial is false inasmuch as he did sign the *solenamah* and knew of it all along), that it was set up in answer to the first suit, it would not affect the operation of section 44 of the Evidence Act, which only takes effect when the decree is put in proof in Court by the adverse party. Against this it is contended that certain rulings of this Court lay down hard and fast rules and there are only three ways to get rid of the *solenamah* upon which the decree has been passed by the person against whom it has been passed, *firstly*, to set aside the decree by a suit *secondly*, to get a review, and *thirdly*, to get the Court which passed the decree to vacate it as passed *ex parte*. The rulings cited to us, *Golab Koer* v. *Badshah Bahadur* (3) and *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (4), certainly lay down nothing of the kind. The case of *Golab Koer* v. *Badshah Bahadur* (3) merely decides that an application for review of judgment and vacating a consent decree on the ground of fraud does not bar a suit for setting aside a decree on the ground of fraud. In the case of *Sarbesh Chandra Basu* v. *Hari Dayal Singh* (4), it is laid down that a consent decree which has become infructuous by reason of something unlawful in the agreement or by reason of the fact that it cannot be specifically enforced by a suit can be successfully attacked by a suit just as if it had been obtained by fraud. But the plaintiff who is no party to the compromise cannot be bound by the decree merely because he has been a party in the suit and decree has been made against him, and is not bound to set it aside. A consent decree differs from a decree of Court in this, that no one is a party to the decree who has not willingly contracted to govern himself by the decree if *sui juris* and if he is not, the Court must have declared the decree contracted for him by his guardian to be for his benefit. On the facts found here an *ex parte* decree might have been passed against the plaintiff, but the mortgagors and the mortgagees elected to get a forged consent decree made against him. That decree is a nullity and does not require to be set aside, as it would, if it were an *ex parte* decree against the respondent, after making him a party.

The defendant, therefore, has acquired no title from defendant No. 16 and it is unnecessary to go into the question of the plaintiff's title in detail. But we should in any case be concluded by the finding of fact in the lower Appellate Court's judgment that the *maliks* sold the holdings for arrears of their own rent. The plaintiff's title is,

(1) 31 Ind. Cas. 894; 22 C. L. J. 409.
(2) 27 C. 11; 3 C. W. N. 660.
(3) 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197.
(4) 5 Ind. Cas. 236; 14 C. W. N. 451; 11 C. L. J. 346.

therefore, complete from the date of his purchase.

For all these reasons the appeal must be dismissed with costs.

*Appeal dismissed.*

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 14 OF 1913-14 OF AZAMGARH DISTRICT.

February 14, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

ILAHI KHAN—DEFENDANT—APPLICANT

*versus*

RAJAB ALI—PLAINTIFF—RESPONDENT.

*U. P. Land Revenue Act (III of* 1901), *s.* 219—*Revision*—Jamabandi, *application for correction of*—*Summary disposal*—Res judicata—Sir, *entry of, in partition proceedings, if binds tenant who is no party.*

Where an application for correction of *jamabandi* is disposed of in a summary manner without fixation of issues, the decision does not operate as *res judicata.*

An entry of a land as *sir* in partition proceedings does not bind a tenant who was no party to the partition, and to hold him so bound is a gross and palpable error of law justifying interference in revision.

Application for revision of the order of the Commissioner of Gorakhpur Division, dated the 7th November 1913, confirming that of the Assistant Collector, Azamgarh District, in a case of ejectment.

JUDGMENT.

CAMPBELL, J. M.—(*January* 18, 1915.)—I am unable to agree with the Commissioner in this case. I do not think that the matter is *res judicata* as between the parties on account of the order of 1911, as the application for correction of the *jamabandi* was disposed of in a summary manner without fixation of issues.

It is clear that the partition papers of 1302 *Fasli* cannot be accepted as possessing any great degree of accuracy, as old No. 777 was recorded as respondent's *sir*, which it would not possibly be, having only been cultivated for the first time in that year.



As against this I can see no definite reason for rejecting the accuracy of the settlement record of 1309 *Fasli*, which shows applicant as occupying No. 777, on which he has now acquired occupancy rights.

I would, therefore, set aside the orders of the lower Courts as regards that part of No. 1339 which represents old No. 777, and dismiss plaintiff's suit for ejectment on the ground that defendant has occupancy rights.

I would uphold the Commissioner's order for the rest of the land in suit.

I would give defendant-appellant half his costs in all Courts.

HOLMS, S. M.—I agree, on the understanding that that part of No. 1339 which represents old No. 777 can be identified and is a separate sub-plot. The entry of *sir* in partition proceedings does not affect the tenant who was no party to the partition.

After writing this order (which will remain good) I ascertained from my colleague that the reason why he proposed to interfere on revision was that the lower Courts acted with "material irregularity" in accepting the order of 1911 as final and in attaching undue importance to the partition papers, which could not affect the appellant's rights. I would prefer to base the grounds for interference in revision on a gross and palpable error of law having been committed which has resulted in substantial injustice.

*Application allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3472 OF 1912.

July 11, 1913.

*Present*:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MAHARAJA BIRENDRA KISORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

*versus*

NABIN CHANDRA CHAKRAVARTY AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant*—*Relationship of landlord*

*and tenant*—Khatian, *entry in—Adverse possession—Presumption.*

In a suit for declaration of title and assessment of rent to the land in suit the plaintiff relied on an entry in a *khatian* for the purpose of establishing the relationship of landlord and tenant. The defendant set up title by adverse possession. It was found that the defendant was in possession even prior to the entry:

*Held*, that inasmuch as no rent was ever paid the inference was that not only there was no relationship of landlord and tenant between the parties but that the defendant was in adverse possession. [p. 853, col. 1.]

Appeal heard under Order XLI, rule 11 of the Code of Civil Procedure, against the decree of the Officiating District Judge, Tipperah, dated the 20th August 1912, affirming that of the Munsif, 2nd Court, Kashba, dated the 20th May 1912.

FACTS appear from the following judgment of the lower Appellate Court, dated 20th August 1912:—

"This appeal arises out of a suit by plaintiff for declaration of title and assessment of rent to the land in suit. Plaintiff's case is that the land is in his *zemindari* and the defendant has been in possession of it without obtaining settlement from him or from his predecessors.

The defendant set up title by adverse possession for over the limitation period.

The lower Court has dismissed the suit and the plaintiff has appealed.

The only question urged for determination in this appeal was that of *limitation*.

It is admitted on behalf of the appellant that defendant has been in possession for over the limitation period. The only question for determination is whether that possession has been adverse possession for over 12 years before this suit.

Now it appears that the defendants set up their title by adverse possession before the Settlement Officer in March 1896, *i.e.*, 12 years before this suit. This claim of adverse title was set up to the knowledge of the plaintiff. The period of limitation starts from the date when an adverse title and possession are set up to the knowledge of the opposite party. Thus the plaintiff's claim is clearly barred by limitation and the appeal must fail. This case, I may remark, is exactly analogous to the case reported as *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1), in which their Lordships of the High Court held the same view.

The learned Pleader for the appellant has filed a certified copy of a judgment of the Hon'ble High Court in another analogous case reported as *Aman Gazi* v. *Birendra Kishore Manikya Bahadur* (2), decided by Stephen, J., and Richardson, J., on the 3rd May 1912, in which their Lordships held that the period of limitation began to run from the date of the final publication of the Record of Rights, and not from the date of the actual setting up of the adverse title by the defendant. With all due respect to the judgment of their Lordships in the last case I consider it right to follow the ruling laid down in *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1). It is not clear how an inquiry by the Settlement Officer followed by an entry in the Record of Rights can nullify the effect of the claim of adverse title and possession previously set up by the defendant so far as the running of the period of limitation is concerned. Let us look at the position clearly. In March 1896, while the Settlement operations were in progress, the defendant, to the knowledge of the plaintiff, set up before the Settlement Officer his title by adverse possession. He asserted that he paid no rent in respect of the land in question and that so far as this land was concerned, he had acquired title by holding the land without paying rent to any one. All that the Settlement Officer did was to record his opinion in the finally published *khatian* that the defendant held the land without paying rent. It is clear that so far as the question of title was concerned, the entry in the Record of Rights left the matter indeterminate. That this was so is quite clear from pages 88 and 89 of the Settlement Officer's (Mr. J. G. Cumming) report on the survey and settlement of the Chakla Roshanabad Estate 1892-99, to which the learned Munsif has made reference. While thus leaving the question of title open, the Settlement Officer found the defendant's plea of possession without payment of rent correct. The parties were thus left on the same status as before. It is difficult to see how

(1) 13 Ind. Cas. 518; 15 C. L. J. 203; 39 C. 453; 16 C. W. N. 931 *note*.

(2) 15 Ind. Cas. 64; 16 C. W. N. 929

the entry in the Record of Rights could have made any difference in the defendant's position and how it could have prevented limitation running from the date of his claim of adverse title and possession; for it is admitted that his possession continued.

In the appeal decided by their Lordships Stephen and Richardson, JJ., they observe that in the case reported as *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1) their Lordships did not consider the effect of any entries in the Record of Rights. But it will appear that in the judgment of Chatterjee, J., in the latter case the entry in the *khutian* is expressly referred to and the *khatian* entry was evidently held not to have prevented limitation from running from the actual date of the setting up of the adverse title and possession.

The appeal is accordingly dismissed under Order XLI, rule 11 of the Civil Procedure Code."

Babu *Romes Chandra Sen*, for the Appellant.

JUDGMENT.—We dismiss this appeal for this reason. It appears to us that a fair reading of the judgment under appeal is that there was no such relationship between the parties established as would preclude the application of the doctrine of adverse possession. The plaintiff in this case, as in all other cases, relied on the *khatian* and that alone, for the purpose of establishing that relationship. The Courts were not satisfied on the entry in the *khatian* that there was the relationship of landlord and tenant. Although there was an entry which was susceptible of that meaning, having regard to the fact of long possession—possession which, according to the judgment of the Munsif, was prior to the entry—and to the fact that no payment of rent was ever made, evidently the inference drawn was that not only was the relationship of landlord and tenant not established, but further that there has been an adverse possession proved which furnishes an answer to the plaintiff's claim.

The appeal is accordingly dismissed under Order XLI, rule 11, Civil Procedure Code.

*Appeal dismissed*

## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1490 OF 1915.

February 2, 1916.

*Present:*—Mr. Justice Shadi Lal.

AMIR CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

*versus*

JAWAHIR MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Partnership—Property bought with money belonging to firm, nature of -Partnership at will, how dissolved -Intention—Suit for dissolution of partnership and rendition of accounts—Limitation Act (IX of 1908), Sch. I, Art.* 106.

In the case of a partnership at will, the intention to dissolve may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern. [p. 854, col. 1.]

*Sudarsanam Maistri* v. *Narasimhulu Maistri*, 25 M. 149 at p. 164; 11 M L. J. 353; *Moung Tha Huyin* v. *Mah Thein Myah*, 28 C. 53; 5 C. W. N. 114; 27 I. A. 189 (P. C.), referred to.

A suit for the dissolution of partnership not entered into for a fixed term and for rendition of accounts was filed in July 1913. It appeared, however, that the business of the firm began to fail in *Sambat* 1963 (1906 A. D.) and was closed in 1966, the only work done subsequently consisted of realising assets, paying debts due to the creditors and recovering rents from tenants in occupancy of the immoveable property belonging to the partnership:

*Held*, that as the partnership came to an end long before three years prior to the date of institution of the suit for dissolution of partnership, the suit did not lie and that the prayer for the rendition of the accounts of a dissolved partnership could not be granted in view of the lapse of the period prescribed by Article 106 of the Limitation Act. [p. 854, col. 2.]

Lands or houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property, unless it be proved that from time to time portions of the partnership assets were, by mutual agreement, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners. [p 855, col 1.]

*Sudarsanam Maistri* v. *Narasimhulu Maistri*, 25 M. 149 at p. 164; 11 M. L. J. 353; *Nihal Devi* v. *Kishore Chand*, 8 Ind. Cas. 999; 142 P W R. 910; 11 P. L. R. 1911; 97 P. R 1910, referred to.

First appeal from the decree of the District Judge, Amritsar, dated the 2nd of June 1914, dismissing the suit.

Mr. *H. Beechey* and Lala *Labhu Ram*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, for the Respondents.

JUDGMENT.—The suit brought by the plaintiffs for the dissolution of partnership and the rendition of accounts has been dismissed by the District Judge as barred by

time, and I have, after examining the arguments advanced on both sides and the evidence on the record, reached the conclusion that the partnership had been dissolved more than three years prior to the 1st July 1913, the date on which the suit was instituted.

It will be observed that the partnership in question was not entered into for a fixed term, and may, therefore, be treated as a partnership at will. The business carried on by the firm consisted of buying and selling of piece-goods, and there is not a scintilla of evidence on the record to show that any such business was done within three years prior to the suit. The testimony of the defendants' witnesses Sant Ram and Ganga Ram, both of whom appear to be respectable and disinterested persons, shows that the business of the firm began to fail in *Sambat* 1963 (1906 A. D.), when several Marwari firms at Amritsar came to grief, that the shop was finally closed in *Sambat* 1965, and that no business was done after Viru Mal's death which took place in *Magh* or *Phagan* of the latter year. Indeed, Ramji Das, one of the witnesses produced by the plaintiffs, deposes that he was a *munim* of the firm, that the business was closed about five or six months before he left in *Phagan* 1966, and that he simply realised outstandings after the closing of the business.

The only work done subsequently consisted of realising assets, paying debts due to creditors, and recovering rents from tenants in occupancy of the immoveable property belonging to the partnership. Having regard to these facts I consider it unnecessary to determine the question whether the two joint families were partners in the firm, and whether the death of Viru Mal did not, by itself, amount to a dissolution of the partnership. In the case of a partnership at will, an intention to dissolve may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern; though no positive rule can be laid down as to what evidence will suffice. However precarious or speculative the subject-matter of a partnership may be, it is a matter of inference to be drawn from the fact of each case whether or not there has been abandonment or loss of interest by a partner, *vide Sudarsanam Maistri* v. *Narasimhulu Maistri* (1) and *Moung Tha Huyin* v. *Mah Thein Myah* (2).

Upon the material before me, I am convinced that the partnership came to an end long before three years prior to the date of institution of the suit and that the present suit for the dissolution of the partnership does not lie, and that the prayer for the rendition of the accounts of a dissolved partnership cannot be granted in view of the lapse of the period prescribed by Article 106 of the Limitation Act.

I am unable to accept the contention that the plaintiffs were not allowed to produce all their oral evidence or that they did not get sufficient opportunity to examine the partnership books. The order of the District Judge dated the 25th May 1914 contains a correct statement of the facts in this connection, and I am satisfied that plaintiffs were afforded every reasonable facility to adduce their evidence and that the Court was justified in not acceding to requests for further adjournments, which were intended to delay the decision of the case.

If appears that part of the assets of the firm was invested in immoveable property, and consequently it is argued that both the parties became co-owners therein, and that the expiry of the period prescribed by Article 106 does not preclude the plaintiffs from recovering their share in the immoveable property. Now the plaint makes it abundantly clear that the house property is a part of the firm's assets, and the plaintiff's Pleader, when called upon to pay Court-fee on the claim in respect of immoveable property, made the following significant statement on 19th August 1913: "The suit is one purely for rendition of accounts. It is only after the settlement of accounts that the plaintiff can be in a position to know whether anything remains, out of which he is entitled to a certain share. There is a possibility that all the assets of the firm including the immoveable property might not be sufficient to meet the liability of the firm, so it cannot be definitely stated that the parties will get any

(1) 25 M. 149 at p. 164; 11 M. L. J. 353.
(2) 28 C. 53; 5 C. W. N. 114; 27 I. A. 189 (P. C.).

portion of the immoveable property. The whole thing depends upon adjustment of accounts." In view of this statement of the plaintiffs' claim, I have no hesitation in holding that, if the claim is barred in respect of the moveable property, it is equally barred as regards the immoveable. The contention of the appellants would, as observed in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (1), "certainly hold good if it had been alleged and proved that, from time to time, portions of the assets of the partnership were, by the agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners.

"In the absence, therefore, of any such allegation and proof, lands and houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property.

"The case is, therefore, governed by the ordinary rule that, unless a contrary intention appears by express agreement, or by the nature of the transaction, property bought with money belonging to the firm, is deemed to have been bought on account of the firm."

This judgment has been followed by a Division Bench of this Court in *Nihal Devi* v. *Kishore Chand* (3).

Accordingly I hold that the suit is barred in respect of both moveable and immoveable properties. The appeal, therefore, fails and is hereby dismissed with costs.

*Appeal dismissed.*

(3) 8 Ind. Cas. 999; 97 P. R. 1910; 142 P. W. R. 1910; 11 P. L. R. 1911.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 888 OF 1914.

February 10, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

*Sheikh* UMAR ALI—PLAINTIFF—APPELLANT

*versus*

JADU RAM KAPALI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act* (*VIII of* 1885), *s.* 5—*Non-transferable occupancy holding, transferee of—Co-sharer landlord, recognition by, effect of.*

A settlement by a co-sharer landlord does confer a right with regard to the share of that landlord. Therefore, a transferee of a non-transferable occupancy holding, who afterwards obtains a recognition from some of the co-sharer landlords, acquires a good title with regard to the shares of those landlords and as such has the right to joint possession of the holding. [p. 856, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Mymensingh, dated the 12th January 1914, reversing that of the Munsif, 1st Court, Kishoregunj, dated the 13th of November 1912.

FACTS material to the report were as follows:—

The plaintiff purchased a non-transferable occupancy-holding and thereafter obtained the recognition of some co-sharer landlords; the defendants as *burgadars* of the land in suit were in possession. The plaintiff dispossessed them, but they recovered possession in a suit under section 9 of Act I of 1877. These *burgadars* then, perceiving the precarious nature of their right, approached the landlord, and obtained a settlement of the entire holding from them, but the co-sharer landlords, who had recognised the plaintiff's purchase, did not join in the settlement. The plaintiff being out of possession of the entire holding brought a suit against the defendants for declaration of his title in respect of the shares of the co-sharer landlords who had recognised him and for recovery of possession thereof. The Munsif decreed the suit and granted him possession of these shares jointly with the defendants. On the defendants' appeal the Subordinate Judge dismissed the plaintiff's suit and observed "The *jote* is admittedly non-transferable and the plaintiff did not acquire any right by his purchase. The settlement by the co-sharer *maliks* also gave him no right as *ryot*. *Vide* the principles laid down in the case of *Kader Bakhsh* v. *Ram Manikya Das* (1). The plaintiff has, therefore, no right to the land. As the suit fails on merits it is unnecessary to try the question of limitation."

The plaintiff thereupon appealed to the High Court.

(1) 19 Ind. Cas. 395.

Babu *Mukunda Nath Roy*, for the Appellant.

JUDGMENT.—The plaintiff in this case purchased a non-transferable occupancy holding and thereafter obtained a recognition from some of the co-sharers. The defendants had obtained a title, from some other co-sharers. The learned Subordinate Judge has dismissed the suit of the plaintiff on the ground that he had no title, because the settlement by a co-sharer landlord does not confer any title with regard to the share of that landlord. We think that the learned Judge is wrong in holding that a settlement by a co-sharer landlord does not confer any title. On the other hand there is ample authority for saying that a settlement by a co-sharer landlord does confer a right with regard to the share of that landlord. We think, therefore, that the first Court was right in decreeing joint possession to the plaintiff in respect of the share of 15/26ths.

With regard to the question of limitation, it is clear from the pleading and the proceedings in the Court below that the plaintiff was in possession in March 1900, that is, at the time when there was a suit under section 9 of the Specific Relief Act by the defendants against the plaintiff and the suit being brought in February 1912 was quite within twelve years thereof. There is, therefore, no necessity for sending down this case to the Court below for a finding on the question of limitation.

We set aside the decree of the lower Appellate Court and restore that of the first Court with costs.

*Appeal allowed.*

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 3482 TO 3484, 3527, 3530, 3572, 3574, 3575, 3579 AND 3580 OF 1912.

July 11, 1913.

*Present:*—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

MAHARAJA BIRENDRA KISORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

*versus*

RAMKUMAR CHAKRAVARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Adverse possession—Landlord and tenant—Settlement proceeding, right claimed at—Hostile right—Suit for possession—Limitation.*

A right claimed by a defendant at a settlement proceeding in himself is a right claimed hostile to the plaintiff and a suit brought more than 2 years after is barred by limitation. [p. 857, col. 1]

Appeals heard under Order XLI, rule 11, Civil Procedure Code, against the decrees of the District Judge of Comilla, dated the 24th May 1912, affirming that of the Munsif, 2nd Court, at Comilla, dated the 17th February 1912.

FACTS appear from the following judgment of the first Court, dated the 12th February 1912:

This is a suit for assessment of rent on certain property and for mesne profits. The case for the plaintiff is that at the last cadastral survey, the defendants were recorded as tenure-holders under plaintiff with regard to the disputed property; that the defendants have not yet taken settlement; and that hence this suit.

The defendants plead *nishar* right and raise other objections, which will appear from the issues.

The issues settled are :—

1. Is the suit barred by limitation ?
2. Is the disputed property liable to assessment of rent ? If so, at what rate ?
3. Is the plaintiff entitled to get mesne profits ? If so, how much ?
4. To what relief, if any, is plaintiff entitled ?

### FINDINGS.

*Issue* No. 1:—According to the recent decision of Justices Caspersz and Chatterjee, limitation ought to run from the date of the dispute This suit was instituted more than 12 years after the date of decision

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of the dispute, *vide* defendants' documents. Hence it is barred.

The other issues need not be decided.

Hence ordered that the suit be dismissed with costs.

Babu *Gobind Chander Dey Roy*, for the Appellant.

JUDGMENT.—Both Courts have agreed in dismissing this suit, and it is conceded that no case is more favourable to the plaintiff than this. The Munsif expressly purported to follow the decision in *Birendra Kishore Manikya Bahadur* v. *Roshan Khan* (1), where, in circumstances like the present, the learned Judges considered that hostile right was claimed to the knowledge of the plaintiff, and no suit was brought until more than 12 years after. Therefore, it was thought that the suit as framed was clearly barred by limitation and liable to be dismissed. That decision was certainly binding upon the lower Appellate Court, as it is on us, and we must, therefore, dismiss the appeal.

*Appeal dismissed.*

(1) 13 Ind. Cas. 518; 39 C. 453; 16 C. W. N. 93 *n*; 15 C. L. J. 203.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 3 OF 1913-14 OF JHANSI DISTRICT.

March 19, 915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

KHUSHAL SINGH PLAINTIFF—APPELLANT

*versus*

BHAGWAN DAS—DEFENDANT—RESPONDENT.

*Agra Tenancy Act (II of 1901), ss. 18, 28—Ex-proprietary tenant, permanent sub-lease granted by—Ex-proprietary right extinguished—Sub-lease, if binding on landholder.*

*Quære.*—Whether any sub-lease given by a female ex-proprietary tenant should be binding in perpetuity against the landholder under section 28 of the Agra Tenancy Act for a period after her interest as ex-proprietaty tenant is extinguished. [p. 858, col. 1.]

Second appeal from the order of the Commissioner of Jhansi Division, dated the 11th May 1914, reversing that of the Assistant Collector, Jhansi, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February* 27, 1915).—Assuming for present purposes that the ex-proprietary tenant, *Musammat* Nona Dulaya, abandoned her holding and that her rights of occupancy were extinguished under section 18, I am unable to understand the Commissioner's finding that the *zemindar* was not entitled to eject the present respondent Bhagwan Das, the sub-tenant, until after the lady's death. The abandonment, if established, was equally with her death operative to extinguish her interest and I do not know why the Commissioner has made the distinction, unless perhaps on account of her having a life-interest only. But according to the written statement it was the lady herself who sold her proprietary rights, and she had full ex-proprietary rights. [*Babu Gopi Krishna* v. *Babu Mangla Prasad* (1).] If the covenant in the perpetual lease was enforcible at all, it presumably was enforcible even after the lady's death, and this is the respondent's present contention. He contends that under section 28, when the interest of an ex-proprietary tenant is extinguished, then the landlord is bound for ever by a perpetual sub-lease given by the ex-proprietary tenant. This on the face of it seems absurd. The result is that the perpetual sub-lessee might acquire a greater interest in the land than the occupancy tenant had. No rulings have been produced before me as to the contention that a female ex-proprietary tenant has a right to sublet for ever under section 25 (4), and the point is not an easy one. Appellant refers me to *Gulzari Mal* v *Lachmi Chand* (2), in which an occupancy tenant is treated as a tenant from year to year and in which the Board lay down that the sub-lease granted by an occupancy tenant is necessarily a sub-lease from year to year being limited as to its term by the limit

(1) Selected Decision No. 1 of 1911.
(2) Selected Decision No. 1 of 1898.

of the term of the lease held by the tenant. It is not easy to distinguish a perpetual sub-lease from a transfer of occupancy rights under section 20, and I feel grave doubt as to whether any sub-lease given by a female ex-proprietary tenant should be binding in perpetuity against the landholder under section 28 for a period after her interest as ex-proprietary tenant is extinguished.

There is, however, another point in the case. The Assistant Collector fixed the 24th of January for delivery of judgment. There had been an issue in the case as to whether the suit was to fail on account of the non-joinder of the ex-proprietary tenant as a party, and the respondent has pleaded that the lady was still an ex-proprietary tenant and he held under her. Despite this issue, the appellant produced no evidence to prove that the lady had abandoned the holding, and it was on her own application two days before the date fixed for delivery of judgment that her evidence was taken. There was no cross-examination. It is recorded that Sajjan and Nathu, the respondents in the two connected cases, were present, but it does not clearly appear how they were present or whether their Pleaders were informed. A strong point in favour of accepting the lady's statement as to her abandonment as correct is that in the ejectment suit of 1909 she stated she had no objection to being ejected, and her admission of the 22nd January in the present suit was against her interest. In the circumstances, however, the respondent had no proper opportunity of cross-examining her or producing rebutting evidence.

I would, therefore, remand the case for a finding on the following issue: "At the time the present suit was instituted, had *Musammat* Nona Dulaya abandoned the holding?" Fresh evidence being taken if necessary. Objections in ten days from date of finding. No fresh date will necessarily be fixed unless objections are filed.

CAMPBELL, J. M.—I agree.

*Issue remitted.*

## CALCUTTA HIGH COURT.

RULE *Nisi* No. 728 OF 1915.

February 4, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

PRAMOTHA NATH ROY CHOUDHRY AND ANOTHER—DEFENDANTS—PETITIONERS

*versus*

*Rani* DINOMONI CHOUDHURANI—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXII, r. 10, O. XLIII, r. 1, cl. (l)—Continuance of suit by plaintiff after devolution of interest—No application—Appeal, maintainability of.*

A widow sued for recovery of possession of certain shares in a *zemindari* and thereafter adopted a son to her late husband. But before the adoption a registered agreement was entered into between the widow and the natural father of the adopted son to the effect that during the life-time of the widow she would continue to be in sole possession and enjoyment of the properties. The defendant raised an objection to the maintainability of the suit by the widow as her interest in her husband's property devolved on the adopted son as soon as the adoption took place. The objection was overruled:

*Held*, that the order was not an order under Order XXII, rule 10, of the Civil Procedure Code, inasmuch as the plaintiff did not make any application for being allowed to continue the suit in consequence of any assignment, creation or devolution of interest in her favour and was, threrefore, not appealable under Order XLIII, rule 1, clause (*l*) of the Civil Procedure Code, 1908. [p. 859, col. 2.]

Rule against the order of the District Judge of Mymensingh.

FACTS of the case are as follows:—

Rani Dinomoni Choudhurani instituted a suit in the Court of the Subordinate Judge of Mymensingh for recovery of possession of certain shares in a *zemindari* against Promatha Nath Roy Choudhry and another, the five-annas *zemindars* of Santosh.

Sometime after the institution of the suit the plaintiff Rani adopted a son to her late husband. But before the adoption a registered agreement or *ekrarnama* was entered into between the Rani and the natural father of the adopted son to the effect that during the life-time of the Rani she would continue to be in sole possession and enjoyment of the properties, as she had been since the death of her husband, and the adopted son would be maintained by her according to his present position and get a personal allowance of Rs. 1,000 a month during the life-time of the Rani.

PRAMOTHA NATH ROY *v.* DINOMONI CHOUDHURANI.

After the adoption the defendants raised an objection to the maintainability of the suit by the Rani as plaintiff, on the ground that her interest in her husband's property had devolved on the adopted son as soon as the adoption took place. The Subordinate Judge overruled this objection and ordered that the plaint should be amended by adding that the Rani is the plaintiff as guardian of the adopted son by reason of the ante-adoption agreement.

Against this order the defendants preferred an appeal to the District Judge of Mymensingh, who dismissed the appeal on the preliminary objection taken by the plaintiff that no appeal lay.

Against this order of the District Judge the High Court was moved under section 115, Civil Procedure Code, and the present Rule was issued.

Mr. *B. Chakravarti* (with him Babu *Jogesh Chandra Roy*, Dr. *Nares Chandra Sen Gupta* and Babu *Surendra Mohan Ghosh*), for the Petitioners.—The Rani is now an assignee of the minor son whom she has adopted. On adopting the son to her late husband, the interest devolved on the son, but by an agreement, the merits or validity whereof we are not concerned with at the present moment, she got the assignment of all interests from her adopted son to herself. This is clearly a case of assignment. There being an assignment during the pendency of the suit, leave of the Court must be obtained for the continuance of the suit by the Rani under Order XXII, rule 10, Civil Procedure Code, and an appeal lies from such order under Order XLIII, rule 1, clause (*l*), Civil Procedure Code. Now the Rani seeks to go on with the case in her personal capacity as the assignee of the interest of the son without getting the permission of the Court. She desires to be allowed to go on on the basis of the agreement between herself and the natural father of the adopted son. The further prosecution of the suit is certainly not maintainable by the Rani; she has not got the right to continue the suit by an order of the Court and the suit cannot be carried on by her. The District Judge was wrong in allowing the Rani (plaintiff) to continue the suit. He ought to have set aside the order of the Subordinate Judge, which was illegal.

Sir *S. P. Sinha* (with him Babus *Basanta Coomar Bose* and *Asita Ranjan Ghose*), for the Opposite Party.—The question here is, was there a right of appeal by the petitioners? The section referred to by my learned friend is an enabling section. We do not want to sue on the basis of there having been a devolution of interest. In the present case nobody has asked for leave of the Court to prosecute the case saying that there has been a devolution of interest.

The Rani had not applied for the leave of the Court. The order appealed from is not an order under Order XXII, rule 10, of the Civil Procedure Code, so obviously no appeal lies. The Rani contests the suit on the ground that there was no devolution of any interest but that the interest which she had before has been continued by reason of the agreement which she entered into, during the pendency of the suit, with the natural father of the adopted minor. The order against which appeal was preferred to the District Judge was not an order under Order XXII, rule 22, and no appeal lay to him as there is no provision for appeal against an order like this.

Mr. *B. Chakravarti*, in reply.

JUDGMENT.—Order XXII, rule 10, of the Civil Procedure Code has application to cases in which during the pendency of a suit, the interest is assigned, created or devolves and an application is made for the leave of the Court for the continuance of the suit in favour of or against a person in whose favour such an assignment, creation or devolution has operated. Against the order made by the Court on such application there is an appeal provided by Order XLIII, rule 1, clause (*l*). In this case the plaintiff did not make any application for being allowed to continue the suit in consequence of any assignment, creation or devolution of interest in her favour. She contests the suit on the ground that there was no devolution of any interest, but that the interest which she possessed had been maintained in consequence of a certain agreement with the father of the son she

had adopted pending the suit. We have nothing to do with the merits of the question that arises upon the adoption or agreement. All that we have to see in this case is whether the order was one under Order XXII, rule 10. We think it was not and, therefore, the appeal to the District Judge did not lie and this Rule is discharged with costs, hearing fee five gold *mohurs*.

*Rule discharged.*

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PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 1414 OF 1915.

January 10, 1916.

*Present* —Mr. Justice Shadi Lal.

BASHESHAR NATH—DEFENDANT—APPELLANT

*versus*

RAMKISHAN DAS AND OTHERS—PLAINTIFFS AND ANOTHER DEFENDANT—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLVII, r. 7—Order granting application for review for "other sufficient reason", whether appealable Revision.*

No appeal lies under Order XLVII, rule 7, of the Civil Procedure Code against an order granting an application for review for "other sufficient reason" within the meaning of rule 1.

*Yusaf* v. *Naza*, 16 Ind Cas. 995: 17 P. L. R. 1913; 278 P. W. R. 912; 11 P R. 1913, followed.

Such an order cannot be interfered with in revision, especially as there is a right of appeal from the final decree.

Miscellaneous first appeal from the order of the Subordinate Judge, 1st Class, Delhi, dated the 8th May 1915, granting application for review of the order passed by him on the 18th January 1915, granting a decree in a partition suit.

Mr. *Santanam*, for the Appellant.

Rai Sahib Lala *Moti Sagar*, for the Respondents.

JUDGMENT.—I have heard arguments on both sides and have no hesitation in holding that the law does not give any right of appeal from the order granting the application for review in this case. Order XLVII, rule 7, of the Civil Procedure Code mentions those specific grounds upon which an order granting an application for review may be objected to, and a perusal of the application and of the order of the lower Court makes it clear that the present case does not come within the purview of any of the clauses mentioned in the aforesaid rule. The learned Counsel for the appellant places his sole reliance upon clause (*b*), and contends that the order appealed against is in contravention of the provisions of rule 4.

Now, it is indisputable that the previous notice required by law was given to the appellant, and there can be no doubt that the application has not been granted on the ground of the discovery of new matter or evidence. The application has been allowed for what the Judge considered to be "other sufficient reason" within the meaning of rule 1, and the circumstance that the respondent prayed for producing further evidence and that prayer found favour with the Court, does not convert the order into one granting review on the ground of the discovery of new evidence.

The case is on all fours with that reported as *Yusaf* v. *Naza* (1) and I must hold that no appeal is competent.

The prayer for treating this appeal as an application for revision cannot be entertained, for the simple reason that there is no sufficient ground which would warrant my interference on revision. The order granting the review and directing further enquiry may be bad in law, but that is not sufficient for invoking the revisional jurisdiction of this Court. Further, the appellant is entitled to prefer an appeal from the final decree, and the existence of this remedy is an additional reason for declining to exercise the revisional jurisdiction.

For the aforesaid reasons, I dismiss the appeal with costs.

*Appeal dismissed.*

(1) 16 Ind. Cas. 995; 11 P. R. 1913; 17 P. L. R. 1913; 278 P. W. R. 1912.

CHAMI *v.* ANA PATTAR.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2459 OF 1914.

February 3, 1916.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

P. T. CHAMI—DEFENDANT No. 1—APPELLANT

*versus*

A. ANA PATTAR AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 4—RESPONDENTS.

*Malabar Compensation for Tenants' Improvements Act (I of 1900), s. 5—Payment into Court by landlord of amount due for improvements, whether valid tender—Contract Act (IX of 1872), s. 38—Transfer of Property Act (IV of 1882), s. 83—Tenant remaining in possession afterwards—Right of landlord to claim mesne profits.*

When a landlord has tendered that which a Court has subsequently found to be the true amount due and owing in respect of the improvements effected by a tenant, if the tenant chooses to hold over after that date, he can do so only at his peril and on condition of paying the mesne profits on the land. [p. 861, col. 2.]

Per *Seshagiri Aiyar, J.*—The value of improvements effected by a tenant cannot be brought under the expression "amount due on the mortgage" in section 83 of the Transfer of Property Act and, therefore, the section does not enable a tender to be made by a landlord for the value of improvements but such a tender is a valid tender under section 38 of the Contract Act. [p. 862, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit No. 1049 of 1913, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 499 of 1912.

Mr. *T. K. Govinda Aiyar*, for the Appellant.

Mr. *P. V. Parameswara Aiyar* for Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

### JUDGMENT.

COUTTS TROTTER, J.- In this case the learned Judge found that the landlord tendered by paying into Court the whole value of the improvements effected by the tenant. It is said that the Judge did not determine what was the exact sum due. What he did say was that "the correct amount was deposited because Rs. 100 was deposited" and, of course, in a matter of this kind the value of the improvements cannot be accurately estimated. All that he can say is whether the sum tendered was substantially reasonable compensation for the improvements; and he has found it was, and, therefore, it was a perfectly good tender. I confess to a good deal of difficulty in seeing how the landlord was entitled to take the procedure of paying into Court. But that is not complained of here and, therefore, no difficulty arises on that score.

That being so, the landlord then says that the tenant has got to pay him mesne profits for two years or for such period as he remained in possession after the principal mortgage-money and the interest had been paid off and after there had been this tender of the amount due for improvements. The Malabar Compensation for Tenants' Improvements Act, section 5, says: "Every tenant shall, on ejectment, be entitled to compensation for improvements which have been made by him.....and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage-money, be entitled to remain in possession until ejectment in execution of a decree or order of Court." The appellant says that this entitles him to turn a deaf ear to any tender or offer of the compensation money and squat upon the land rigidly until a suit is actually brought. I think that is a wholly unreasonable construction of the Act and would permit wholly unreasonable conduct on the part of the tenant. I think that when the landlord has tendered that which the Court has subsequently found to be the true amount due and owing in respect of the improvements, if the tenant chooses to hold over after that date, he can do so only at his peril and on condition of paying the mesne profits on the land, if the amount tendered is found to be adequate.

I desire to express no opinion as to whether the compensation under the Malabar Compensation for Tenants' Improvements Act can be treated, in circumstances like the present, as being part of the mortgage-money within the Transfer of Property Act. I do not know whether it is or is not, but it is not necessary to decide that point for the purposes of this case, having regard to the fact that no point is taken about payment into Court being a regular means of tendering,

The appeal fails and is dismissed with costs.

SESHAGIRI AIYAR, J.—The question raised by Mr. Govinda Aiyar is not free from difficulty. I agree with him that the value of improvements cannot be brought under the expression "amount due on the mortgage" in section 83 of the Transfer of Property Act, because the mortgage-money, as defined in the Transfer of Property Act, only includes the principal and the interest. Therefore, I do not think that section 83 of the Transfer of Property Act enables the tender to be made. But we have section 5 of the Malabar Compensation for Tenants' Improvements Act and in clause (1) of that section it is stated that after the mortgage-money has been tendered, which must be, I suppose, under section 83 of the Transfer of Property Act, the relation of landlord and tenant subsists between the parties for certain purposes. If that relation subsists, the liability to pay mesne profits to the landlord by the tenant also subsists. Then the further question arises as to whether during the subsistence of this relationship the landlord is entitled to tender the value of improvements. There is section 38 of the Contract Act, which enacts the general law that a person who is under an obligation, can tender the amount to the person who is entitled to it. Mr. Govinda Aiyar has conceded in this Court that his complaint is not that the amount has not been tendered to him personally but that it has been tendered in Court. Therefore, we may take it that he is not prejudiced by the fact that the tender of the value of the improvements was made into Court and not directly to him. Applying the principle of section 38 of the Contract Act, there was a good tender and the obligation on the part of the landlord was performed. If that is so, the obligation on the part of the tenant under section 5, clause (2), of the Compensation for Tenants' Improvements Act remains and under that clause the tenant is bound to pay the mesne profits. I, therefore, agree with my learned brother that the decision of the Court below is right in directing the appellant to pay the mesne profits after the period of tender by the respondent. The question of costs was certainly in the discretion of the Court, and taking all the circumstances into consideration the Court below has made a fair award. I see no reason to differ from the exercise of the discretion. I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 233 OF 1914.

February 11, 1916.

*Present*:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.

BHARAT CHANDRA DAS AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

RAMANANDA DEB AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Appeal, second*—Thak *map, preference given to, whether a question of law—Finding of fact or law—Weight given to a document which is not one of title, whether a question of law*—Halabadi chittas—*Execution proceeding, question to be left to be decided in.*

The question that a lower Appellate Court gave undue preference to a *thak* map involves a pure question of fact and as such cannot be raised in second appeal. [p. 864, col. 2.]

*Halabadi Chittas* cannot be called documents of title and, therefore, what effect is to be given to them in evidence is not a question of law which can be raised in second appeal. [p. 864, col. 2.]

A question, which it was not essential to decide in a suit, may be left to be decided in execution proceedings. [p. 865, col. 1.]

Where a lower Court without re-laying the *thak* map and ascertaining the boundaries decreed a suit for declaration of title to and possession of a share in the residuary *chak* of a *thak* number of a certain *mauza* and directed that the *thak* map should be re-laid in the locality by a Commissioner in execution of the decree:

*Held*, that there was no error in leaving the ascertainment of boundaries by re-laying the *thak* map to be decided in the execution proceeding. [p. 865, col. 2.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 27th September 1913, affirming that of the Subordinate Judge, 2nd Court at that place, dated the 18th of June 1912.

FACTS material to the report will appear from the following extracts from the judgment of the Additional District Judge of Sylhet:

"The plaintiffs sued to recover possession as auction-purchasers of *Taluq* Benode Ram Gopal, which it seems was brought to sale for arrears of revenue and local rates. They alleged that an undivided 2-annas share of the residuary *chaks* of *thak* map No. 3450 appertains to the *taluq* in question. As such they sought to recover possession of an undivided 2-annas share of the above residuary *chaks*. The defaulting proprietors (defendants Nos. 1—22) were said to have stood in their way, they did not permit them to peacefully recover possession of the *taluq* sold for arrears of revenue and local rates.

A few defendants only contested the suit. Their common defence was that they did not oppose the plaintiffs when they (the plaintiffs), as they alleged, sought to recover possession. Defendants Nos. 11, 14 and 21, however, disputed the title of the plaintiffs, as purchasers of the *Taluq* Benode Ram Gopal, to any land of *Mauza* Rampasha.

The learned Subordinate Judge has decreed the suit against defendants Nos. 1—20 and 22 only. The defendants Nos. 10, 11, 12 and 14 alone chose to challenge his decision in this appeal. * * *

* * * * *

The next ground taken in appeal is that the lower Court was wrong in decreeing the suit when there was no local investigation, no re-laying of the *thak* map. * *

* * * * *

[After distinguishing the case reported as *Mohesh Chunder Sen* v. *Juggut Chunder Sen* (1), the learned District Judge goes on]

Here the plaintiffs seek to recover possession of an undivided 2-annas share of residuary *thak chaks* in *Mauza* Rampasha. There is no claim for recovery of specific plots. The lower Court has decreed possession of an undivided 2-annas share. The residuary *thak chaks* in Rampasha will in terms of the decree be marked out in execution, the *thak* map will then be re-laid. I think the decree cannot successfully be assailed because the re-laying of the *thak* map has been postponed to a later stage.

* * * * *

(After discussing the contentions of the appellant as to the reliability of the *thak* map and *wajib ul-arz*, the judgment proceeds). In short there is no satisfactory evidence to hold that the *thak* map in the *wajib-ul-arz* is inaccurate. * * *

* * * * *

The *thak* map and *wajib-ul-arz* may well be relied on. * * * *

* * * * *

I need only add in conclusion that though the plaintiffs are allowed to recover an undivided 2-annas share of the residuary *thak chaks* in *thak* map No. 3450, they will not be entitled by virtue of this decree to claim joint possession of any specific plots of land which any of the above defendants may hold as part proprietors of any of the 6 *taluqs* which own land jointly in *Mauza* Rampasha. Joint possession is possible even when some of the co-sharers hold specific plots for the sake of convenience. Such a contingency was clearly contemplated and recognised in a recent ruling [see *Kumudini Mozumdar* v. *Rasik Lal Mozumdar* (2)]. The plaintiffs will be able to dislodge them, if need be, by a regular suit for partition. The result is the appeal is dismissed with costs."

Dr. *Sarat Chandra Basack* and Babu *Hemendra Kumar Das*, for the Appellants.

Babu *Broja Lal Chakrabartty*, for the Respondents.

JUDGMENT.

BEACHCROFT, J.—The plaintiff-respondent brought this suit for declaration of his title to and possession of a 2-annas share in the residuary *chak* of *thak* No. 3450 of *Mauza* Rampasha, as appertaining to the *Taluq* No. 24775-59, Benode Ram Gopal, which he had purchased at an auction sale and of which he alleged that the defendants had prevented him from taking possession. He also asked for mesne profits. He stated in his plaint that the other 14 annas of the *mauza* appertained to 5 other *taluqs* of which he gave details.

Written statements were filed by various sets of defendants and a number of issues framed by the first Court, of which the most important seem to have been whether a 2-annas share of any land in *Mauza* Rampasha appertained to the plaintiff's *taluq* and as to liability of various defendants for mesne profits.

(1) 5 C. 212; 4 Ind. Jur. 624.

(2) 11 C. W. N. 517.

BHARAT CHANDRA DAS *v.* RAMANANDA DEB.

The Subordinate Judge made a decree declaring plaintiffs' title to an undivided 2-annas share of the lands of the residuary *chak* of the *thak* map No. 3450 of *Mauza* Rampasha. He directed that the map should be relaid in the locality by a Commissioner in execution proceedings, who would deliver possession. He also awarded mesne profits, the amount to be ascertained later against defendants Nos. 1 to 20 and 22.

On appeal the Additional District Judge upheld the judgment and decree of the Subordinate Judge, but in doing so remarked that the plaintiffs would not be entitled by virtue of the decree to claim joint possession of any specific plots which the defendants may hold as part proprietors of any of the *taluqs* which own land jointly in *Mauza* Rampasha

These remarks of the learned Judge have not been incorporated in the decree. Nor was it intended that they should be. The object was evidently merely to make clear to the plaintiffs the limitations of the decree for possession given to them. But they have been made the foundation for the main arguments advanced on behalf of the appellants: they have been presented as a finding on the part of the learned Judge that by some arrangement, express or implied, the appellants were in exclusive possession of plots of lands representing their interest not only in the *taluq* which was sold, but in others of the five remaining *taluqs* comprised in the 16 annas of the *mauza* and on this again, have been based the further arguments that the exact limits of the residuary *chak* should have been ascertained by re laying the boundary during the course of the suit and that it should have been found in the course of the suit exactly which was the land from possession of which the plaintiffs had been kept, that this question should not have been left to be decided in execution proceedings, and unless this was found the decree for possession could not be executed.

In addition it has been urged that the subject-matter of the suit has not been described with the particularity required by Order VII, rule 3, that the defendants should not have been made liable jointly for mesne profits and that the learned Judge was wrong in giving preference to the *thak* map over the *mouzawari* papers and *halabadi chittas* filed by the defendants.

The objection that the land has not been described with sufficient particularity is, in my opinion, unsubstantial. The name of the village is given, so are the name and number of the *taluq* and the number of the *thak*. But this is not all. Of the defendants, who have appealed one only, *viz.*, No. 2, raised an objection in his written statement on the ground of uncertainty of the subject-matter. He stated in one paragraph that want of a definite description and boundaries of the land had proved a bar to a proper answer being filed. And even though a supplementary written statement was put in by two of the defendants, Nos. 11 and 14, 19 months after the first written statement, no objection was taken on this ground. Nor does the objection of defendant No. 12 appear to have been pressed in any way after the filing of the written statement.

The argument that the learned Judge gave undue preference to the *thak* map would seem, thus broadly stated, to involve a pure question of fact and as such not one to be admitted in second appeal. But it takes this form: though the learned Judge's finding that the *thak* map is preferable to the *mouzawari* papers might be unassailable in second appeal, the *halabadi chittas* are documents of title and the effect to be given to them is a question of law. To support his argument the learned Vakil has referred to certain passages at page cxxviii *et seq* of Words' Introduction to the Assam Land and Revenue Regulation. But he seems to have confused *halabadi pattas* with *halabadi chittas*, which cannot be called documents of title. The argument thus loses its force and the matter is reduced to a pure question of fact, and the learned Judge has found, a finding which cannot be interfered with in second appeal, that as evidence the *thak* map is to be preferred to the papers relied on by the appellants.

The arguments that the appellants should not have been made jointly liable for mesne profits also depends on the findings of fact of the learned Judge. The learned Judge says, "joint tort-feasors are jointly and severally liable for damages." I do not think the learned Subordinate Judge was in error when he found the above

defendants jointly liable for mesne profits." It is admitted that if the appellants combined to keep the plaintiffs out of possession they would be jointly liable for mesne profits, but it is argued that that is not the case here and in the absence of such a state of things, the liability of each appellant is limited to mesne profits in respect of the land out of possession of which he kept the plaintiffs and that this was an additional reason for re-laying the boundaries in the locality before a decree was given. It is to my mind perfectly clear that the learned Judge, though he does not say it in so many words, intended to find that the appellants combined to keep the plaintiffs out of possession. If that was not his intention his reference to joint tort-feasors is absolutely meaningless.

No difficulty as to mesne profits arises from the fact that the boundaries have not been re-laid in the locality. This is not one of those cases in which a question, which it was essential to decide in the suit, has been left to be decided in execution proceedings. That argument might have had force had there been dispossession of specific plots. But here there has been dispossession, or rather a keeping out of possessicn, of the whole of an undivided share of the *mauza*.

As already indicated, the main argument for appellants was that they could not be deprived of possession in execution because the lands of which they are in individual possession represent not only their shares in the *taluqs* purchased by the plaintiff, but of other *taluqs*. Now not only is there no finding that this is the nature of the possession of the appellants but a reference to the pleadings makes it clear that there could be no such finding. This state of things was not alleged by any one of the defendants who filed a written statement. Of the present appellants the three who filed written statements, *viz.*, Nos. 11, 12 and 14 said they had nothing to do with any land of the *taluq* bought by plaintiffs, and they did not contest his right to get possession of any land in that *taluq*. Then in their supplementary written statement defendants Nos. 11 and 14 stated that none of the six *taluqs*, *i.e.*, the plaintiffs' and the other five specified in the plaint were *ijmal*. And from the judgment of the Subordinate Judge it would appear that the case was fought out on that line in the first Court. Even if this line of defence is not inconsistent with the theory now set up, I do not think I am doing the appellants an injustice when I say that the theory now presented was never made a prominent part of the defendants' case or involved in the issues framed. Apparently possession of specific plots was advanced as an argument that the *taluqs* were not *ijmal*, and the learned Subordinate Judge to meet the argument hazarded the conjecture that possession of specific plots might have been with the consent of the proprietors of other *taluqs*. But possession of separate plots was never advanced as a bar to the plaintiffs' obtaining possession on the lines now formulated.

It is quite possible that if in execution the plaintiffs attempted to take *khas* possession of lands in possession of the defendants, difficulties might arise if it were found that those defendants were proprietors of other *ijmali taluqs*, but there is no fault to be found with the decree given by the learned Subordinate Judge with which decree the first Appellate Court has not interfered. The decree is one for joint possession and the method of executing it is indicated in Order XXI, rule 35.

As regards the argument that possession cannot be given unless the exact subject-matter of the suit has been ascertained by boundaries and that that should have been ascertained in the suit itself, it is sufficient to say that that is the same argument which was raised in connection with the mesne profits in another form and requires no further discussion.

I would, therefore, dismiss the appeal with costs.

D. CHATTERJEE, J.—I agree.

*Appeal dismissed.*

HIRA LAL PAL *v.* ETBAR MANDAL.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2006 OF 1913.

April 23, 1915.

*Present*:—Mr. Justice Richardson and Mr. Justice Mullick.

HIRA LAL PAL—DEFENDANT No. 1—APPELLANT

*versus*

ETBAR MANDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O XLI, rr. 23, 25—Remand—Remanding Court, whether can re-consider decisions on issues decided on occasion of remand—Preliminary decree, when decisions on certain issues—Test—Interlocutory orders, effect of.*

A suit for ejectment was dismissed by the first Court after deciding the issues relating to the merits of the dispute between the parties but without deciding the issues relating to limitation and misjoinder The lower Appellate Court decided the issues relating to the merits and remanded the suit to the first Court to dispose of it after the trial of the issues relating to limitation and misjoinder and according to its findings on the issues relating to merits On appeal to the High Court from the order of remand it was held that the lower Appellate Court ought only to have sent the case back under rule 25 of Order XLI of the Civil Procedure Code. The officer of the Appellate Court was succeeded by another officer. On the record again coming up before the Appellate Court it refused to review the decision already arrived at on issues relating to merits:

*Held*, that the lower Appellate Court was not wrong in treating the decision of his predecessor upon the issues relating to merits in the suit as final and in refusing to re-consider those issues upon the evidence for the purpose of arriving at an independent determination in regard to them. [p. 867, col. 2.]

*Held*, (*Mullick, J., dubitante*) that the order of remand of the lower Appellate Court was not merely interlocutory but was a formal expression of an adjudication and as such amounted to a preliminary decree, and no appeal having been preferred from that decree as such, it became final. [p 868, col. 2.]

*Lachman Prasad* v. *Jamna Prasad*, 10 A. 162; A. W. N (1887) 295, referred to.

Per *Richardson, J.*—An opinion incidentally or provisionally expressed by an Appellate Court while remanding a case under Order XLI, rule 25, is open to re-consideration by the same Court when the record again comes up to it after the remand. [p. 868, col. 1.]

*Boncharee Ghose* v *Ainooddeen Biswas*, 24 W. R. 137; *Mubarak Husain* v. *Bihari*, 16 A. 306: A. W. N. (1894) 97; *Hiatunnessa Bibi* v. *Kailash Chandra Saha*, 17 Ind Cas. 224; 16 C. L J. 259; *Ganendra Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury*, 15 Ind. Cas 39; 17 C. W. N. 462: *Balvant Ramchandra Natu* v. *Secretary of State*, 32 B. 432; 10 Bom L. R. 431; *Broja Soondar Gossamee* v *Juggut Chunder Dey*, 21 W. R. 199; *Jammalamadaka Subbalakshmamma* v. *Jammala Venkatar yadu*, 2 Ind Cas 525; 32 M. 318 at p. 329 5 M. L. T. 75; *Suraj Din* v. *Chattar*, 3 A. 755; A. W. N. (1881) 55; *Kharag Prasad Bhagat* v. *Durdhari Rai*, 14 A. 348; A. W. N. (1892) 2-, referred to.

Interlocutory orders may be, and often are, decretal and final in their character and, therefore, (subject to review by a superior Court in appropriate proceedings) binding as between the parties in subsequent stages of the same litigation. [p. 868, col 1.]

One test for the purpose of determining whether an adjudication is or is not final and conclusive so far as it goes, is whether it does or does not amount to a preliminary decree. [p. 869, col. 2.]

Per *Mullick, J.*—As a matter of practice a Court will not and ought not to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction on the occasion of remand. [p. 869, col. 1.]

When, however, the interlocutory decision amounts to a preliminary decree within the meaning of section 2 of the Civil Procedure Code the Court is incompetent to revise that decree till it is duly set aside or amended according to law. [p. 869, col. 1.]

Appeal from a decree of the Subordinate Judge, 24-Parganas, dated the 14th March 1913, reversing that of the Munsif, Baruipur, dated the 7th October 1909.

Babus *Mohendra Nath Roy*, *Mohini Mohan Chatterjee* and *Probodh Chandra Dutt*, for the Appellant.

Babu *Provash Chandra Mitter*, for the Respondents.

### JUDGMENT.

RICHARDSON, J.—On consideration we are of opinion that there is no sufficient reason for our interference. The point which was taken at the hearing was that the learned Subordinate Judge in the Court of Appeal below was wrong in treating the decision of his predecessor upon issues Nos. 3 and 4 in the suit as final so far as he was concerned and in refusing to re-consider those issues upon the evidence for the purpose of arriving at an independent determination in regard to them. Issues Nos. 3 and 4 relate to the merits of the dispute between the parties and what happened was this. The first Court originally decided those issues against the plaintiff and dismissed the suit without deciding the remaining issues Nos. 1 and 2, which raised separate questions of limitation and misjoinder. Upon appeal the then Subordinate Judge in a judgment, dated the 31st May 1910, found in the plaintiff's favour upon issues Nos. 3 and 4 and remanded the suit to the first Court with the direction that the Munsif was to "dispose of the suit after the trial of the first and second issues and according to the findings of this Court, on the third and fourth

issues." There was an appeal to the High Court from the order of remand and the High Court in its judgment of the 4th June 1912, held that the order was wrong inasmuch as it was passed apparently under rule 23 of Order XLI whereas the case should have been dealt with under rule 25 of the same Order. In pursuance to directions given by this Court, the suit was then remitted to the first Court in order that the Munsif might try issues Nos. 1 and 2 and certify his findings thereon to the lower Appellate Court, upon whose file the appeal remained as a pending appeal. When the record again came up to that Court, the Subordinate Judge who had previously dealt with the appeal had left. His successor expressly refused to review the decision already arrived at on issues Nos. 3 and 4 and confined himself to a consideration of the first two issues in regard to which he accepted the findings of the Munsif which were in favour of the plaintiff. It may be mentioned that those issues are quite independent of issues, Nos. 3 and 4. The suit is a suit for ejectment. The parties are rival tenants. The true title is found in the plaintiff. The defence to which issues Nos. 1 and 2 were directed was whether the plaintiff had been dispossessed by the landlord, whether he ought to have been made a party and whether the limitation specially provided by the Bengal Tenancy Act for suits between landlord and tenant applied? These questions have been answered in the negative and upon the whole of the findings including those of his predecessor, the Subordinate Judge made a final decree in the plaintiff's favour. The contention is that the decree is wrong because the Subordinate Judge refused to treat the issues decided by his predecessor as open to further discussion and the contention is pushed to this point that if the appeal had come the second time before the Subordinate Judge who first dealt with it, he too would not have been bound by his previous judgment.

Now, I observe that the first Subordinate Judge evidently intended to dispose off finally issues Nos. 3 and 4. This is clear from the terms of the order of remand. It is equally clear that the High Court in its judgment of the 4th June 1912 did not contemplate a re-hearing of these issues. Having pointed out that the Subordinate Judge ought "only to have sent the case back under rule 25 of Order XLI in order that the Munsif might come to findings on issues Nos. 1 and 2," the learned Judges added:—"It would have been open to the parties then to argue on those two issues (namely, issues Nos. 1 and 2) and the lower Appellate Court should have then proceeded to deal with the case." There is no suggestion that issues Nos. 3 and 4 should be re-argued or re-heard. The High Court did not set aside the Subordinate Judge's judgment of the 31st May 1910, but merely altered the form of the remand. *Prima facie* it would seem sufficient to say that in the subsequent proceedings the High Court's orders were properly understood and carried out. It was argued, however, that, nothing being expressly said about issues Nos. 3 and 4, the orders operated under the Civil Procedure Code to re-open them, and in support of this argument some reported cases were cited which must be briefly noticed.

The case of *Boncharee Ghose* v. *Ainooddeen Biswas* (1) is of no assistance to the appellant. The case had been wrongly remanded by a Subordinate Judge and the High Court gave specific directions as to how it was to be dealt with, including a direction that when the case came again before the Subordinate Judge, with the findings of the Munsif upon the issues sent down to him for trial, the Subordinate Judge was to hear the appeal *de novo*. In the present case the High Court might, no doubt, have made a similar direction but did not do so.

In the cases of *Mubarak Husain* v. *Bihari* (2) and *Hiatunnessa Bibi* v. *Kailash Chandra Saha* (3) it does not appear from the reports that there was any adjudication by the remanding Judge which would bind him or his successor at the final hearing. There is no doubt that an issue can be sent down in such a way that the whole appeal remains open. In such a case the appeal will be finally decided on the record as a whole and it may be possible to disregard the issue sent down and the finding upon it as otiose.

I doubt whether the case of *Ganendra*

(1) 24 W R. 137.
(2) 16 A 306; A. W. N. (1894) 97.
(3) 17 Ind. Cas. 224; 16 C. L. J. 259.

*Nath Roy Chowdhury* v. *Surja Kanta Roy Chowdhury* (4) goes any further. It seems obvious that in remanding a case an opinion may be incidentally or provisionally expressed which would not amount to a final adjudication so as to conclude the parties.

On the other hand, in *Balvant Ramchandra Natu* v. *Secretary of State* (5) it was recognised that a remanding judgment may be "conclusive on all points therein specifically decided beyond possibility of revision." In *Brojo Soondur Gossamee* v. *Juggut Chunder Dey* (6) it was held that a District Judge has no authority, when hearing an appeal from a Munsif's decision, to vary or ignore the directions made by an Appellate Court of co-ordinate jurisdiction, such as that of the Subordinate Judge. The learned Judges observed:—"The District Judge in such cases ought to be guided by the practice which obtains in this Court, where, when one Division Bench sees fit to give certain directions, any other Bench before which the case may afterwards come on, has to keep itself within those directions." This case was cited with approval in *Jammalamadaku Subbalakshmamma* v. *Jammala Venkatarayadu* (7). The cases of *Suraj Din* v. *Chatter* (8) and *Kharag Prasad Bhagat* v. *Durdhari Rai* (9) may also be referred to. Moreover there is a catena of authorities which show that interlocutory orders may be, and often are, decretal and final in their character and therefore (subject, of course, to review by a superior Court in appropriate proceedings taken before it) binding as between the parties in subsequent stages of the same litigation [*Munigul Pershad Dichit* v. *Grija Kant Lahiri* (10), *Ram Kirpal* v. *Rup Kuari* (11), *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (12), *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (13) and *Ahmed Musaji Saleji* v. *Hashim Ebrahim Saleji* (14)].

The observations in the case of *Lachman Prasad* v. *Jamna Prasad* (15) as to the possible difficulty of drawing up a final decree on the basis of separate judgments delivered at different dates had reference to the Civil Procedure Code of 1882. The difficulty disappears under the Code of 1908, which in section 2 defines the term "preliminary decree" and by section 97 provides that if no appeal is preferred from a preliminary decree, its correctness cannot be afterwards disputed in an appeal from the final decree. One test, therefore, which may be suggested for the purpose of determining whether an adjudication, such as that of the 31st May 1910, is or is not final and conclusive so far as it goes, is whether it does or does not amount to a "preliminary decree." In the case before us the order of that date was assumed in argument to be merely interlocutory in its nature or rather to be nothing more than an order of remand. It was appealed from as an order of remand and, therefore, treated as such in the judgment of this Court of the 4th June 1912. On that footing it would, in our opinion, as we have already intimated, be sufficient to say that the lower Appellate Court has correctly carried out the directions of this Court according to their true interpretation. But if it be necessary to go further, I should be disposed to hold that the order was a formal expression of an adjudication which amounted to a preliminary decree and that no appeal having been preferred from that decree as such, the appellant is now bound by it.

In the result this appeal must be dismissed with costs.

MULLICK, J.—I agree that the appeal must be dismissed on the ground that having regard to the manner in which the remand order of the High Court was expressed, it was not open to the Subordinate Judge to revise the decision of his predecessor (the remanding Subordinate Judge)

(4) 15 Ind. Cas. 39; 17 C. W. N. 462.
(5) 32 B. 432; 10 Bom. L. R. 531.
(6) 21 W. R. 199
(7) 2 Ind. Cas. 525; 32 M. 318 at p. 320; 5 M.L.T. 75.
(8) 3 A. 755; A. W. N. (1881) 55.
(9) 14 A. 348; A. W. N. (1892) 25.
(10) 8 I. A. 123; 11 C. L. R. 113; 8 C. 51. 4 Sar. P. C. J. 249.
(11) 11 I. A. 37, 6 A. 269; 4 Sarasvati P. C. J. 489.
(12) 24 I. A. 22 at p. 32; 19 A. 155; 7 Sar. P. C. J. 111.
(13) 27 I. A. 209; 5 C. W. N. 52; 23 A. 152.
(14) 28 Ind. Cas. 710; 17 M. L. T. 312; 2 L. W. 377; 21 C. L. J. 419; 13 A. L. J. 540; 17 Bom. L. R. 432; 29 M. L. J. 70; (1915) M. W. N. 485; 42 C. 914; 42 I. A. 91; 19 C. W. N. 449.
(15) 10 A. 162; A. W. N. (1887) 295.

on issues Nos. 3 and 4. But even if there had been no appeal to the High Court, the Subordinate Judge was, in my opinion, not bound to re-hear the parties on these issues; for it seems to be well settled that though it is open to a Court to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction, yet as a matter of practice a Court will not and ought not to do so. When, however, the interlocutory decision amounts to a preliminary decree within the meaning of section 2 of the Civil Procedure Code the Court is, of course, incompetent to revise that decree till it is duly set aside or amended according to law. In the present case I would hesitate to say that the findings on issues Nos. 3 and 4 amounted to preliminary decrees. Issue No. 4 does not decide any question of right. Issue No. 3 does decide the question of title to the land in suit, but as that decision is subject to the decision of issues Nos. 1 and 2 which relate to limitation and non-joinder of parties, it seems doubtful whether the remanding Subordinate Judge did conclusively determine the rights of the parties. But it is not necessary to go into this question any further because for the reason already given the appeal must be dismissed with costs.

*Appeal dismissed.*

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MADRAS HIGH COURT.

**FULL BENCH.**

CIVIL REVISION PETITIONS NOS. 338, 339 AND 340 OF 1914.

October 22, 1915.

*Present*:—Sir John Wallis, KT., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

November 24, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

A. T. S. A. ANNAMALAI CHETTY AND OTHERS—PLAINTIFFS—PETITIONERS IN ALL

*versus*

IN C. R. P. NOS. 338 AND 340 OF 1914

S. V. VELAYUDU NADAR—DEFENDANT—RESPONDENT

IN C. R. P. NO. 339 OF 1914

SUNDARA NADAN—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 73, 80—Suit on promissory note payable on demand—Collateral agreement postponing time for payment, whether valid—Time, when begins to run.*

An agreement in writing executed along with a promissory note postponing the time for payment is a valid and enforceable agreement. [p. 870, col. 2.]

Where, therefore, in a suit on a promissory note payable at demand it appeared that the drawer gave an agreement in writing fixing ten months' time for payment from the date of the pro-note:

*Held*, (1) that time began to run from the expiry of the period fixed in the agreement and that the suit was governed by Article 80 of the Limitation Act; [p. 871, col. 2.]

*Simon* v. *Hakim Mahomed Sheriff*, 19 M. 368; *Somasundaram Chettiar* v. *Narasimha Chariar*, 29 M. 212; 16 M. L. J. 103, dissented from.

*Sanjivi* v. *Errapa*, 6 M. 290, distinguished.

(2) that such an agreement was operative under sections 62 and 63 of the Contract Act and was recognised by the Legislature in Article 73 of the Limitation Act. [p. 871, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Small Cause Suit No. 88 of 1913.

This petition coming on for hearing on the 21st and 30th July 1915, upon perusing the petition and the judgment and decree of the lower Court and the record in the case, and upon hearing the arguments of the Counsel for both sides and the case having stood over for consideration till the 5th August 1915, the Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AIYAR, J.—The plaintiffs are the petitioners in revision. They brought the suit on a promissory note, dated 4th August 1909, payable on demand. On that same date, however, a writing, Exhibit A1, was given by the drawer as follows:—"Ten months' *thavanai* (time for payment) from the date of the pro-note has been fixed for this note." Thus Exhibit A was in the words of Article 73 of the First Schedule of the Limitation Act accompanied by a writing postponing the right to sue for ten months. The present suit was brought on the 30th June 1913, more than three years from the date of the promissory note, 4th August 1909, but within the limitation period of three years from the expiry of the ten months' period and within the period of the extension given by the

provisions of section 4 of the Limitation Act, which permits the plaintiff to institute a suit on the day on which the Court re-opens if the time expired during the vacation of the Court. The Subordinate Judge, relying on *Somasundaram Chettiar* v. *Narasimha Chariar* (1) which followed *Simon* v. *Hakim Mahomed Sheriff* (2) held that the writing which evidences the agreement to give time for payment is a collateral agreement, that notwithstanding that agreement, the plaintiffs could have sued on the promissory note within the ten months and that, therefore, time for calculating limitation began to run from the date of the promissory note itself and the suit was, therefore, barred. He does not mention the Article of the Limitation Act which in his opinion applies to the case. I presume that he applied Article 73 itself of the Limitation Act and that was theArticle relied upon by therespondent's learned Vakil.

The petitioners' learned Vakil, Mr. B. Sitarama Rao, argued in the first place that the decision in *Somasundaram Chettiar* v. *Narasimha Chariar* (1) decided only that notwithstanding the contemporaneous written agreement restraining and postponing the payment, the holder of the note was entitled to sue at once and not that the limitation period should be calculated from the date of the note under Article 73 of the Limitation Act. Conceding that the actual point decided was only that the holder was entitled to sue from the date of the promissory note notwithstanding the accompanying agreement, that actual decision necessarily involves the conclusion that the cause of action on the note arose at once notwithstanding the accompanying agreement. If the cause of action arose at once, the period of limitation must also begin at once except in the cases of disability, etc., provided for by the Limitation Act. I might add that Justice Sir Subramania Aiyar, who was one of the two Judges who decided *Somasundaram Chettiar* v. *Narasimha Chariar* (1), decided as a single Judge the prior case of *Simon* v. *Hakim Mahomed Sheriff* (2), in which he enunciated the same view as to the arising of the cause of action at once on a promissory note payable on demand even though there was a contemporaneous written agreement postponing the time for payment. In deciding those two cases, that very learned Judge seems to have been guided by certain English decisions, the most important of which is the case of *Salmon* v. *Webb and Franklin* (3). It seems to me that those English cases are based upon the doctrine of the English Law that an agreement not to sue for a limited time or a covenant for a limited time only, that is, a covenant not to sue for a limited time was no answer to an action on a promissory note or even an ordinary bond unless that covenant was supported by a fresh consideration. As pointed out by Sir Subramania Aiyar, J., himself in *Davis* v. *Cunnasami Mudali* (4) the Indian Law (enacted in sections 62 and 63 of the Contract Act) is different; Article 73 of the Limitation Act also clearly implies, in my opinion, that an agreement in writing accompanying a promissory note, which agreement postpones the time for payment, is a valid and enforceable agreement. Of course the negotiable character of the promissory note is not destroyed and *bona fide* holders without notice of the accompanying agreement in writing will be protected even if they sued before the term mentioned in the accompanying agreement had expired. As between the parties to the note and as between the drawer and holders with notice or holders who are not holders in due course I am unable to see why the accompanying agreement, if in writing, should not be enforced. (That oral agreements to grant time will not extend limitation has been decided long ago by this Court and when such oral agreement varies the terms of a written contract, it would, in most cases, be inadmissible in evidence under section 92 of the Evidence Act.)

Article 73 of the Limitation Act provides three years' period from the date of the promissory note for a suit on a promissory note payable on demand and "not

(1) 29 M. 212; 16 M. L. J. 103.
(2) 19 M. 368.
(3) (1852) 3 H. L. C. 510; 10 E. R. 201; 88 R. R. 182.
(4) 19 M. 368, 6 M. L. J. 220.

accompanied by any writing postponing the right to sue." The promissory note in the present case as it was accompanied by such writing cannot fall, in my opinion, under Article 73. If it cannot fall under Article 73 it must, in my opinion, fall under Article 80 which relates to a suit on a bill of exchange, a promissory note or a bond not herein expressly provided for, the Article providing a period of three years from when the bill, note or bond becomes payable. The promissory note in this case not having been provided for in Article 73 or by any other previous Article, falls under Article 80 and as it becomes payable according to the accompanying agreement ten months after the date of the note, the three years must be calculated from the expiry of those ten months.

Mr. Sitarama Rao argued on the strength of *Sanjivi* v. *Errapa* (5) that the suit came under the general Article 120, which gives a period of six years from when the right to sue accrues. I am unable to accept this contention.

In the *first* place, the terms of the promissory note in *Sanjivi* v. *Errapa* (5) were very peculiar as the note was not one containing merely a promise to pay on demand, nor was it accompanied by anything in writing postponing the period of payment; but its own terms were "to pay at any time within six years on demand." Hence the learned Judges thought the Article 120 applied.

In the *second* place, Article 80 of the Limitation Act is not referred to in the judgments and seems not to have been brought to the notice of the learned Judges. Mitra in his Limitation Act, page 960, referring to this case, doubts its soundness and is evidently of opinion that Article 80 was the proper Article to be applied in such cases. Another learned writer, Rustomji, in his recent book on the Law of Limitation at page 233, also thinks that Article 80 ought to have been applied. In *Kuttiassan* v. *Suppi* (6) Article 80 was applied to a promissory note which was payable on demand to be made after the payee attained majority, the Court holding that time began to run from when the payee after attaining majority made his demand.

(5) 6 M. 290.

(6) 3 M. L. J. 199.

I would, therefore, refer for the decision of the Full Bench the following question:—

What Article of the Limitation Act applies to the suit on the promissory note sued on and when did the period for calculation of limitation begin?

(The opinion of the Full Bench will govern the decisions in the connected petitions also.)

OLDFIELD, J.—I should have been inclined after so many years to follow *Somasundaram Chettiar* v. *Narasimha Chariar* (1) as settled law. But I am not sure that English decisions, on which it is based, are applicable in India or that they represent the English law correctly. *Vide* observations on *Cumber* v. *Wane* (7) and *Thimbleby* v. *Barron* (8).

I, therefore, concur in the reference proposed by my learned brother.

This petition coming on for hearing as per above order on the 18th October 915, upon perusing the said order of reference and upon hearing the arguments of Mr *B. Sitarama Rao*, for the Petitioners, and of Mr. *S. Ranganadha Aiyar*, for the Respondents, and the question having stood over for consideration till this day, the Court expressed the following

OPINION.—We agree with Sadasiva Aiyar, J., and, for the reasons given by him, that Article 80 is the Article applicable, and that time began to run from the expiry of the period fixed in Exhibit A1. Such an agreement to give time is operative in India under sections 62 and 63 of the Indian Contract Act and is recognised by the Legislature in Article 73 of the Limitation Act, which excludes on demand bills and notes from the operation of the Article when they are accompanied by any writing restraining or postponing the right to sue. Lastly, such agreements appear to be expressly saved by the provision in section 32 of the Negotiable Instruments Act, which provides that notes and bills are payable at maturity according to the apparent tenor of the note or acceptance only in the absence of a contract to the contrary, thus expressly recognising that such a contract may postpone the date of payment. We think

(7) 1 Sm. L. C 338 at p. 352; 1 Strange 426; 93 E. R. 613.

(8) (1838) 3 M. & W. 210; 1 H. & H. 61; 7 L. J. Ex. 128; 150 E. R. 1119.

that *Simon* v. *Hakim Mahomed Sheriff* (2) and *Somasundaram Chettiar* v. *Narasimha Chariar* (1) proceed on the authority of English decisions which are inapplicable to India and would appear to be no longer law in England since the passing of the Judicature Act, and that they must be treated as no longer law.

These petitions coming on for hearing after the expression of opinion by the Full Bench in Civil Revision Petition No. 338 of 1914, the Court delivered the following

JUDGMENT.—In accordance with the opinion of the Full Bench, we set aside the decision of the Small Cause Court which dismissed the suit on the preliminary point of limitation and remand the suit for disposal on the other questions arising in the suit. Costs hitherto incurred will abide. There will be similar orders in the connected Civil Revision Petitions Nos. 339 and 340 of 1914.

*Petitions allowed; Suit remanded.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2300 OF 1914.

February 1, 1916.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Tuenon.

JOGENDRA NARAIN ROY CHOUDHURY—PLAINTIFF—APPELLANT

*versus*

MISS P. J. FORBES—DEFENDANT—RESPONDENT.

*Limitation Act (IX of 1908), s. 22—Suit against wrong defendant—Right person made defendant after period of limitation, effect of—Clerical mistake—Misdescription of defendant—Amendment.*

In a suit for the correction of a certain entry in the Record of Rights the defendant was described as Mr. P. J. Forbes but sometime after the period of limitation for the suit had expired on the petition of the plaintiff, alleging that the defendant had been misdescribed in the plaint and that the defendant was really a lady named Miss P. J. Forbes, the lady was made a defendant. She contested the suit and it was dismissed as barred by limitation against the lady:

*Held*, that the suit was not barred by limitation inasmuch as the mistake in the name of the defendant was but a clerical one and the case was merely of misdescription having regard to the fact that the party that was meant to be the defendant in the suit was the person whose name had been recorded in the Record of Rights. [p. 873, col. 1.]

Appeal against the decree of the District Judge, Purneah, dated the 11th May 1914, affirming that of the Munsif, Kotihar, dated the 28th of July 1913.

Babus *Jogendra Nath Mukerjee* and *Karuna Moy Ghose*, for the Appellant.

Maulvi *Muhammad Mustfa Khan*, for the Respondent.

JUDGMENT.—This is a second appeal on behalf of the plaintiff of the suit which was instituted on the 2nd January 1912. The suit was for the correction of a certain entry in the Record of Rights which was finally published on the 27th December 1905. In the plaint, the defendant was described as Mr. P. J. Forbes *pisar la maloom*, which means son of some unknown person. On the 20th April 1912, a petition was put in by the plaintiff alleging that the defendant had been misdescribed in the plaint and that the defendant was really a lady named Miss P. J. Forbes. It appears that on this application having been filed, Miss P. J. Forbes was made a defendant. She was summoned, put in appearance, filed a written statement and contested the suit.

Both the Courts below have dismissed the plaintiff's suit on the ground of limitation and have held that inasmuch as Miss P. J. Forbes was made a defendant sometime after the period of limitation, the suit against her must fail. The plaintiff appeals to this Court.

The only ground taken is that it is evident from a perusal of the plaint and the written statement that as a matter of fact the party that was meant to be the defendant in the suit was *the* person whose name had been recorded in the Record of Rights as *mokararidar* of the land in dispute and that it was for the correction of the word "*mokararidar*" into "*malguzar istamrari*" that the suit was brought.

On behalf of the respondent, it is urged that it was at the discretion of the Court to accept the petition for amendment or not, and that in fact no order was made either on the petition or in the order sheet of the 20th April 1912.

We have referred to the order sheet and we find that as a matter of fact there is no such order or any mention of the fact that a petition for amendment was put in. It

appears, however, from the judgment of the first Court that there was an application made for amendment on the 20th April 912 and that Miss P. J. Forbes was made a defendant.

The learned Pleader who appeared for Miss P. J. Forbes contended that as the petition for amendment was made on the 20th April 1912, that is to say, sometime after the period of limitation, the suit against the defendant, Miss P. J. Forbes, must fail.

The question, therefore, is whether in the circumstances the suit is barred by six years' limitation.

Now, when Miss P. J. Forbes was made a defendant, the lower Court in the exercise of its discretion granted the application, otherwise there is no reason why she should have been allowed to put in a written statement and contest the suit. From this it is clear that the fact of her being made a defendant was the result of the application for amendment that was put in on the 20th April 1912. The suit was the same, only with this difference that the plaintiff prayed that the defendant should be described as Miss and not Mr. P. J. Forbes. This kind of mistake creeps into records in consequence of abbreviations frequently used in *Hindi*, for instance, 'Mi' is used for both Mr. and Miss. The Record of Rights is not before us; but we think that it would have been very difficult for the plaintiff to find out whether the name mentioned in the Record of Rights was that of a male or of a female. But on finding afterwards that it was the latter, he came to Court and asked to have the mistake corrected. We are of opinion that this is but a clerical mistake and a case merely of misdescription.

That being our view, we set aside the judgments of the lower Courts and remand the case to the lower Appellate Court in order that it may decide the case on the merits; if necessary, that Court may send it to the first Court for the same purpose.

Costs will abide the result.

*Appeal allowed; Case remanded.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS Nos. 1234 AND 1633 OF 1913.

December 21, 1915.

*Present*:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

IN C. M. P. No. 1234 OF 1913

ATYAM VENKATASUBBARAYUDU AND ANOTHER—RESPONDENTS—PETITIONERS

IN C. M. P. No. 1633 OF 1913

BACHOTI BHAVAN NAROYANA SASTRI—RESPONDENT—PETITIONER

*versus*

*Sri Rajah* VELUGOTI GOVINDA KRISHNA YACHENDRULU VARU BAHADUR ZAMINDAR GARU—PLAINTIFF—RESPONDENT IN BOTH.

*Civil Procedure Code (Act V of 1908), ss. 114, 117—Letters Patent (Mad.), s. 15—Appeal—Judgments—Review, maintainability of—High Court, jurisdiction of.*

The High Court has jurisdiction to entertain a review in appeals preferred under section 15 of the Madras Letters Patent. [p. 874, col. 2.]

As empowered under section 44 of the Letters Patent the Governor-General in Council has, by section 117 of the Civil Procedure Code, 1908, incorporated into the Letters Patent the provisions relating to review. [p. 874, col. 1.]

Section 114 of the Civil Procedure Code, 1908, applies to judgments in appeal under section 15 of the Letters Patent. [p. 874, col. 1.]

*Hafiz Muhammad Mohsin* v. *Sheo Prasad*, 1 A. L. J. 509, distinguished.

*Krishen Doyal* v. *Irshad Ali*, 31 Ind. Cas. 965; 22 C. L. J. 525, followed.

*Sabhapathi Chetti* v. *Narayanasami Chetti*, 25 M. 555, 11 M. L. J. 346; *Babaji* v. *Babaji*, 15 B. 650; *Lala Pryag Lal* v. *Jai Narayan Singh*, 22 C. 419; *Nana* v. *Sheku*, 32 B. 337; 10 Bom. L. R. 330, distinguished.

*Ravi Veeraraghavulu* v. *Bomma Devara Venkata Narasimha Naidu Bahadur*, 25 Ind. Cas. 305; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 19 C. W. N. 97; 16 Bom. L. R. 853; 37 M. 443 (P. C.), followed.

Petitions praying that, in the circumstances stated therein, the High Court will be pleased to review the judgment of the Hon'ble Justice Sir Ralph Benson and the Hon'ble Mr. Justice Sundara Aiyar, in Letters Patent Appeals Nos. 26 and 28 of 1912, preferred against the order of the Hon'ble Mr. Justice Abdur Rahim, in Second Appeals Nos. 1107 and 1109 of 1911, respectively, preferred against the decrees of the Court of the Subordinate Judge of Kistna at Ellore, in Appeal Suits Nos. 218 and 220 of 1910 (Original Suits Nos. 432 and 430 of 1908 on the file of the Court of the District Munsif of Ellore), respectively.

Mr. *T. R. Ramachandra Aiyar*, for the Petitioners.

Mr. *S. Subramania Aiyar*, for the Respondent.

JUDGMENT.—Mr. Subramania Aiyar has taken the preliminary objection that the High Court cannot entertain a review in appeals preferred under section 15 of the Letters Patent. The question is practically *res integra* as the decision in *Hafiz Muhammad Mohsin* v. *Sheo Prasad* (1), in which the point was directly raised, gives no reason for the conclusion arrived at.

After hearing the matter fully argued by the learned Vakils on either side, we are of opinion that there is no force in the objection. Section 44 of the Letters Patent says that the provisions are subject to the legislative powers of the Governor-General in Council. As at present advised, we are in agreement with Mr. Subramania Aiyar that this provision would not enable Courts, by implication, to supplement the Letters Patent by importing into it all Acts *ejusdem generis* passed by the Governor-General in Council and that the provision is only intended to empower the Governor-General in Council to legislate with a view to supplement omission in the Letters Patent. Even in this view, we think that by section 117 of the Code of Civil Procedure (Act V of 1908) the Governor-General in Council did incorporate into the Letters Patent the provisions relating to review. It was then argued that the review section 114 of the Code (Act V of 1908) cannot apply as it provides only for the review of decrees or orders passed under the Code of Civil Procedure. We are not impressed by this argument. In the *first* place, decrees are passed in appeals heard under the Letters Patent only under the Code of Civil Procedure. In the *second* place, clause (*b*) of section 114 does not require that orders and decrees should have been passed under the Code. *Further*, the word decree or order includes a judgment. [*Krishen Doyal* v. *Irshad Ali* (2)]. Mr. Subramania Aiyar relies on *Sabhapathi Chetti* v. *Narayanasami Chetti* (3) for the proposition that section 15 of the Letters Patent is not controlled by the Code of Civil Procedure. All that was decided in that case was that as section 15 had given an unlimited power of appeal against every judgment of a single Judge, the Governor-General in Council should not be understood to have taken away by implication that power of the litigant by making section 540 of the Code (Act XIV of 1882) applicable to Chartered High Courts. This does not contravene the principle that it is competent to the Governor-General in Council to supplement the remedy of appeal by giving an additional remedy by way of review to the litigant.

The decisions in *Babaji* v. *Babaji* (4), *Lala Pryag Lal* v. *Jai Narayan Singh* (5) and *Nana* v. *Sheku* (6), only lay down that a self-contained Act should not be added to by the provisions of the Code of Civil Procedure. This does not affect the present question.

Mr. Ramachandra Aiyar has referred us to two reported cases and to an unreported decision, in which reviews under similar circumstances were entertained. Apparently the practice by this High Court has been in favour of allowing reviews to be filed in appeals under the Letters Patent.

It was pointed out by the Judicial Committee in *Ravi Veeraraghavulu* v. *Bomma Devara Venkata Narasimha Naidu Bahadur* (7), that even though a strict coustruction of the law may not permit of the entertainment of appeals, a long standing practice of the Court should not be lightly departed from in that respect. What relates to appeals applies *mutatis mutandis* to reviews also. We must, therefore, overrule the preliminary objection. If we are to interfere in review in these cases, it can only be by upsetting conclusions of fact at which the learned Judges who heard the appeal arrived. We are not prepared to adopt this procedure.

The petitions are dismissed with costs.

*Petitions dismissed.*

(1) 1 A. L. J. 509.
(2) 31 Ind Cas. 965; 22 C. L. J. 525.
(3) 25 M. 555; 11 M. L. J. 346.
(4) 15 B. 650.
(5) 22 C. 4 9.
(6) 32 B 337; 10 Bom L. R 330.
(7) 25 Ind Cas. 305; 7 M. 443 (P C.); 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 451; 20 C. L. J. 375; 19 C. W. N. 97; 16 Bom. L. R. 853.

RUKMAN *v.* SAIN DAS.

## PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1127 OF 1912.

February 3, 1916.

*Present*:—Mr. Justice Rattigan and Mr. Justice LeRossignol.

*Musamma* RUKMAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

SAIN DAS—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

*Custom—Hindu Law*—Kapur Khatris *of Hafizabad*—*Succession, if governed by custom—Daughters, right of, to succeed.*

In a suit against the widow and daughters of a deceased member of a big land-owning *Kapur Khatri* family of Hafizabad for a declaration that the plaintiff was the reversionary heir of the deceased, the question arose as to whether such family was governed by custom or by H ndu Law:

*Held*, 1) that the family, being exoga nous and being for generations past intimately connected with *zemindari* work, could not be taken to be governed by Hindu law; [p. 877, col. 2; p. 878, col. 1.]

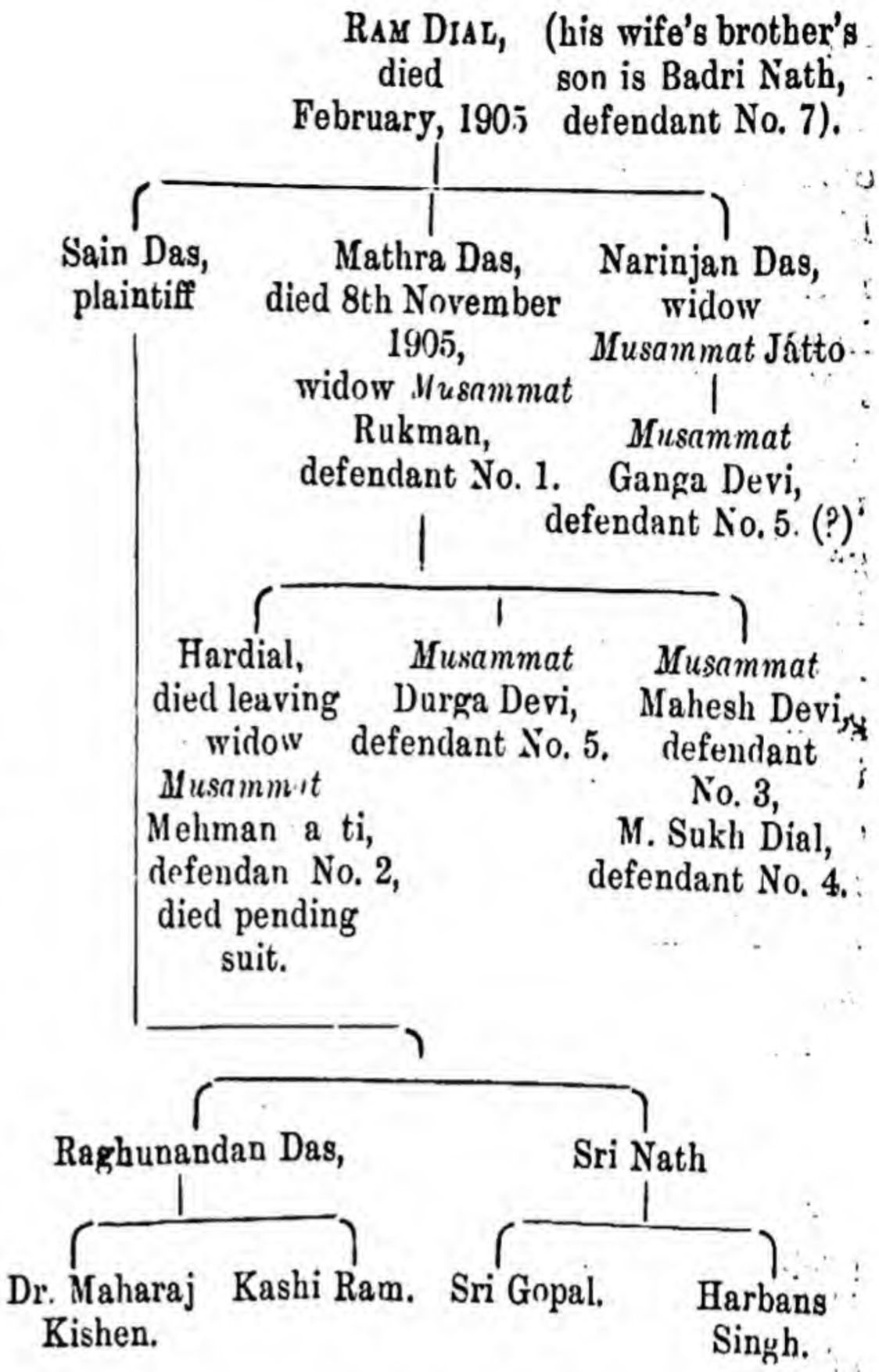
(2) that in the absence of *wajib-ul-araiz* and *riwaj-i-ams* limiting the collaterals' preferential rights merely to ancestral property, a daughter in the family had, according to custom, no right to succeed *as an heir* to either the ancestral or the self-acquired immoveable property of her deceased father. [p. 879, col. 1.]

First appeal from the decree of the Additional District Judge, Gujranwala, dated the 20th April 1912, decreeing the claim.

Messrs. *Fazl-i Hussain* and *Abdul Ghani*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, and Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The landed property in suit belongs to an influential *Kapur Khatri* family which owns a large amount of property in various villages in the Hafizabad Tahsil of the Gujranwala District. The family tree is given in detail in the judgment of the Additional District Judge but as it does not include the names of the various ladies who are interested in the present suit, the following might be added as a supplement:—




It is alleged that part of the property claimed was acquired by Mathra Das, deceased, but there can be little doubt that by far the more valuable part of it has come down through Ram Dial, the father of the plaintiff, Sain Das, and the deceased Mathra Das. This Ram Dial died at an advanced age in February 1905. It was alleged that he made a Will during his life-time and on his death a dispute arose between his two sons Sain Das and Mathra Das. While the matter of the succession to Ram Dial's landed property was before the Revenue Authorities for consideration in connection with the alteration of the entries in the Revenue Records, the dispute was referred to arbitrators and an award appears to have been given about June 1905. The dispute, however, was not settled and mutation had not taken place when Mathra Das, who was an old man, fell ill in September 1905. He was taken by his son-in-law, Sukh Dial, defendant No. 4, to Gujrat where he appears to have consulted, and to have been treated by, a local medical man but seemingly without much beneficial result. He was brought back to his house in Hafizabad and on the 20th October is alleged to have made a Will, Ex-

hibit D1, in favour of *Musammat* Rukman and defendants Nos. 2, 3, 5 and 6. He died on the 8th November 1905, and upon his death the defendants claimed to have mutation of names effected in their favour in respect of all the deceased's property, reliance being placed upon the said Will. The Revenue Authorities naturally declined to express any opinion with regard to the genuineness or validity of the Will, though in respect of lands in two villages (namely, *Mauza* Chatai and *Mauza* Karyala) they granted mutation in accordance with the terms thereof. As regards the lands in other villages mutation was sanctioned in favour of *Musammat* Rukman and *Musammat* Mehmanwanti, the two widows who were alleged to be in possession.

The present suit was instituted by Lala Sain Das on the 4th January 1907. The plaint recites that Mathra Das died on the 8th November 1905, leaving moveable and immoveable property of the value of Rs. 64,916-13-0 in *Tahsil* Hafizabad, and claims that the whole of the said property, as specified in the lists attached, was the deceased's ancestral property. It is admitted in the plaint that *Musammat* Rukman Devi, defendant No. 1, as widow of the deceased is entitled to retain possession of the property for her life-time; but the plaintiff claims that on her death he will be entitled by custom to succeed as reversionary heir. The plaint also refers to the fact that a Will is alleged to have been executed by Mathra Das, but states that the plaintiff does not admit either its genuineness or its validity or that the deceased had a disposing mind at the time when he is alleged to have made the Will. Plaintiff prayed, therefore, for a declaratory decree to the effect that he is entitled to succeed as reversionary heir on the death of defendant No. 1 to the entire property left by Mathra Das and that the alleged Will set up by defendants is not genuine or valid or in any way effectual as against his rights.

Defendants filed written statements to the effect that the property left by Mathra Das was not admitted to be ancestral; that the parties being high caste *Khatris* and residents of Hafizabad are bound in matters of succession by the Hindu Law and not by custom, that in the presence of daughters and daughters' sons, plaintiff as the brother of the deceased had no right to sue for possession and was not the heir to the property; and that the deceased had made a Will in favour of defendants and that the said Will was valid in every respect. Defendant Sukh Dial further pleaded as regards his own rights that in 1898 Ram Dial and Mathra Das had given him one-half of a certain *haveli* and also the land attached to the well known as Ram Dialwala in Kila Ram Kaur and that to this property the plaintiff had no right whatsoever, especially as he had acquiesced in the gift. The Court framed the following issues:—

1. Is the property in suit ancestral?
2. Are the parties governed by custom?
3. In case they are governed by Hindu Law, can the present suit for a declaration be brought by the plaintiff?
4. Cannot the late Mathra Das' daughters and their children have priority over the plaintiff so far as the question of succession is concerned?
5. Did the late Mathra Das execute a Will validly, and if so, was he authorized to do so by law?
6. Was Sukh Dial given a portion of the property by Mathra Das or Ram Dial, and did the plaintiff in any way acquiesce in that gift? How far does that acquiescence affect the present case?
7. Cannot the widows of Mathra Das and Hardial Singh claim any portion of the property as *stridhan*?
8. Did the late Mathra Das make any *sankalp*, and if so, cannot his widow dedicate a portion of his property to cover that *sankalp*?
9. What property has been left by the deceased Mathra Das?
10. Has Badri Nath, defendant, given up his rights under the late Mathra Das' Will?

After a protracted trial, the suit was eventually decided on the 20th April 1912, when the Additional District Judge granted plaintiff a declaratory decree to the effect that he was entitled to succeed after the death of defendant No. 1 to the whole of the property left by Mathra Das (with the exception of ornaments and wearing apparel) and that the Will set up by the defendants was not to affect plaintiff's right. The learned Judge's findings on the various issues were as follows:—

RUKMAN *v.* SAIN DAS.

1. That the parties were in matters of succession to immoveable property governed by custom and not by Hindu Law;

2. That the Will propounded by defendants was not executed by Mathra Das;

3. That plaintiff was competent to institute the present suit and that the daughters of Mathra Das had no right of succession in the presence of a near collateral such as plaintiff;

4. That it was unnecessary to determine whether the property was ancestral or self-acquired inasmuch as the daughters had no right to succeed to either ancestral or self-acquired property;

5. That Mathra Das made a gift of ancestral residential houses in favour of Sukh Dial, but that plaintiff did not acquiesce in the gift which was in no way binding upon him;

6. That there was no evidence to prove that Mathra Das had made any *sankalp* during his life-time and that accordingly his widow had no right to set apart any property for that purpose;

7. That it was unnecessary in the present suit to decide issue No. 9; and

8. That inasmuch as the Will of Mathra Das had not been proved it was unnecessary to give any decision with regard to issue No. 10.

Defendants have appealed to this Court and the case has been argued at great length and very elaborately by Mr. Fazl-i-Hussain for the appellants, and by Mr. Muhammad Shafi for the respondents.

Mr. Fazl-i-Hussain contends :—

1. That the parties are governed in matters of succession by the principles of Hindu Law and not by the Customary Laws which obtain among agriculturists, and that accordingly the daughters of Mathra Das, who was separate from his brother Sain Das, are entitled to succeed to the whole of the deceased's property; (2) that the Will propounded by defendants was actually executed by Mathra Das who was fully competent to transfer his property as he pleased whether by gift *inter vivos* or by Will; that Mathra Das was in his senses and had a disposing mind at the time when he executed the Will; and that the Will is valid by law; (3) that if Hindu Law does not apply and if the Will is held not to have been established, even then the daughters would under the ordinary rule of Customary Law exclude plaintiff from succession to such part of the property as was self-acquired; that in the absence of evidence to shew that the property is ancestral, it must be deemed to have been acquired by the deceased; (4) that the gift of the *haveli* in favour of Sukh Dial had been duly proved and that the gift was in every respect valid and binding on the plaintiff; and (5) that the decision of the Additional District Judge with regard to the alleged *sankalp* was erroneous.

The first and perhaps the most important question to be decided on this appeal is, whether the *Kapur Khatris* of the Hafizabad Tahsil are governed in matters of succession to immoveable property by the ordinary principles of the Mitakshara Law or by the customary rules obtaining among agricultural tribes of this Province. This question has been carefully and exhaustively considered by the Additional District Judge and the conclusion at which he arrived is that succession in such cases is regulated by custom. The learned Judge has given detailed reasons for his finding and after hearing Mr. Fazl-i-Hussain's criticisms, we are satisfied that this finding is correct and in accordance with the evidence on the record.

*Kapur Khatris* are not members of any of the well-known dominant agricultural tribes of the Province, and Mr. Shafi for the respondents readily conceded that the *onus probandi* was upon plaintiff to shew that the branch of *Kapur Khatris* with whom we are now concerned do not follow Hindu Law in matters connected with succession to immoveable property. He contended, however, and, in our opinion, successfully, that plaintiff had been able to discharge this burden and had proved that in such matters the family of Ram Dial had for generations past been intimately connected with *zemindari* work; that they had been for two or three centuries owners of large village estates situate in the immediate neighbourhood of villages owned by such agricultural tribes as *Bhatti Rajputs*, *Jats* and *Arains*, that their main source of income was derived from the possession of such estates; that the head of the family for the time being was the leading agricultural headman (*zaildar* and *lambardar*)

in the Tahsil, and had as such actually signed the *wajib-ul-araiz* of his villages (pages 114 and 116 of paper-book 'A', which bear the signatures of Ram Dial); that the *riwaj-i-am* of the District prepared at the Settlement of 1868 was signed by the said Ram Dial and that the recent *riwaj i-am* of 1894-1895 was signed by Mathra Das, the person whose property is now in dispute (see pages 134 and 200 of paper-book 'A'); and that so far as concrete instances could be adduced, plaintiff had been able to give evidence of numerous instances (some, *e. g.*, those relating to the property left by Ram Rakha Mal and Narinjan Das, in this very family) of daughters being excluded from inheritance by collaterals of their father (see Exhibit P—37, 38, 39, 40, 41, 104, 105, 106, 107 110), whereas defendants had not been able to point to a single instance of a daughter's succession, apart from a gift made to her by her father in his life-time. As already remarked the Additional District Judge has dealt very fully with this question and it is unnecessary for us to travel over the ground once more No doubt, as Mr. Fazl-i-Hussain argues, in most of the cases adduced as evidence to prove the daughters' exclusion, the value of the property involved was not great, but the fact remains that while plaintiff has been able to adduce instances in support of his contention, defendants have entirely failed to point to a single well-authenticated case where a daughter has succeeded, as an heir, to her father's immoveable property, ancestral or self-acquired. The fact that these *Kapur Khatris* are exogamous would doubtless account to some extent for this exclusion, but the main grounds upon which the rule of succession observed by them was based were the prevalent desire in times past to keep the village compact and the conception that the best protectors of the land, at a time when might was often stronger than right, were the male members of the family.

The bald statements of witnesses that *Kapur Khatris* observe, and are regulated by, Hindu Law are obviously of no value, and it is in this respect that a marked distinction exists between the evidence of witnesses called by the plaintiff and of those called by the defence. The former are able to refer to numerous cases of exclusion of daughters; the latter are not, and merely state dogmatically that *Kapur Khatris* are high caste Hindus and observe the rules of Dharm Shastra. Some of them admit they are partly Sikhs and partly Hindus (*e. g.*, Amar Nath, D. W. No. 6), and others are obliged in cross-examination to say that they do not know the difference between the rules of Hindu Law and of custom (see Hira Nand, D. W. No. 22, Guranditta, D. W. No. 31). Hari Kishen (D. W. No. 19) says that *Jat* customs are quite different from the rules regulating succession amongst *Kapur Khatris*, but admits that he does not know what *Jat* customs are, and Sri Nawas (D. W. No. 16), who is one of the priests of the family, deposes that *Kapur Khatris* are *Guruke Sikhs*, and that the customs observed by them are identical with the customs of the *Jats*. Finally, three of defendants' own witnesses (Amar Chand, D. W. No. 25, Nihal Chand, D. W. No. 27, and Devi Ditta Mal, D. W. No. 28) have admitted that among *Kapur Khatris* a daughter does not succeed *as an heir* to her father's immoveable property. Having regard then to the circumstances above referred to and especially to the very ancient connection of the family village lands, we agree with the Court below that so far as regards succession to immoveable property, the family of the parties is bound by the rules not of Hindu Law, but of custom as embodied in the *wajib-ul- ruiz* and *riwaj-i-ams* of 1856, 1868, 1892 and of the last Settlement (see Customary Law of Gujranwala District by Mr. Lall, pages 16 and 30). Under the ordinary rules of Customary Law in this Province, a daughter would have no right to succeed to her father's ancestral immoveable property in the presence of her paternal uncle, and defendants have completely failed to prove a special custom in this family which would give her such preference. On the other hand, plaintiff has been able to point to numerous instances in support of the statements in the *wajib-ul-araiz* and *riwaj-i ams* above mentioned. Mr. Fazl-i-Hussain contends, however, that even if such be the rule with regard to ancestral immoveable property, the *presumption* is that a daughter has a preferential right to succeed to her father's acquired immoveable property and that as there is no proof that any part of the landed or house property left by Mathra

Das is ancestral property *qua* plaintiff, the daughters of Mathra Das should be held to be entitled to the whole of his estate.

There is considerable authority for the general proposition as stated by Mr. Fazl-i-Hussain, and here again Mr. Shafi admits that the onus was originally on plaintiff. He argues, however, that the onus has been shifted by the evidence which his client has adduced. The *wajib-ul-araiz* and *riwaj-i ams* do not limit the collateral preferential rights merely to ancestral property. The *riwaj-i-am* of 1894-1895 especially makes it clear that the distinction between ancestral and acquired property was not lost sight of [see question 43 (2) and 47, pages 225 and 227 of paper book 'A'], and the answer to question 47 is clear and emphatic that "the daughter has in no case a right to succeed to the property" (*cf.* also the answers to questions 49 and 50). Furthermore, Narinjan Das (brother of plaintiff and Mathra Das) left both acquired and ancestral property and though a daughter, *Musammat* Ganga Devi, survived him, the whole of his property went to his brothers [see Nanak Chand, P. W. No. 18; Jawahar Mal, P. W. No. 21; Raghpat Rai, P. W. No. 22 (page 419, line 20, page 420, line 30); Gayan Chand, P. W. No. 32 (page 429, line 7)]. So also in the matter of succession to Ram Rakha Mal (another member of the family), his daughters were excluded from the inheritance, though he left both acquired and ancestral property, [see Pandit Harnam Das, P. W. No. 8 page 407, line 20) the first of the family; Raghpat Rai, P. W. No. 22 (page 419), line 18; Gyan Chand) page 429, line 7]. The like happened on the death of Guru Das, Kapur [see Mohan Lal, P. W. No. 62) page 481, lines 4—7.]

We hold, therefore, that plaintiff has succeeded in proving that in this family a daughter has no right to succeed, *as an heir*, to either the ancestral or the acquired immoveable property of her deceased father. It was probably for this very reason that defendants realized the necessity of having a Will to support their claims to Mathra Das' property. This brings us to a consideration of the Will which they have propounded.

The Additional District Judge has found against the genuineness of the Will and the reasons given by him in support of his finding are certainly very strong. He points out that the document was written out by the defendant Badri Nath who is himself one of the legatees thereunder; that there is considerable and material discrepancy between the statements of the three attesting witnesses who gave evidence in Court as to what occurred at the time of execution· that it was not possible for an enfeebled and paralysed man, over 70 years of age, and on his death-bed, to dictate an elaborate and detailed Will of this kind which, moreover, contains not a single alteration or correction (see the Will as translated at pages 383 and 3c4 of paper-book 'A'); and that in view of the value of the property involved and of the facts that owing to paralysis the testator was unable to sign the document and was compelled (apparently for the first time in his life) to affix his thumb-mark instead, and that registration could have been effected without any trouble or inconvenience at any time between the alleged date of execution (the 20th October) and the date of the testator's death, the omission to take so obvious and natural a precaution was very significant. We might add that this omission is more remarkable when we find that the Sub-Registrar, *Lala* Harsukh Rai (P. W. No. 38) actually saw Mathra Das no less than four times after he had been brought back from Gujrat (that is to say about the end of September) and before his death on the 8th November. It is also an unfortunate fact that the three attesting witnesses who have given evidence in Court, Amar Chand, D. W. No. 25, Diwan Chand, D. W. No. 26, and Nihal Chand, D. W. No. 27, are, for various reasons, by no means favourably disposed towards plaintiff and his son Sri Nath.

Mr. Fazl-i-Hussain made no attempt to explain the omission to register so important a Will. All that he could urge was that it was not compulsorily registrable. That, no doubt, is quite true, but it is nevertheless a common practice in this country to register Wills and it is surely surprising to find intelligent men of business such as Mathra Das and Sukh Dial omitting to take a precaution of the kind especially at a time when the relations between Sain Das, plaintiff, and Mathra Das were very strained and the disputed succession to Ram Dial's property had not been settled.

In this connection we might point out

that the witness Daulat Ram (P. W. No. 41), who appears to be an impartial witness, has deposed that he was asked, some twenty days prior to Mathra Das' death, to attest a Will alleged to have been executed by the latter, but that he refused to attest it as he knew that Mathra Das was not then in his proper senses. It was probably this man who raised the suspicions of Sain Das, as we find the latter on the 4th November presenting a petition (see page 292 of paper-book 'A') to the Collector praying that officer to take action, as he (Sain Das) had reason to believe that certain persons were "securing" a document from Mathra Das who was not in his proper senses. The petitioner's application states that Mathra Das has been seriously ill for the last two months and is quite incapable of any intelligent act, and he begs the Collector, while Mathra Das is still alive, to satisfy himself upon this point. Unfortunately no action was taken on this petition until after Mathra Das' death when it was in due course rejected. In these circumstances we agree with the learned Additional District Judge that the Will set up by defendants is open to the very gravest suspicion and that its genuineness cannot be regarded as established. But even if we could hold that it was in fact executed by Mathra Das, we should still have to find that at the time when it was executed, the testator had not "a disposing mind". Admittedly he had been seriously ill since the beginning of September and had been taken for medical treatment to Gujrat where Ganesh Das, a connection of his by marriage, resides. He remained there under treatment till about the end of September when he was taken back to his own house in Hafizabad, and from the admitted fact that he was then still ill, we may reasonably infer that the object of taking him back was to enable him to die (as it was feared he must very shortly) in his own house. He was certainly very ill indeed when he was brought back, and on the 20th October when the Will is said to have been executed, he was so paralysed that (according to the Will itself) he was unable to append his signature. In addition to these admitted facts, we have a mass of evidence to the effect that he was utterly incompetent to make a Will after his return to Hafizabad (see the statements of Lala Harsukh Rai, P. W. No. 38; Bhola Nath, contractor, P. W. No. 39; Dr. Amrit Singh, P. W. No. 40; Daulat Ram, Hospital Assistant, P. W. No. 41; Nanak Chand, retired Hospital Assistant, P. W. No. 42; Gopal Das, P. W. No. 45; Badri Nath, P. W. No. 46; Devi Dial, P. W. No. 48; and Hari Chand, P. W. No. 49). On the other hand, Sukh Dial, defendant (who is conducting the case on behalf of himself and his co-defendant) deposed that Mathra Das, after his return from Gujrat, was professionally treated by Lal Muhammad, Hospital Assistant (one of the attesting witnesses) and a Dr. Kaul Das (see page 394, lines 20 and 43). Lal Muhammad died while the suit was pending in the lower Court, but defendants did not call Dr. Kaul Das nor have they explained why he was not called as a witness.

Upon the evidence before us we must hold that Mathra Das was not mentally competent to dispose of his property at the time when he is said to have made the Will upon which defendants rely. The Will, therefore, fails.

As regards defendant Sukh Dial's claim to the *haveli* (issue No. 6), we need say no more than that it is admittedly based on the *ruqqa* (Exhibit D-2). This document is open to grave suspicion in many respects and has clearly been tampered with in respect of the date which it purports to bear, but it is unnecessary to discuss it further as Mr. Fazl-i-Hussain had to admit that it had not been proved. Sukh Dial in his evidence makes no reference to it nor was any witness called to prove it.

The only other point to which reference was made at the hearing before us was as regards the right of the widow, *Musammat* Rukman, to make certain gifts by way of charity (*sankalp*). This is a very minor question, but as the donees are not parties to this suit, we obviously can give no decision as to the validity or otherwise of the gift that would be binding on them.

Plaintiff preferred cross-objections from the decree of the Additional District Judge in respect of the dismissal of the claim to certain ornaments and moveables in the possession of defendants, but Mr. Shafi on behalf of his client withdrew them at the hearing.

The result is that the appeal and cross-objections stand dismissed. The parties will bear their own costs in this Court.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1192 OF 1913.

September 16, 1915.

*Present:*—Justice Sir William Ayling, KT., and Mr. Justice Tyabji.

DAVULURU VIJAYA RAMAYYA—DEFENDANT No. 1—APPELLANT

*versus*

DAVULURU VENKATASUBBA RAO AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, Sch. II, Para. 1—Agreement to refer to arbitration on behalf of minor, when valid—Decree passed in accordance with award, scope of—Suit for partition—Consent decree passed on appeal by father of minor parties—Leave of Court not obtained—Minor, whether entitled to avoid decree.*

The agreement to refer to arbitration contemplated in Schedule II, paragraph 1, of the Code of Civil Procedure is an "agreement with reference to the suit" under Order XXXII, rule 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule. [p. 886, col. 2.]

*Hardeo Sahai* v. *Gauri Shankar*, 28 A. 35: A. W. N. (1905) 171; 2 A. L. J. 493; *Lutawan* v. *Lachya*, 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57; *Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167 at pp. 173, 183; 29 I. A. 51 (P. C.); 6 C. W. N. 226: *Luxumibai* v. *Hajee Widina Cassum*, 23 B. 629; *Mahadev Balkrishna* v. *Krishnabai*, (1896) P. J. B. H. C. 609; *Walji Mathura Das* v. *Ebji Umersey*, 29 B. 285 at p 289; *Lakshmana Chetti* v. *Chinnathambi Chetti*, 24 M. 326; *Samibai* v. *Premji Pragji*, 20 B. 304; *Venkatachellam Reddi* v. *Rungiah Reddi*, 12 Ind. Cas. 372; 21 M. L. J. 990 at p. 996; 10 M. L. T. 248; (1911) 2 M. W. N. 249; 36 M. 353; *Pragdas* v. *Girdhardas*, 26 B. 76; 3 Bom. L. R. 431; *Tincowry Dey* v. *Fakir Chand Dey*, 30 C. 218; 7 C. W. N. 180; *Ganesha Row* v. *Tuljaram Row*, 19 Ind. Cas. 515; 36 M. 295 at p. 303; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.); *Adams* v. *Great North of Scotland Railway Company*, (1891) A. C. 31 at p. 39; *Jones* v. *Powell*, (1838) 6 Dowl. P. C. 483 at p. 485; 49 R. R. 728 at p. 729; *Wrightson* v. *Bywater*, (1838) 3 M. & W. 199 at pp. 204, 205; 1 H. & H. 50; 7 L. J. Ex. 83; 150 E. R. 1115; 6 Dowl. P. C. 359; 49 R. R. 570, referred to.

The principle of finality which attaches to a decree passed in accordance with an award given in arbitration proceedings, does not affect matters which are outside the arbitration proceedings. [p. 889, col. 2.]

*Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167 at pp. 173, 183; 29 I. A. 51 (P. C.); 6 C. W. N. 226; *Raja Narain Singh* v. *Chaudhrain Bhagwant Kuar*, 13 A. 300; 18 I. A. 55 (P. C.); 6 Sar. P. C. J. 14; 15 Ind. Jur. 283; *Maharajah Joymungal Singh Bahadoor* v. *Mohun Ram Marwaree*, 23 W. R. 429; *Achuthayya* v. *Thimmayya*, 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315; *Rajrani Dasi* v. *Gonesh Prosad Srichandan Mohapatra*, 5 Ind. Cas. 650; 14 C. W. N. 626; 37 C. 407; *Nandram Daluram* v. *Nemchand Jadavachand*, 17 B. 357 at p. 360; *Tallapragada Suryanaraina Row* v. *Tallapragada Sarabaya*, 9 Ind. Cas. 173; 21 M. L. J. 263, 9 M. L. T. 251; (1911) 1 M. W. N. 151 (F. B.), referred to.

Where a minor seeks to avoid a decree he can avoid it only *in toto*, and not only in part. [p. 890, col. 2.]

*Bhimaji Govind* v. *Rakmabai*, 10 B. 338 at p. 340; *Pasupati Nath Bose* v. *Nando Lal Bose*, 30 C. 718; *Manohar Lal* v. *Jadunath Singh*, 28 A. 585; 10 C. W. N. 898; 9 C. C. 219; 4 C. L. J. 8; 8 Bom. L. R. 489; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128; *Earl of Bandon* v *Bicher*, 3 Cl. & Fin. 479 at p. 510; 6 E. R 1517; 9 Bli. (N. s.) 532; *Mewa Lal Thakur* v. *Bhujhunjha*, 13 B. L. R. App. 11; 22 W. R. 213; *Khajooroonissa* v. *Rowshan Jehan*, 2 C. 184 at pp. 191, 916; 26 W. R 36; 3 I. A. 291 (P. C.), referred to.

Where a Court simply records a compromise under Order XXXII, rule 7, Civil Procedure Code, and passes a decree in accordance therewith, this does not amount to sanction. [p. 882, col. 1.]

*Kalavati* v. *Chedi Lal*, 17 A. 531; A. W. N. (1895) 126, followed.

*Aman Singh* v. *Narain Singh*, 20 A. 98; A. W. N. (1897) 205, dissented from.

Plaintiffs, who were minors, were parties to a suit for partition brought by the 1st defendant. That suit was referred to arbitration and a decree was passed in accordance with the award. Plaintiffs' father having appealed, the appeal was compromised and a decree was purported to be passed therein by consent of parties. Plaintiffs now sued to have the decree set aside as not binding on them:

*Held*, that no leave of the Court having been obtained under Order XXXII, rule 7 of the Civil Procedure Code, the decree was not binding on the minor plaintiffs and they were entitled to avoid it. [p. 890, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 26 of 1913, preferred against that of the Additional District Munsif of Masulipatam in Original Suit No. 91 of 1911.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Nagabhushanam*, for the Respondents.

This second appeal coming on for hearing on the 5th and 6th October 1914, the Court (Ayling and Hannay, JJ.) delivered the following

JUDGMENT.—The *first* point argued for appellant is that as the compromise was entered into by plaintiffs' father and not by their guardian *ad litem* (who was their brother, the present 2nd defendant) no sanction of the Court was necessary under section 462 of the old Code of Civil Procedure. Reliance is placed on *Ganesha*

*Row* v. *Tuljaram Row* (1), which, however, affords no support for such a contention. It is not denied that if plaintiffs' father had been representing the interests of his sons in Appeal Suit No. 504 of 1907 he could not have entered into a valid compromise on their behalf without the leave of the Court so as to bind them. We cannot accept the suggestion that when he had no responsibility for them, and when their interests were entrusted to another person, he should have larger powers to bind them. We have no hesitation in rejecting this contention.

It is *next* argued that although the compromise was entered into without the leave of the Court, it is only voidable by plaintiffs if they can show that it was prejudicial to their interests. Reliance is placed on *Aman Singh* v. *Narain Singh* (2). We have carefully considered that ruling and do not think it is of any use to the appellant. In that case the Court appears to have considered the propriety of the compromise from the point of view of the minor's interests and to have sanctioned it; though this was after and not before it was entered into. It is not suggested that anything of the kind was done here; the Court simply recorded the compromise under section 375 of the old Code of Civil Procedure and passed a decree in accordance therewith. This does not amount to sanction [*Vide Kalavati* v. *Chedi Lal* (3)]. So far as appears, the propriety of the compromise from the point of view of the minors' interests was never considered at all by the Court. We must, therefore, hold that the compromise is voidable by the plaintiffs in this case.

*Lastly*, it is urged that the decree directing the return by the appellant alone of a portion of the items received by him under the compromise decree is inequitable; and that his claim to plaint item No. 3 embodied in issue 4 must be decided. This appears to be so.

In order to frame a proper decree (apart from the portion declaring the *razinama* and decree in Appeal Suit No. 504 of 1907 to be not valid and binding on plaintiffs) we must call for findings on the evidence on record on issues 4, 7 and 9. Two months are allowed for submitting findings, and 7 days for filing objections.

In compliance with the above order of this Court, the Subordinate Judge submitted the following

FINDINGS.—As directed by the High Court, I beg to record the following findings on issues 4, 7 and 9.

2. *Issue* 4. Item No. 3 (1 acre and 14 cents in Survey No. 96) is admitted by the 1st defendant to be the ancestral property of himself and plaintiffs' late father, *vide* his deposition. There is no proof that it was plaintiffs' father's exclusive property.

3. In 1906, 1st defendant, who was the *kurnam*, sued plaintiffs' father for recovery of some lands including the one in question, on the ground that they were service *inams*, and could not, therefore, be held by a non-office-holder, *vide* Exhibit A; and it was then decided that the land had lost the nature of "service *inam*" and was held by the plaintiff's father as "*seri*" under the *zemindar*. Even if it was a service *inam* on the date of its transfer by plaintiffs' father to 1st defendant under the compromise, the transfer was not valid in view of section 5 of Madras Act III of 1895, and even if the *inam* was enfranchised subsequent to the alienation, 1st defendant is not entitled to the land as against the plaintiffs, *vide Narahari Sahu* v. *Sira Korithan Naidu* (4). When a service *inam* is enfranchised it becomes family property. I, therefore, find the 4th issue for plaintiffs.

4. 7th *Issue*. It has been held in *Lakshmana Chetti* v. *Chinnathambi Chetti* (5) that an award passed on a reference made to arbitrators in a pending suit would not bind the minors, when leave of the Court was not obtained under section 462 of the old Code of Civil Procedure. The 1st defendant's Vakil relies on the decision to the contrary reported as *Hardeo Sahai* v. *Gauri Shankar* (6) affirmed recently in *Lutawan* v. *Lachya* (7). I am bound to prefer the Madras ruling

(1) 3 Ind. Cas. 928; 6 M. L. T. 325; 21 M. L. J. 1033.
(2) 20 A. 98; A. W. N. (1897) 205.
(3) 17 A. 531; A. W. N. (1895) 126.
(4) 19 Ind. Cas. 881; 24 M. L. J. 462; (1913) M. W. N. 415.
(5) 24 M. 326.
(6) 28 A. 35; A. W. N. (1905) 171; 2 A. L. J. 493.
(7) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

and, therefore, find that the award is not binding on the plaintiffs.

5. 9th *Issue.* Even if the award was not superseded by the decree in appeal, plaintiffs can claim the suit properties, as the award as well as the compromise are not binding on them, *vide Ganesha Row* v. *Tuljaram Row* (8). I find accordingly on this issue.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial on the 6th August 1915 and having stood over for consideration till the 31st August 1915, the Court delivered the following

JUDGMENT.

TYABJI, J.—The present plaintiffs, who are minors, were parties to Original Suit No. 416 of 1905 which had been instituted by the present 1st defendant for partition. That suit was in the first Court referred to arbitration (by orders in November 1906 and March 1907). The award was dated 9th April 1907 and a decree passed in accordance with it. The present plaintiffs' father appealed from the decree passed on the award (Appeal Suit No. 504 of 1907). The appeal was compromised and a decree was purported to be passed therein by the consent of the parties. The present suit is to have it declared that the consent decree does not bind the plaintiffs, to have it set aside, to obtain possession of the properties mentioned in the plaint, and other reliefs.

It is admitted that neither the reference to arbitration nor the consent decree was with leave of the Court under Order XXXII, rule 7 (section 462 of the Civil Procedure Code, 1882). I shall in the rest of my judgment refer only to the Code of 1908 though most of the decided cases are, of course, on the Code of 1882. At an earlier hearing it was held by this Court that the compromise was on this ground voidable by the plaintiffs, and findings were called for. The finding on the 4th issue is admitted to be one of fact which we cannot question in second appeal. The other findings are contested.

It is contended for the appellant that as the consent decree in appeal is inoperative, the decree passed in the original Court must revive, and that, as that decree was passed on an award, it cannot now be set aside, but has become final.

The respondent in answer contends in the first place that the decree on the award was finally and effectively set aside by the appellate consent decree, notwithstanding that the plaintiffs elect to avoid the latter. But the plaintiffs having elected to avoid the consent decree must do so *in toto* so far as they are concerned, and cannot, after avoiding it, rely upon it for the purpose of rescinding the decree which it purported to supersede, and which it would have superseded only if it had been of any legal effect.

The real point on which the parties are at issue is, the appellate consent decree being out of the way, to what extent is the decree on the award binding on the minors? The appellant's argument is based on two cases decided by the Allahabad High Court which are directly in point: *Hardeo Sahai* v. *Gauri Shankar* (6) and *Lutawan* v. *Lachya* (7). The grounds on which the first of these decisions proceeds are:

(*a*) that Schedule II to the Civil Procedure Code, 1908, relating to arbitration proceedings, contains special proceedings which are not subject to Order XXXII, rule 7;

(*b*) that there is nothing in Schedule II requiring the Court to give leave to the parties to make the application for a reference to arbitration where minors are concerned;

(*c*) that an application made under Schedule II, paragraph 1, is very different from an agreement or compromise contemplated by Order XXXII, rule 7; and

(*d*) that assuming that Order XXXII, rule 7, applies, and has been violated, once a decree is passed in accordance with the terms of an award, it can only be impeached on one of the grounds mentioned in Schedule II, paragraph 16, that is only if, and in so far as, (*i*) the decree is in excess of or (*ii*) not in accordance with the award.

(8) 19 Ind. Cas. 515; 36 M. 295 at p. 303; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).

In the second case above alluded to, *Lutawan* v. *Lachya* (7), Richards, C. J., and Ryves, J., approve of the decision in *Hardeo Sahai* v. *Gauri Shankar* (6); Banerji, J., proceeds on a different basis.

I shall deal for the present only with the first three reasons above stated which are cognate to each other.

With all deference I cannot agree that arbitration proceedings can be considered to be special, in the sense that acts of the guardian *ad litem* or next friend of a minor—I shall include both in the term guardian *ad litem*—in regard to those proceedings are unaffected by Order XXXII, rule 7, which defines the powers of guardians. The first step in arbitrations is that the parties should agree to refer; it is also contemplated that they agree upon the arbitrator (Schedule II, paragraphs 1, 2, 7, 17). See *Ghulam Khan* v. *Muhammad Hassan* (9) and *Luxumibai* v. *Hajee Widina Cassum* (10). Where the parties are before the Court as plaintiffs and defendants in a suit, and any of them is a minor, such agreements on behalf of the minor can be entered into only at the instance of the guardian *ad litem:* Order XXXII, rule 5. It would be supererogation to expect that whenever any enactment contemplates the doing of any act by the guardian *ad litem* (*e. g.* entering into an agreement on behalf of the minor) the provisions contained in Order XXXII, rules 6, 7, which define the powers of a guardian *ad litem* should be repeated in that enactment. To say that those provisions are not to be given effect to unless they are repeated in every other Act is to make them a dead letter where they stand. If the provisions contained in the Civil Procedure Code are not to govern arbitration proceedings as laid down in a Schedule to the same Act, what force can they have in regard to any independent enactment? See *Mahader Balkrishna* v. *Krishnabai* (11) referred to in *Vithaldas* v. *Dattaram* (12) during arguments.

Here I may refer to an argument of Richards, C. J., and Ryves, J., in *Lutawan* v. *Lachya* (7), *viz.*, that in Schedule II, paragraph 1, the expression *agree* is to have no different force from the term *desire*, the latter word being what was contained in section 506 of the Code of 1882. But where a particular word is altered in a provision which is in other respects re-enacted, it is hardly permissible to interpret the later provision on the basis that in spite of the alteration, the enactment will have the same force as if the original word had been retained. It seems to me that the Legislature substituted for the vague expression *desire* the more definite expression *agree*, which is legislatively defined, and frequently interpreted judicially. But in the present case reading the word "desire" for "agree" cannot support the argument based upon it. For the desire of a minor to refer to arbitration must in the first instance be communicated to the other parties concerned and then to the Court through an application made by his guardian *ad litem*, and as the order granting the application can be made only by the consent of the parties, it must be sanctioned by the Court on behalf of the minor: *Ghulam Khan* v. *Muhammad Hassan* (9), *Luxumbai* v. *Haji Widina Cassum* (10).

The learned Subordinate Judge followed *Lakshmana Chetti* v. *Chinnathambi Chetti* (5) considering it to be directly opposed to the Allahabad decisions above mentioned. It is there decided that as the award therein was not made after a reference by the Court, it could only be taken cognizance of (if at all) as an adjustment of the suit (Order XXIII, rule 3). The Court assumed, without deciding, the correctness of the view expressed by Starling, J., in *Samibai* v. *Premji Pragji* (13) that "an agreement to refer coupled with the award resulting from the reference may be treated as an adjustment." [*Venkatachellam Reddi* v. *Rungiah Reddi* (14)]. The grounds for making this assumption have become stronger since *Lakshmana Chetti* v. *Chinnathambi Chetti* (5) was decided as a similar decision is given by Jenkins,

(9) 29 C. 167 at pp. 173, 183; 29 I. A. 51 (P. C.); 6 C. W. N. 226.
(10) 23 B. 629.
(11) (1896) P. J. B. H. C. 609
(12) 26 B. 298; 3 Bom. L. R. 887.
(13) 20 B. 304.
(14) 12 Ind. Cas. 372; 21 M. L. J. 990 at p. 996; 10 M. L. T. 248; (1911) 2 M. W. N. 249; 36 M. 353.

C. J., and Starling, J., in *Pragdas* v. *Girdhardas* (15) and it is not rejected in *Tincowry Dey* v. *Fakir Chand Dey* (16) and *Venkatachellam Reddi* v. *Rangiah Reddi* (14).

The result of *Lakshmana Chetti* v. *Chinnathambi Chetti* (5) in the light of the later cases may be taken to be that (1) where there is an agreement to refer to arbitration, followed (without the intervention of the Court) by an award, the two together may form "such an agreement, compromise or satisfaction" as has to be recorded by the Court under Order XXIII, rule 3, and in accordance with which a decree has to be passed: and (2) that in such a case it is necessary if any minors are concerned that leave of the Court should be obtained under Order XXXII, rule 7, either before the submission to arbitration or after the award, otherwise the award cannot take effect as such agreement, compromise or satisfaction. Hence unless leave has been obtained, the minor is not bound by it: the Court must proceed with the suit so far as he is concerned, and cannot merely pass a decree in accordance with the award.

In the present case we have a reference through the Court, and the gist of this part of the appellant's argument is that such a reference is not an agreement or compromise within Order XXXII, rule 7. The decision of this question depends in the first instance upon the provisions of the law relating to references through the intervention of the Court, to which I shall presently refer more fully.

It seems to me, however, a legitimate argument on the side of the respondents to rely upon the following words in *Lakshmana Chetti's* case (5): "The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to leave such adjudication to a private tribunal. Such an agreement seems to us to be clearly one falling within section 462 (Order XXXII, rule 7) of the Civil Procedure Code." Thus a submission to arbitration without an order of the Court pending a suit was considered by the Court to be an agreement of the nature referred to in Order XXXII, rule 7. The opinion so expressed is opposed to the view taken in *Hardeo Sahai* v. *Gauri Shankar* (6), unless it can be shown that there is nothing common between such a submission and a submission through the Court. But the preliminary agreement to refer (on which an application to the Court under Schedule II, paragraph 1, is subsequently based) must be exactly of the same nature as that which the Court was considering in *Lakshmana Chetti* v. *Chinnathambi Chetti* (5). This preliminary agreement must always be entered into out of Court. It is only after such an agreement has already been arrived at that the parties may follow or make a departure from the provisions of Schedule II: (1) they may apply to the Court for an order of reference, or (2) proceed with the arbitration without such an order. If they choose to apply to the Court, does their agreement to submit to arbitration become (at the hearing of the application) something other than an agreement, merely by reason of their application? It may be argued that after the Court makes an order upon the agreement, its original character merges in the order of the Court. The answer is that by reason of Schedule II, paragraphs 2 and 3, the order of the Court is entirely based on the agreement. The Court does not in referring the matter to the arbitrator exercise any judicial discretion, and the passing of such an order on the agreement is hardly more than a ministerial act. The analogy between an order passed on an agreement to refer to arbitration, and a decree passed on a compromise falling under Order XXIII, rule 3, is complete. Where a compromise on behalf of a minor has not been sanctioned by the Court under Order XXXII, rule 7, it acquires no validity by reason of a decree having been passed on it: *Ganesha Row* v. *Tuljaram Row* (8), equally it seems to me that where an order is passed on an agreement to refer, the order has no more validity in regard to the sanction of the Court than the agreement itself.

As against these considerations the decision in *Ghulam Khan* v. *Muhammad Hassan* (9) was relied upon by the appellant. Lord Macnaughten there said: "In cases falling

(15) 26 B. 76: 3 Bom. L. R. 431.
(16) 30 C. 218; 7 C. W. N. 180

under head 1 the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." In the sentences immediately following he describes an application under paragraph 17 or 20 as a "litigious proceeding," in the sense that "Cause may be shown against the application." Reading the whole of the paragraph together it seems to me that nothing more is meant than that when the parties have agreed to a proceeding they cannot object to it. The words "no question can arise as to the regularity of the proceedings up to that point" cannot imply that the validity of "the agreement to refer" [which, as Lord Macnaughten expressly says, "must be the agreement of all the parties to the suit" (page 182) and "must have the concurrence of all parties concerned" (page 183) ] can never be questioned, or that if questioned before a Court competent to decide upon it, then the provisions of the Civil Procedure Code are not to be considered for determining whether the guardian was entitled to bind the minor—this question being involved in the question whether the agreement to refer had the concurrence of all the parties concerned.

His Lordship, however, also stated that "there did not appear to have been any substance in any of" the objections raised against the award—the first of these being that the defendant's guardian had agreed without leave of the Court to refer the case to arbitration. It was argued that this expression of opinion must be taken to mean that leave is unnecessary.

But this does not seem to be so. The allegation that at the time of the reference leave of the Court had not been obtained, was apparently brought to the notice of the Subordinate Judge [see *Ghulam Khan* v. *Muhammad Hassan* (9)] and he nevertheless pronounced judgment in accordance with the award. As implied in *Lakshmana Chetti* v. *Chinnathambi Chetti* (5) the leave may be obtained either at the time of agreeing to refer or after the award. Their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (9) point out that the award was a fair and reasonable settlement. Therefore, the objection was characterised as one in which there was no substance. It is also noticeable that their Lordships refer (page 184) to the objection that the award was bad because the Court had no jurisdiction and dispose of this objection by saying that the Court will not sit as a Court of Appeal on awards in respect of matters of fact or of law and cite *Adams* v. *Great North of Scotland Railway Company* (17). But there is no reference to the point whether the minors were bound by the award; see also *Jones* v. *Powell* (18), *Wrightson* v. *Bywater* (19).

In my opinion, therefore, the agreement contemplated in Schedule II, paragraph 1, *et seq* is an "agreement with reference to the suit" under Order XXXII, rule 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule.

The last ground (*d*) mentioned above must now be considered. It was contended that the decision of the Judicial Committee reported as *Ghulam Khan* v. *Muhammad Hassan* (9) is a direct authority in its favour.

Before dealing with this aspect of the case it is necessary to refer to the relevant provisions of the Code with particular reference to the question whether any means are available to a minor for rectifying an order of reference made without leave of Court under Order XXXII, rule 7.

The first stage in arbitration proceedings under Schedule II is, as I have already said, to agree to refer. Next comes the application to the Court under paragraph 1. The leave of the Court under Order XXXII, rule 7, may then be obtained. Where this is omitted to be done, the arbitration proceeds independently of the Court, unless the Court is asked to make an incidental order subserving the course of the arbitration proceedings, which it is

(17) (1891) A. C. 31 at p. 39.

(18) (1838) 6 Dowl. P. C. 483 at p. 485; 49 R. R. 728 at p. 729.

(19) (1838) 3 M. & W. 199 at pp. 204, 205; 1 H. & H. 50; 7 L. J. Ex. 83; 150 E. R. 1115; 6 Dowl. P. C. 359; 49 R. R. 570.

empowered to make in regard to the following matters:—

(1) Fixing or enlarging the time for making the award: paragraphs 3 (1), 4 (2), and 8.

(2) Providing for the course to be followed in cases of disagreement between two or more arbitrators (when the parties are not able to agree): paragraph 4 (1) (*d*).

(3) Appointing an arbitrator or umpire: paragraph 5 (2).

(4) Giving leave to the arbitrator to state a case: paragraph 11.

Apart from these incidental orders, the powers of the Court that has made an order of reference, as well as of the Appellate Court, over the litigation or the arbitration are restricted [paragraph 3 (2)] to making one of the following 6 classes of orders:—

(*i*) The Court making the reference may make an order superseding the arbitration, but only where there has been failure (*a*) to appoint an arbitrator or umpire or (*b*) to make the award in time: paragraphs 5, 8.

(*ii*) It may modify or correct the award if (*a*) it deals with a mattter not referred to, or contains some (*b*) formal or (*c*) obvious or (*d*) clerical mistake, etc.: paragraph 12.

(*iii*) It may remit the award to the re-consideration of the arbitrator if (*a*) some matter that ought to be determined by him has been left undetermined, or (*b*) *vice versa*, or (*c*) if it is indefinite, or (*d*) there is an objection to its legality apparent on the face of it: paragraph 14.

(*iv*) It may supersede the arbitration and proceed with the suit after setting aside the award in the circumstances mentioned or implied in paragraph 15, *viz.*, (*a*) for corruption or misconduct of the arbitrator; (*b*) for fraudulent concealment, etc.; (*c*) the award having been made—

(1) after an order of supersession by the Court (under paragraph 5 or 8);

(2) after the expiration of the period allowed by the Court;

(3) being otherwise illegal;

(*d*) the award having been remitted and the arbitrator or umpire having failed to re-consider it (paragraph 15, first sentence).

(*v*) It may pronounce judgment in accordance with the award: (paragraph 16).

(*vi*) From a judgment pronounced by the Court making the reference under the last mentioned provision there is no appeal except in so far as the decree is (*a*) in excess of, or (*b*) not in accordance with, the award.

It will be observed that the first class of orders may be made before and the rest after the award has been made: the 5th is merely to give effect to the award: the first five are powers to be exercised by the Court making the reference: the 6th class alone refers to the powers of the Appellate Court, which (so far as the provisions now under consideration are concerned) are defined only in regard to cases where the Court making the reference has passed an order under the fifth head: there are no provisions regarding the Appellate Court's powers where the Court making the reference has exercised any of its powers under the first four heads.

These powers do not, it is apprehended, affect the Court's powers of reviewing its own judgment. But the power of review need not now be considered. I now come to deal with the decision in *Ghulam Khan* v. *Muhammad Hassan* (9).

The argument before the Privy Council was that the award was not a valid and legal award, (1) having been made without jurisdiction—jurisdiction having been taken away from the Civil Courts by the Punjab Tenancy Act, and (2) the agreement to refer to arbitration having been without leave of the Court under Order XXXII, rule 7.

The question directly decided was whether there was any ground (1) on which an appeal lay, or (2) on which the Chief Court of the Punjab could have exercised its powers of revision. Each head

of this question was answered in the negative for the reasons

(1) that no appeal lies except in so far as the decree is in excess of or not in accordance with the award, (6th head above) and this was not alleged,

(2) that revision was not permissible, as (*a*) it would lay the finality of an award open to question, (*b*) being avowedly an application to set aside the award it was barred by limitation, and (*c*) even if it were not barred, the Subordinate Judge had in the events that had happened, no option but to pass a decree in accordance with the award, and had strictly followed the course prescribed by the Code.

Their Lordships' decision, therefore, referred directly only to the powers of the Appellate Court in cases where the Court making reference has proceeded under the fifth head and consequently where the Appellate Court's powers are subject to the 6th head above.

Previous to this decision it had been held by the Privy Council (approving the trend of decisions in India) that the finality of a decree on an award depends upon the award itself being valid and legal and that, therefore, an award may be shown in appeal to be illegal in which case the decree on the alleged award would be set aside and suits ordered to be proceeded with: *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (20). See also *Maharajah Joymungul Singh Bahadoor* v. *Mohun Ram Marwaree* (21) [referred to in *Nandram Daluram* v. *Nemchand Jadavachand* (22)].

I need not consider such cases as *Achuthayya* v. *Thimmayya* (23) which had held that on appeal from the final decree passed after an award has been set aside, the propriety or otherwise of setting aside the award may be considered by the Appellate Court. Those cases have reference to the powers of the Appellate Court when they are not restricted by the 6th head above. In *Raja Har Narain Singh's* case (20) their Lordships of the Privy Council approved of this view, and proceeded further. For, reversing the decrees of both Courts in India, they set aside a decree based on an award which was shown to have been made after the expiry of the time fixed for the making of the award, thus in effect enlarging the powers of the Appellate Court under the 6th head, by adding to it the power to set aside a decree passed in accordance with the award when it is found that the award itself was illegal on one of the grounds mentioned in paragraph 15. On this point there seems to be a conflict between *Raja Har Narain Singh's* case (20) and *Ghulam Khan* v. *Muhammad Hussan* (9). In the judgment in *Ghulam Khan's* case (9), however, the point (though argued in appeal) was not alluded to. The decision in *Raja Har Narain Singh's* case (20) was apparently not cited to the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* (9), nor is it alluded to in the judgments of the Punjab Chief Court.

The conflict between *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (20) and *Ghulam Khan* v. *Muhammad Hussan* (9) is explained in *Rajrani Dasi* v. *Gonesh Prosad Srichandan Mohapatra* (24) by the fact that in the earlier case the question of the competence of a Court of Appeal was not raised, but it is noticeable that Lord Morris said in the beginning of his judgment that the case had to be decided upon the construction of sections 508, 514 and 522 of the Civil Procedure Code; and in the absence of express reference to *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (20) in *Ghulam Khan* v. *Muhammad Hassan* (9) we cannot proceed on the basis that that case has been overruled: and we must as far as possible give effect to both pronouncements of the Judicial Committee.

The two decisions can be partially reconciled if *Ghulam Khan* v. *Muhammad Hassan* (9) is taken as deciding that the matters on which the decision of the Court making the reference is final (provided it upholds the award) must be connected

(20) 13 A. 300; 18 I. A. 55 (P. C.); 6 Sar. P. C. J. 14; 15 Ind. Jur. 283.
(21) 23 W. R 429.
(22) 17 B. 357 at p. 360.
(23) 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315.
(24) 5 Ind. Cas. 650; 14 C. W. N. 626; 37 C. 407.

with the proceedings before the arbitrator (see paragraphs 14 and 15). That something to this effect was in the minds of their Lordships is indicated by the following expressions: "The Court makes an order of agreement (which must be the agreement of all the parties to the suit)," "In cases falling under head 1 the agreement to refer, and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." Thus they assume that the regularity of the proceedings up to that point is not in question. Their Lordships also cite *Adams* v. *Great North of Scotland Railway Company*(17), the first portion of the head note to which seems to me to represent correctly the views expressed by Lords Halsbury and Watson in the following terms: "The Act of Regulations of 1695, which provides that 'for the cutting off of groundless processes in time coming the lords of session sustain no reduction of any decrees arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the judges arbitrators' was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the Courts from setting aside an award where the arbitrator has exceeded his jurisdiction, or has disregarded any one of the expressed conditions or the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award."

This view of the case of *Ghulam Khan* v. *Muhammad Hassan* (9) seems also to have been taken in *Walji Mathura Das* v. *Ebji Umersey* (25)by Jenkins, C. J., and Batchelor, J., who referring to *Nandram Daluram* v. *Nemchand Jadavachand* (22) say: "But the Bombay case only decides that an appeal lies where the award is illegal *ab initio*, or, in other words, where in law there is no award. Obviously if there is no award, there is no basis for the decree." The case of *Ghulam Khan* v. *Muhammad Hassan*(9) is cited by them at the end of the judgment.

(25) 29 B. 285 at p. 289.

*Tallapragada Suryanaraina Row* v. *Tallapragada Sarabaya* (26) may seem at first sight to be against the view I am taking, but the question referred to the Full Bench shows that the objection to the award was that on the refusal of two arbitrators to act and on their subsequent death the Court had appointed new arbitrators in their stead and three of the old and the two new arbitrators had made the award. This was clearly an objection to the proceedings in arbitration, on all of which the Court making the reference has to decide finally under the new Code. The Chief Justice (with whom Ayling, J., agrees) at page 277 distinguishes *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (20) from *Ghulam Khan* v. *Muhammad Hassan* (9). Krishnaswami Aiyar, J., does the same and points out (page 278—279) one kind of invalid awards which would not be covered by paragraph 16.

In the case before us the award is not said to be invalid for any corruption or misconduct on the part of the arbitrator or of the parties to it during the arbitration. The Court is not asked as a "Court of Appeal to examine whether or not the conclusion at which the arbitrator had 'arrived was sound in point of law or in point of fact:" *Adams* v. *Great North of Scotland Railway Company* (17) per Lord Halsbury. What we are asked to pronounce upon is quite distinct,—whether the proceedings, not of the arbitrator, but of the Court bind the minors or are voidable by them.

It seems to me, therefore, though not without hesitation that the principle of finality which finds expression in the Code [*Ghulam Khan* v. *Muhammad Hassan* (9)], does not affect matters which are outside the arbitration proceedings. The objection in the present case is, therefore, not barred.

It has not been contended before us that the minors could in the present case have avoided the arbitration proceedings except by instituting a suit to have it declared that the decree which purports to bind them is a nullity.

(26) 9 Ind. Cas. 173; 21 M L. J. 263; 9 M. L. T. 251; (1911) 1 M. W. N. 151 (F. B.).

For these reasons, in my opinion, it was competent to the minors to institute the present suit and to obtain a declaration that the decree on the award does not bind them.

AYLING, J.—I agree.

This second appeal coming on for further hearing on the 6th September 1915, the Court delivered the following

JUDGMENT.—On a previous occasion, we delivered our judgment holding that the minor was entitled to avoid the decree against him. We let the appeal stand over in order that the learned Vakils may address us on the exact form in which our order should be framed.

It has been argued before us to-day that the decree which the minor seeks to avoid is of such a nature that it cannot be avoided only as against him and not as against the other parties to it. It is a partition decree under which the property is divided into two moieties. We have referred to the terms of the decree and to the facts of the case and we are satisfied that the contention is correct. In our opinion it would be quite impracticable and highly inequitable to allow the minor to avoid the decree only in part. His avoidance of it must be entire as his rights and liabilities under the decree are not separable from the rights and liabilities of the other party to the partition.

It was then argued by Mr. Nagabhushanam that we cannot in the present appeal order that the original suit, which has been compromised in the decree that has now been declared to be voidable, should proceed. We accede to the contention. We are not seized of that suit and we cannot pass any orders with reference to it. Formally our order will merely be that the minor is entitled to avoid the decree and we shall (should the minor exercise that option) record the fact that he has exercised the option but we cannot further give any directions in regard to the previous suit.

It is, however, a part of Mr. Nagabhushanam's argument not only that we cannot in our decree give any such directions as aforesaid to the Court seized of the other suit, but that our order will not have the effect of reviving that other suit. This is a point concerned with the effect and interpretation of our order and we have heard arguments on the point and consider it imperative on us to give a decision on it. We are of opinion that the effect of our order is that the minor has the option of avoiding the decree *in toto*, but that he has no option (even if it were possible to be done in the circumstances of this case) to avoid the decree in part only. Should then the minor avoid the decree the appellant will be able, in our view, to go to the Court of the District Munsif of Gudivada where the original suit was instituted and ask the Court to proceed on the basis that there is no decree in the suit, inasmuch as the minor has been declared to be entitled to avoid the decree and has exercised that option. On this we expect that the Court will proceed with the trial of the suit, as after the avoidance of the decree the suit will be without any proper or final adjudication.

Mr. Nagabhushanam relied upon *Bhimaji Govind* v. *Rakmabai* (27) in which the Court refused to have the suit restored to the file. We do not intend to lay down that the Court may not on occasions do that. The avoidance by the minor of a decree against him may in some cases *ipso facto* be tantamount to an adjudication of the suit; in others it may be possible and proper for the Court merely to avoid such a part of the decree as would affect the minor and that part may be separable from the rest. This seems to have been the case in *Pasupathi Nath Bose* v. *Nando Lal Bose* (28), where however in any case the matter arose in execution, and the Court considered that the decree had not as a matter of fact been set aside as against or between the parties other than the minor. The same seems to have been the case in *Manohar Lal* v. *Jadunath Singh* (29), where the Privy Council evidently considered that it would be proper to let the decree stand as against others than the minors. In these cases, however, it was not, and could not be, considered what

(27) 10 B. 338 at p. 340.
(28) 30 C. 718.
(29) 28 A. 585; 10 C. W. N. 898; 9 O. C. 219; 4 C. L. J. 8; 8 Bom. L. R. 489; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128.

was to be the result of the suit so far as the decree had been set aside, *i. e.*, as between the minor and the other parties to the decree. As to that part of the decree the cases show that the parties are relegated to their original rights.

The decision in *Earl of Bandon* v. *Bicher* (30),cited in *Bhimaji Govind* v. *Rakmabai* (27), is not opposed to the view we have expressed. In form we cannot order that a suit from which there is no appeal before us should be proceeded with, notwithstanding that it might have been instituted in a Court subordinate to us, any more than the Court of Chancery could review a decree of the Court of Exchequer. But that is not what we are doing. We are merely declaring the terms on which in the present case the minor can avoid the consent decree. In our opinion it is impossible to let him avoid it only in part.

*Mewa Lall Thakur* v. *Bhujhunjha* (31) proceeds on the basis that the only proper course where a decision is alleged to be fraudulently obtained is to apply by review. That course is not in the light of more recent decisions now alleged to be the only available course. Apart from this *Mewa Lal Thakur* v. *Bhujhunjha* (31) supports the view that the real effect of avoiding a decree is to require that the suit should proceed till a valid decree is passed therein.

The view we have taken seems to us to be supported by *Khajooroonissa* v. *Rowshan Jehan* (32).

We declare, therefore, that the minor is entitled, if he elects, to avoid the decree in Suit No. 416 of 1905 on the file of the District Munsif of Gudivada and we give him 10 days to let us know whether the option has been exercised.

This case again coming on for further hearing on the 16th day of September 1915, the Court delivered the following

JUDGMENT.—It is now stated to us that the minors elect to avoid the decree in Original Suit No. 416 of 1905, and we declare that the decree is of no effect. The trial of that suit will no doubt proceed if a proper application is made to the proper Court, though we cannot make any order as to that in the present appeal.

We set aside the decree of the lower Court so far as the 1st defendant is ordered to put the plaintiffs into possession.

We have heard the Vakils on the question of costs. In our opinion the suit has resulted from errors in procedure for which we cannot hold one side to be more at fault than the other. The most proper course seems to us to order each side to bear his or her own costs throughout.

*Appeal allowed; Decree set aside.*

(30) 3 Cl. & Fin. 479 at p. 510; 6 E. R. 1517; 9 Bli. (N. S.) 532.

(31) 13 B. L. R. App. 11; 22 W. R. 213.

(32) 2 C. 184 at pp. 191, 196; 26 W. R. 36; 3 I. A. 291 (P. C.).

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## COURT OF THE BOARD OF REVENUE, MADRAS.

REVISION PETITION NO. 4 OF 1915.

January 6, 1916.

*Present*:—Mr. Clegg, F. M.

D. SUNDARARAJA AIYANGAR—PETITIONER

*versus*

R. ASIRI NAIDU—COUNTER-PETITIONER.

*Madras Estates Land (Act I of 1908), ss. 131, 215—Revenue Officer, power of, to revise order of predecessor-in-office—Deposit under section 131, if includes deposit in Sub-Treasury—Application for deposit, form of—Notice—Sale, setting aside of—Jurisdiction.*

A Deputy Collector has no jurisdiction to cancel orders passed by his predecessor-in-office. The proper procedure is to ask the District Collector to revise them. [p. 893, col. 1.]

A deposit in a Sub-Treasury is a deposit with the Collector within the meaning of section 131 of the Madras Estates Land Act; and for the purpose of effecting it, the presentation of a *challan* containing purpose and particulars of the deposit is a sufficient application. [p. 893, col. 1.]

An order setting aside a sale is one passed without jurisdiction when passed without notice to the auction-purchaser. [p. 893, col. 2.]

Revision Petition from the order of the Deputy Collector of Usilampatti, in D. D. No. 1043 Revenue, dated 30th May 1915.

FACTS of the case appear from the judgment.

Mr. *A. Srinivasa Iyengar*, for the Petitioner.—(1) In this case one officer having refused to set aside the sale, his successor had no jurisdiction to act in the matter.

The subsequent order cancelling the sale was one passed without jurisdiction, the matter being *res judicata*.

2. The present counter-petitioner is not the *ryot* whose land was sold; he is quite a different person.

3. As the subsequent order is one passed without jurisdiction I am entitled to come in under section 131, Madras Estates Land Act.

Mr. *V. R. Ponnusawmy Aiyangar*, for the Counter-Petitioner.—No question of *res judicata* arises here, the order is one passed in execution proceedings. The real question in this case is whether there is a deposit within the meaning of section 131 of the Estates Land Act. The section does not prescribe the form of the application or the time within which such application should be made. On the other hand, the wording of the section gives to a mere deposit all the effects of an application: clause (2) casts the duty of setting aside the sale upon the Collector immediately after deposit; it does not say that there should be an application. This is the view taken by the Calcutta High Court in construing the analogous provision of section 174 of the Bengal Tenancy Act: *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (1), *Muttathil Krishna Menon* v. *Collector of Malabar* (2).

[Mr. CLEGG, F. M.—Then what do you say as to jurisdiction. Here one officer refuses to set aside the sale, another officer on the same facts cancels the sale, the latter acted without jurisdiction.]

Mr. *V. R. Ponnusawmy Aiyangar*.—The order is not one passed without jurisdiction. The latter officer merely set aright an irregularity. Under section 131 of the Act, as soon as the deposit is made the Collector is bound to set aside the sale. It was a ministerial duty cast upon him and when he failed to do it, and the subsequent officer set it aright, the latter did not act without jurisdiction.

[Mr. CLEGG, F. M.—Again in this case once no deposit is made under section 131 within 30 days, the purchaser is entitled to a sale certificate and that is conclusive.]

(1) 25 C. 216.
(2) 22 Ind. Cas. 53.

Mr. *V. R. Ponnusawmy Aiyangar*. In this case, there is nothing to shew that any certificate was issued.

To sum up if the payment of money in a Sub-Treasury is a sufficient compliance with section 131 of the Estates Land Act, then the order of the Court of the Deputy Collector to set aside the sale is not illegal: it is setting aright a wrong already done. This is not a case for interference under section 115, Civil Procedure Code. Property worth Rs. 200 is sold for one anna and that clearly shows how irregularly the sale was conducted.

Mr. *A. Srinivasa Iyengar*, in reply.—The counter-petitioner has no interest at all in the property sold; it was a different Dasiri Naidu whose property was sold and a finding on that point may be called.

Mr. *V. R. Ponnusawmy Aiyangar*.—The auction-purchaser is no more the lessee and he has no interest in the property purchased. The Board has a discretion to interfere under section 205 of the Madras Estates Land Act, and in this case it would be most inequitable to interfere.

JUDGMENT.—The facts of the case are as follows:—For arrears of rent for *Fasli* 1321 two fields of *patta* No. 33 and four fields of *patta* No. 195 of *Inam* Thekkampatti village were sold under Chapter VI of the Estates Land Act. All were bought in by the estate lessee (the Board's present petitioner) except one field No. 284 of which the purchaser was Muthusamy Naidu. The Deputy Collector confirmed the sale on 27th February 1914, and an order was issued directing payment of the arrears realised to the estate lessee.

On 22nd June 1914 the Board's counter-petitioner R. Dasiri Naidu petitioned the Deputy Collector for cancellation of the sale of both *pattas*, on the ground that he was the *pattadar* No. 33 and purchaser of the fields in No. 195 from the *pattadar* M. Kamatchi Nayakan, and that he had deposited Rs. 6 for No. 33 and Rs. 14-3-0 for No. 195 in the Sub-Treasury of Periyakulam on 22nd January 1914. The arrears of the *pattas* were Rs. 6-5-9 and Rs. 10-2-6 respectively and the total covered the arrears. The Deputy Collector on 28th July 1914 rejected the application as out

of time. Another application appears to have been similarly rejected on 20th September 1914. In a petition, dated 23rd April 1915, R. Dasiri Naidu again petitioned the Deputy Collector for cancellation. Meantime the *personnel* of the Deputy Collector had changed and the Deputy Collector then in office passed an order on 30th May 1915, cancelling the sale.

It is this latter order that this petition seeks to revise on the grounds (1) that the order of the Deputy Collector was passed without jurisdiction; (2) that there was no application to the Collector nor legal deposit *with the Collector*; (3) that counter-petitioner is not the *pattadar* of Nos. 33 and 195 who are two different persons and counter-petitioner had no right to apply under section 131; (4) that the order passed without any previous notice of the application to the purchaser is bad in law; (5) that the application to set aside the sale is time-barred; (6) and under section 131 there must be an application and deposit within 30 days and clause (2) must be read with clause (1) and not separately.

There can be no question that the Deputy Collector's latest order cancelling those of his predecessor was passed without jurisdiction. The proper procedure was to have asked the District Collector to revise them. Regarding contentions (2), (5) and (6) there is a rule under section 215 of the Act which states that the amount required to be deposited under section 131 may be paid into any Sub-Treasury and the Sub-Treasury Officer's receipt filed in token of payment. The deposit in the sub-treasury was, therefore, equivalent to a deposit with the Collector. It was made within 30 days and under clause (2) of section 131, provided the depositor had a right under the section to make the deposit, the sale should have been set aside. It does not appear that any formal application is necessary. The presentation of a *challan* containing purpose and particulars of the deposit seems to be a sufficient application. This view is supported by the decision in *Abdool Latif Moonshi* v. *Jadub Chandra Mitter* (1) in respect of the analcgous provision in section 174 of the Bengal Tenancy Act.

With regard to the *third* and *fourth* contentions, under the rule framed under section 215 a notice should have been given to the auction-purchasers before passing orders on the application. This rule was contravened. There is no evidence on record to decide whether the counter-petitioner is the defaulting *ryot* in respect of the holding under *patta* No. 33 which was sold or has any interest therein and whether he was the purchaser of the holding under *patta* No. 195 so as to have a right or interest therein affected by the sale. According to the sale records the *pattadar* No. 33 is one Akkaya Dasiri Naicken, whereas the counter-petitioner is R. Dasiri Naidu. In the *challan* paying the arrears for *patta* No. 195 he respresents himself as R. Dasiri Naidu for the *pattadar* M. Kamatchi Naidu. The Revenue Divisional Officer will, therefore, be directed to submit a finding on the above points within one month after giving notice to the two auction-purchasers (the petitioner and Muthusami Naidu) and the depositer R. Dasiri Naidu who is the counter-petitioner and making such enquiry as may be necessary.

* * * * *

The Deputy Collector has found that the counter-petitioner had a right to apply to set aside the sale and no objection is taken to the finding.

The sale will be accordingly cancelled and this petition dismissed with costs.

*Sale set aside; Petition dismissed.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1107 OF 1914.

January 17, 1916.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Roe.

NURI MIAN—DEFENDANT No. 1—APPELLANT

*versus*

AMBICA SINGH AND OTHERS—RESPONDENTS.

*Muhammadan Law—Pre-emption*—Talab muasabat

NURI MIAN v. AMBICA SINGH.

—*Mention of price, if necessary—Jurisdiction—Appeal —Suit valued at less than Rs.* 5,000—*Decree above Rs.* 5,000.

In the performance of the ceremony of *talab muasabat* what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price. [p. 895, col. 2.]

Under the Muhammadan Law a pre-emptor does not lose his right of pre-emption by failing to state, while making the immediate demand for pre-emption, that he is willing to pay the price named in the sale-deed or such a sum as a Court may award. [p. 895, col. 2.]

The pendency of a proceeding for the partition of a joint estate does not bar the claim of a co-sharer to pre-empt. [p. 896, col. 1.]

Where in a suit for pre-emption the plaintiff honestly valued his suit at Rs 4,500 but the Subordinate Judge who tried the suit found the value to be Rs. 7,000 and an appeal was preferred to the District Judge:

*Held*, that the appeal to the District Judge was not incompetent, especially as no objection on this ground was taken before the District Judge nor in the memorandum of appeal to the High Court. [p. 896, cols. 1 & 2.]

*Raj Lakshmi Dasee* v. *Katyayani Dasee*, 12 Ind. Cas. 464; 38 C. 639 at pp. 667, 668, distinguished.

Appeal against the decree of the District Judge of Saran, dated the 7th of April 1914, reversing that of the Subordinate Judge, 2nd Court of that district, dated the 16th of January 1914.

Babu *Umakali Mookerjee* and M. *Khurshed Hossein*, for the Appellant.

Babus *Rajendra Prasad* and *Baidynath Narain Sinha*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal by defendant No. 1 named Nuri Mian against the appellate judgment of the District Judge of Saran, dated the 7th April 1914.

Ambica Singh, the plaintiff of the suit, sued Nuri Mian and Bansidhar, the two defendants in the suit, to establish his right of pre-emption. His case is that Bansidhar, defendant No. 2, sold his shares in three villages, namely, Maritand, Tola Ghyspur and Tola Pandaypur for Rs. 4,500 to Nuri Mian, defendant No. 1, on the 18th September 1912. In the plaint he alleged that Rs. 7,000 mentioned in the sale-deed as the consideration money is a fictitious amount and that he, on hearing from one Garju, one of his witnesses, for the first time on the 20th September 1912, performed the required ceremonies known as *talab muasabat* and *talab istishhad*. The defendant No. 1 contested the suit and traversed the allegations made in the plaint. The Subordinate Judge dismissed the plaintiff's suit, upon which the plaintiff appealed to the District Judge who allowed the appeal by decreeing the plaintiff's suit. The lower Appellate Court further held that the consideration money, namely, Rs. 7,000 mentioned in the deed of sale was the consideration money for the sale of the shares although it included a sum of Rs. 500 as arrears of rent from the tenants, and it was directed that the amount at which the plaintiff might redeem was Rs. 7,000, and it is this judgment which is the subject of the present appeal.

Before I refer to the grounds urged before us it is necessary to state that there was a partition proceeding with respect to the *mahal* wherein the shares were situated, but the partition was not complete on the date of sale. The partition was completed on the 22nd September 1913, and the sale of the shares took place on the 16th September 1912, which means that the *mahal* remained joint for a little over a year before the sale was made.

The grounds urged on behalf of the appellant are:

1. That having regard to the fact that the plaintiff alleged to have offered to pay Rs. 4,500, and not Rs. 7,000 as stated in the deed of sale or the actual price to be found by the Court, the plaintiff had no right of pre-emption.

2. That the *buturara* proceedings having been practically completed before the sale in question, the plaintiff had no right of pre-emption.

3. That the first Court having found the value of the shares to be Rs. 6,000, the District Judge had no jurisdiction to try the question on appeal inasmuch as the appeal lay to the High Court.

It has been found that the plaintiff and defendant No. 2 were co-sharers and the plaintiff on hearing the news of the sale performed the required ceremony and that the value of the shares was Rs. 7,000, which included a sum of Rs. 500 as arrears of rent due from the tenants. On the above finding there can be no question that the plaintiff is a *shafee* and that if he on

hearing the first news of the sale performed the ceremonies in the ways required by the Muhammadan Law he is entitled to pre-empt.

DECISION ON THE FIRST GROUND.

There are three methods to claim *shufa*. The first of these methods is called *talab muasabat*. This has to be done by making an immediate demand of purchase on hearing the news of the sale The second is what is called *talab istishhad* which means an affirmation of the first method and asking people to witness, and the third is by litigation.

In the present appeal we are concerned only with the first method, namely, *talab muasabat*. The contention on behalf of the appellant is that the ceremony of *talab muasabat* was not performed by the plaintiff in the manner required by law. The defect pointed out is that in the performance of the ceremony the plaintiff offered to pay Rs. 4,500 as the .price of the share. He should have offered Rs. 7,000 which was the sum mentioned in the deed of sale. The question is as to whether it is necessary to mention any sum in the performance of the *talab muasabat*.

While dealing with the question the author of the Hedaya says that it is not material in what words the claim is preferred and it is sufficient that the words used should imply a claim. If a person says "I have claimed my *shufa*" or "I shall claim my *shufa*" or "I do claim my *shufa*", he has performed the ceremony as required by law.

In Ameer Ali's Muhammadan Law (page 23, Volume 1, 4th Edition) there is the following passage: "A person who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another must, immediately on receiving information of the sale, express in explicit terms his intention to claim the property. *The intention must be formulated in the shape of a demand.* No express formula is necessary so long as the assertion of the right, or what is called a demand, is expressed in unequivocal language." This learned author relies on the Hedaya.

Another authority is that of Durrul Mukhtar This book is the well-known commentary of Tanwirul Absar. It has been translated into English by Babu Brij Mohan Dayal of Lucknow. This book is considered as an authority on Muhammadan Law. At page 386 of this book there is this passage "Demand should be made by using an expression from which demand may be clearly understood"

In Tyabji's principles of the Muhammadan Law it is stated that the pre-emptor should assert his claim immediately on getting information of a sale.

From the above authorities it is clear that in the performance of this ceremony what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price.

Wilson in his Digest of Anglo-Muhammadan Law (at page 418, 4th Edition) says: "It is not necessary that the pre-emptor should tender the price at the time of making his formal claim. It is sufficient that he should then state his willingness to pay either the price named in the sale-deed, or, if he suspects the price named as fictitious, such a sum as a Court may award."

There is no authority in Muhammadan Law that if the pre-emptor fails to state that he is willing to pay the price named in the sale-deed or such a sum as a Court may award he loses the right of pre-emption. The passage quoted from Wilson's Digest has been relied upon by the appellant. This learned author has only explained the intention of a pre-emptor. The pre-emptor in making the demand tacitly expresses his willingness to pay either the price mentioned in the deed or such a sum as a Court may award.

On a consideration of the various commentaries on Muhammadan Law I do not think that mention of any sum of money is a necessary condition in the due performance of the demand.

Reverting to the facts of the case I find that the first information of the sale, that the plaintiff got, was from one Garju, a witness examined on his behalf. That information was that defendant No. 2 had sold his share of Rs. 4,500 and had received a further sum of Rs. 2,500 from his vendee as arrears of rent due from the tenants. On

receiving this information the plaintiff performed the ceremony of demand and in the performance thereof, although it was not necessary, he mentioned the sum of Rs. 4,500 as the price he was willing to pay for the purchase. The plaintiff believed his informant and said he would pay Rs. 4,000 for the purchase. There can be no doubt that there is no right of pre-emption against conveying the right of realisation of the arrears of rent from the tenants. In the plaint also he claimed to have purchased the property for Rs. 4,500 and further says that he is willing to pay any consideration that may be found by the Court.

For the above reasons, I am of opinion that the *talab muasabat* was duly performed. This ground, therefore, fails.

DECISION ON THE 2ND GROUND.

*Butwara* proceedings are completed on the service of notice as required by section 94 of the Estates Partition Act. The sale in question having taken place more than a year before the partition was complete, the pending *butwara* proceedings were no bar to the claim. The sale in question took place when the estate was joint and it being joint, the plaintiff being a co-sharer in the joint estate was fully entitled to claim his right of pre-emption. This ground also fails.

DECISION ON THE 3RD GROUND.

It is contended that when the Subordinate Judge found that the value of the shares was over Rs. 6,000, the District Judge has no jurisdiction to try the appeal and he should have stayed his hands and directed the appellant to prefer his appeal to the High Court. In this connection reliance is placed on the case of *Rajlakshmi Dasee* v. *Katyayani Dasee* (1). I must observe here that this objection was not taken before the lower Appellate Court, nor does it find a place in the memorandum of appeal to this Court. Section 11 of the Suits Valuation Act (VII of 1887) provides that such an objection, if not taken in the memorandum of appeal to the Appellate Court, cannot be taken at all.

Under section 21 of the Civil Courts Act (XII of 1887) it is provided that an appeal should lie to the District Judge where the value of the original suit, in which the decree was made, did not exceed Rs. 5,000. The plaint shows that the suit was valued for Rs. 4,500 and, therefore, the appeal lay to the District Judge. On behalf of the appellant it is conceded that the appeal no doubt lay to the District Judge, but the District Judge on finding the value of the shares to be more than Rs. 5,000 should not have recorded any judgment but should have directed the appellant to prefer his appeal to the High Court. It is for this purpose that the authority reported as *Rajalakshmi Dasee* v. *Katyayani Dasee* (1) is relied upon. But the facts of that reported case are quite distinguishable from the facts of the present case. In the reported case it was found that the suit was intentionally undervalued and it was further found that the value of the property in the reported case was over a lac of rupees but it was grossly undervalued at Rs. 2,100. In the present case, however, there was no intentional undervaluation. The plaintiff's informant had told him that the shares were sold for Rs. 4,500. He honestly believed that the value of the shares was Rs. 4,500. I am of opinion that this reported case does not help the appellant. This ground also fails. The appeal is dismissed with costs.

RODE, J.—I agree for the reasons given by my learned brother that this appeal must be dismissed. In the *second* and *third* grounds urged in support of the appeal there is no substance.

The *first* ground is based upon a misconception of Sir Roland Wilson's Commentary. It is clear from the Hedaya that it was recognised that the *qazi* must always be called in to settle the price to be paid. Sir Roland Wilson cannot be understood to mean more than that on appearance before the *qazi*, the *shafee* must be willing to pay the price fixed by the *qazi*.

*Appeal dismissed.*

(1) 12 Ind. Cas. 464; 38 C. 639 at pp. 667, 668.

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 282 OF 1915.

February 16, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

A. V. BASHYAM REDDI—PETITIONER No. 1—APPELLANT

*versus*

SOMASUNDARAM CHETTI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Provincial Insolvency Act (III of 1907), ss. 13 (2), 47—Interim Receiver, when to be appointed—Cancellation of order in favour of a party without notice, if illegal—Execution sale in other Courts, whether can be stayed—Civil Procedure Code (Act V of 1908), s. 151.*

The discretion given under section 13, clause (2), of the Provincial Insolvency Act to the Insolvency Court to appoint an *ad interim* Receiver should ordinarily be exercised only in cases where the property of the alleged absconding insolvent has to be preserved from destruction or disappearance, and not in order to vest in an *ad interim* Receiver the properties attached by other Courts in execution.

An order passed in favour of a party should not be vacated without notice to that party.

Neither section 47 of the Provincial Insolvency Act nor section 151 of the Civil Procedure Code gives a Court power to stay an execution sale going on in another Court.

Appeal against the order of the District Court of South Arcot, in Interlocutory Application No. 354 of 1915, in Insolvency Petition No. 35 of 1915.

Mr. *T. Narasimha Aiyangar* for Mr. *T. Rangachariar*, for the Appellant.

Messrs. *C. V. Anantakarishna Aiyar*, *V. Venkatachariar* and *P. S. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.—The order of the District Judge dated 21st October 1915, so far as it stays an execution sale going on in another Court, was clearly passed without jurisdiction. Section 47 of the Provincial Insolvency Act, 1907, or section 151 of the Code of Civil Procedure, 1908, cannot be properly invoked in support of that order.

The discretion given under section 13, clause (2), of the Provincial Insolvency Act to the Insolvency Court to appoint an *ad interim* Receiver should, ordinarily, be exercised only in cases where the property of alleged absconding insolvent has to be preserved from destruction or disappearance, and not in order to vest in an *ad interim* Receiver the properties attached by other Courts in execution.

The District Judge again acted irregularly in vacating his first order without notice to the appellant and we are unable to see that the appellant practised any deception on the learned District Judge (as stated in the second order) when the appellant obtained the first order.

However, as the first order cannot be supported on the merits, we shall dismiss the appeal, but under the circumstances without costs.

*Appeal dismissed.*





## PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2878 OF 1914.

February 15, 1916.

*Present*:—Mr. Justice Scott Smith.

CANON S. S. ALLUNTT—APPLICANT—APPELLANT

*versus*

*Musammat* BADAMO AND ANOTHER—RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), s 19 (a)—Minor child, presumption as to the religion of—Duty of guardian—Marriage of Christian minor with Chamar, whether valid—Christian Marriage Act (XV of 1872), s. 4—Right to be appointed guardian.*

A child in India must, under ordinary circumstances, be presumed to have his father's religion and his corresponding civil and social status, and it is, therefore, ordinarily the duty of a guardian to train his infant ward in such religion. [p. 898, col. 2.]

*Skinner* v. *Orde*, 11 W. R. 77 (P. C.); 10 B. L. R. 125; 14 M. I. A. 309; 2 Suth. P. C. J. 521; 3 Sar. P. C. J. 34; 20 E. R. 802, followed.

An Indian Christian who was originally a *chamar* died leaving behind his wife and a minor daughter. Shortly after this the wife was received back into the *chamar* brotherhood and immediately afterwards she married the minor girl to a *chamar* to whom she had been already betrothed by her father. On an application for the appointment of a guardian to the person of the minor:

*Held*, (1) that the mere fact that the Indian Christian betrothed his daughter to a *chamar* did not warrant the inference that he renounced the Christian religion; [p. 898, col. 2.]

(2) that inasmuch as the father of the girl was, and died, a Christian, the girl must be presumed to be a Christian and the alleged marriage was, therefore, invalid; [p. 898, col. 2.]

(3) that the mother of the girl having renounced the Christian religion was not a fit person to have charge of the girl, who must be brought up as a Christian until she reached years of discretion when she could choose for herself. [p. 899, col. 1.]

Miscellaneous first appeal from the order of the Additional District Judge, Delhi, dated the 16th November 1914, dismissing the petition.

Mr. *Kirkpatrick*, for the Appellant.

JUDGMENT.—This is an appeal from the order of the Additional District Judge,

ALLUNTT *v.* BADAMO.

Delhi, dismissing an application for the appointment of a guardian of the person of *Musammat* Sammon, a minor *Chamar* girl, under Act VIII of 1890. The appellant is the Reverend Canon Alluntt of the Delhi Mission. The case has already been before this Court in Civil Appeal No. 571 of 1914 decided on the 10th of June 1914. At first the lower Court dismissed the application, on the ground that the minor was the married wife of Data Ram and that it was not shown that the latter was unfit to be her guardian. One of the the questions in issue was whether *Musammat* Sammon was a Christian or not, and this Court pointed out that if she was, then she could not be married to Data Ram except under the provisions of section 4 and the following sections of Act XV of 1872 which relate to marriages between persons one or both of whom is, or are, a Christian or Christians. This Court pointed out that it was necessary for the lower Court to determine whether the marriage of *Musammat* Sammon with Data Ram was valid or not. If it was not valid, then section 19 of the Guardians and Wards Act, which the lower Court had applied, would not be applicable. The case was accordingly remanded for re-decision. The lower Court has now held that *Musammat* Sammon was non-Christian at the time of her marriage and that her marriage with Data Ram was, therefore, valid. It accordingly again dismissed the application and Canon Alluntt has appealed to this Court.

It is admitted that the father of the girl by name Ude and the mother *Musammat* Badamon were Christians and that *Musammat* Sammon was herself baptized in December 1907. Subsequently, apparently in about July 1912, Ude betrothed the girl to Data Ram, a *Chamar*. The reason he gave for this was that he was a poor man and the Mission did not give him sufficient help. What I gather from this is that he got some money for betrothing his daughter to Data Ram. Ude died soon afterwards, and the evidence of Mr. Porter, Catechist, shows that he died a Christian and was buried with Christian rites. Shortly after this *Musammat* Badamon, the mother, was received back into the *Chamar* brotherhood, and immediately afterwards married the girl to Data Ram. She, however, never cohabited with him but ran away from his house and took refuge with the Missionaries and is now in the Girls' Industrial School. The lower Court has held that Ude's conduct in betrothing the girl to Data Ram shows that he severed his connection with the Mission and went back to his brotherhood. It goes on to hold that Ude had relinquished the Christian faith sometime before his death. It is, however, not alleged that Ude was ever received back into the *Chamar* brotherhood in the same way as *Musammat* Badamon was received back. On the contrary, Mr. Porter's evidence shows that he died a Christian. The mere fact that he betrothed his daughter to a *Chamar* does not warrant the inference that he renounced the Christian religion. I, therefore, hold that Ude did not renounce it. *Musammat* Badamon, no doubt, did so and was formally received back into the *Chamar* brotherhood. The lower Court holds that as the parents changed their religion their daughter must be presumed to have done so also and, therefore, her marriage is valid. As, however, it is clear that the father did not give up the Christian religion, it cannot be presumed that the girl ceased to be a Christian merely because her mother ceased to be one.

The case has some points of resemblance with that reported as *Skinner* v. *Orde* (1). In that case the minor was born of a Christian marriage. Her father died a Christian. Subsequently her mother contracted union with a second husband and both of them became Muhammadans. The Privy Council held that, from the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social status and that, therefore, it was ordinarily the duty of a guardian to train his infant ward in such religion. In that case the minor expressed her desire to become a Muhammadan, but in spite of that it was held that she should not remain with her mother.

The present case is an even stronger one, because the girl herself says she is a Christian

(1) 17 W. R. 77; 10 B. L. R. 125; 14 M. I. A. 309; 2 Suth. P. C. J. 521; 3 Sar. P. C. J. 34; 20 E. R. 802.

and wishes to stay with Christians. Having regard to the principle enunciated by the Privy Council I am of opinion that *Musammat* Sammon, who must be presumed to be a Christian, should be brought up as such until she reaches years of discretion when she can choose for herself. It is, therefore, the duty of the Court to take all necessary steps with a view that she may be brought up in the Christian faith. If no guardian is appointed, there is a danger that she may go back to her mother and may be forced to live in adultery with Data Ram.

To sum up, I hold that *Musammat* Sammon was a Christian at the time of her so-called marriage with Data Ram and that the marriage was, therefore, invalid. Under the circumstances of the case it is clear that *Musammat* Badamon is not a fit person to have charge of her daughter whereas Canon Alluntt is eminently fit to look after her.

I, therefore, accept the appeal and setting aside the order of the lower Court, appoint Canon Alluntt the guardian of the person of *Musammat* Sammon. Mr. Kirkpatrick for appellant does not ask for costs, so I order that those shall be borne by the parties.

*Appeal accepted.*

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## MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 148 OF 1915.

January 6, 1916.

*Present:*—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

J. SUBBA ROW—DEFENDANT—APPELLANT

*versus*

J. RAMA ROW—PLAINTIFF—RESPONDENT.

*Limitation Act (IX of 1908), Sch. I, Arts. 62, 120—Suit by co-sharer for recovery of his share of profits—Accounts necessary—Previous suit for profits of certain year withdrawn—Subsequent suit for entire profits, whether barred—Civil Procedure Code (Act V of 1908), O. II, r. 2.*

Where the plaintiff, who was entitled to a particular share in a certain *jagir*, sued the manager thereof to recover his share of the profits after an account being taken of what was received by the defendant and what he lawfully spent:

*Held*, that Article 62 of the Limitation Act had no application as it could not be said that the money which might be found due to the plaintiff was received at any particular point of time, and that the suit was governed by Article 120. [p. 900, cols. 1 & 2; p. 901, col. 1.]

*Muhammad Habibullah Khan* v. *Safdar Husain Khan*, 7 A. 25; A. W. N. (1884) 219, followed.

*Dulabh Vahuji* v. *Bansidhar Rai*, 9 B. 111; *Chamanlal* v. *Bapubhai*, 22 B. 669; *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar*, 1 Ind. Cas. 408; 5 M. L. T. 49; 19 M. L. J. 94; 32 M. 191; *Mahomed Wahib* v. *Mahomed Ameer*, 32 C. 527; 1 C. L. J. 167; *Segu Chidambaramma* v. *Segu Balayya*, 12 Ind. Cas. 704; (1911) 2 M. W. N. 467, distinguished.

Where plaintiff sued to recover the profits of a certain year, but the plaint was returned to him for presentation to the proper Court because the valuation exceeded the limits of the pecuniary jurisdiction of the Court in which the suit was originally brought, and the plaintiff never afterwards represented the plaint, but subsequently sued for his share of the entire profits:

*Held*, that the first suit having been practically withdrawn must be treated as if it was never filed, and that Order II, rule 2, Civil Procedure Code, did not operate as a bar to the present suit. [p. 900, col. 2.]

Appeal against the preliminary decree passed by the District Court of Bellary in Original Suit No. 45 of 1913 on the file of that Court.

Mr. *E. V. R. Sarma*, for the Appellant.

Messrs. *L. A. Govindaraghava Aiyar* and *L. Venkataraghava Aiyar*, for the Respondent.

### JUDGMENT.

ABDUR RAHIM, J.—Two points have been argued before us in this appeal. The first relates to the question of limitation, and the point for decision is whether to this suit Article 62 of the Limitation Act applies. If it does not, admittedly we have got to refer to Article 120 of the Act. Article 62 lays down 3 years for recovery of money had and received for the plaintiff's use and the starting point of limitation is when the money is received. That is a well-known form of action, and it applies in cases where a definite sum of money has been received by the defendant and which, the law says, he must hold for the use of the plaintiff. The present case is a suit against the defendant who is the manager of a *jagir* appointed by the Government, and he is asked to account for money which he received as such manager to the plaintiff who is entitled to a particular share. It is undoubtedly a suit for an account. The defendant was entitled to receive the money and he was bound to pay over what was due to the plaintiff only after the deduction of the legitimate expenses and outgoings. One test which seems to be conclusive is that it could not be said that the money which may be found

due to the plaintiff was received at any particular point of time that is put down in Article 62 as the starting point of limitation. Then it is pointed out by the learned Vakil for the respondent that the defendant would be liable not only for what he actually received but also for what he failed to receive from default. That is a case which could not possibly be covered by Article 62. A number of rulings have been cited to us. Except *Muhammad Habibullah Khan* v. *Safdar Husain Khan* (1), the other cases seem to be quite distinguishable. For instance, in the ruling reported as *Dulabh Vahuji* v. *Bansidhar Rai* (2) and *Chamanlal* v. *Bapubhai* (3), there is no discussion whatever of Article 62 and it does not appear that that Article was applied to those cases. *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (4) and *Mahomed Wahib* v. *Mahomed Ameer* (5) seem to be cases very similar to the Bombay decisions, but none of them relate to suits for an account. The case in *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (4) was a suit by a certain member of a Hindu family which had become divided and the claim was to recover money received by another member in which the plaintiff was entitled to a share. There was no question of rendering any account and the money in the hands of the defendant belonged to the plaintiff. The defendant had no right to receive the money as the defendant in this case had, and it was a claim for a definite sum which in law belonged to the plaintiff when it was received by the defendant and was, therefore, held to be received by the defendant for the plaintiff's use. The case reported as *Segu Chidambaramma* v. *Segu Balayya* (6) is also similar to those cases. To the case of *Muhammad Habibullah Khan* v. *Safdar Ali Khan* (1), Article 120 was applied. There the person who was jointly entitled with the defendant sued to recover his share of the money in the hands of the defendant after an account being taken of what was received by the defendant and what he lawfully spent That was a case very close to the present and it was held that Article 62 had no application and the case was governed by Article 120. In my opinion the present suit is governed by Article 120 and not Article 62.

The learned Pleader for the appellant has also argued that the suit of the plaintiff is barred by virtue of rule 2 of Order II of the new Civil Procedure Code, corresponding to section 43 of the old Code. What happened was that the plaintiff instituted a suit for the profits of the year 1912 in the District Munsif's Court, but afterwards the plaint was returned to him for presentation to the proper Court because the valuation exceeded the limits of the pecuniary jurisdiction of the District Munsif and the plaintiff never afterwards re-presented the plaint. It is said that because he had filed a suit for the profits of the year 1912, rule 2 of Order II applies and his present suit must be held to be barred. But it seems to me that the suit, having been practically withdrawn, must be treated as if it was never filed and it is impossible to understand how the mere fact that the plaintiff had filed a suit which was afterwards withdrawn should operate as a bar to his present suit. Nothing was adjudicated upon and the suit previously filed does not now exist.

These are the only questions raised in the appeal and, in my opinion, the judgment of the learned District Judge is right on all the points. The appeal is dismissed with costs.

SRINIVASA AIYANGAR, J.—The jural relationship between the plaintiff and the defendant is not disputed. Both of them are beneficially interested and are owners beneficially of a certain *jagir*. But the defendant is the person who is constituted the manager. As manager he is entitled to collect the rents and revenue of the *jagir* and bound to account finally for the collections and disbursements. The plaintiff cannot claim a share in each individual collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded, makes no difference.

(1) 7 A. 25; A. W. N. (1884) 219.
(2) 9 B. 111.
(3) 22 B. 669.
(4) 1 Ind. Cas. 408; 32 M. 191; 5 M. L. T. 49; 19 M. L. J. 94.
(5) 32 C. 527; 1 C. L. J. 167.
(6) 12 Ind. Cas. 704; (1911) 2 M. W. N. 467.

On taking of the accounts, it may be found that no money is due to the plaintiff from the defendant and that money is due from the plaintiff to the defendant. The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The Article of limitation saving the suit is not, therefore, Article 62. There is no other Article suggested and the suit must fall within Article 120. The case in *Muhammad Habibullah Khan* v. *Safdar Husain Khan* (1) seems to be precisely in point and I follow it, though I am not willing to adopt the language "resulting trust" as expressing the jural relationship between the plaintiff and the defendant. Other cases, as pointed out by my learned brother, are clearly distinguishable from this case. In all these cases it will be found that the plaintiff was entitled from the very moment the money was received to a particular share of that sum. On the other question, I have nothing to add.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

CIVIL APPEAL No. 28 OF 1913.

December 15, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

SURAPUDI MUNIAPPA AND ANOTHER—DEFENDANTS NOS. 12 AND 13—APPELLANTS

*versus*

NOOKALA SESHAYYA GARI SUBBIAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Mortgage—Simple mortgage—Mortgagor, whether entitled to use and enjoyment of mortgaged property—Plants growing on mortgaged property cut and removed—Mortgagee's suit to enforce security, whether maintainable—Proper cause of action—Limitation Act (IX of 1908), Sch. I, Arts. 36, 49, 132.*

In India, a mortgage transaction is merely a security for the re-payment of the debt and in the case of a simple mortgage the mortgagor, both before and after default of payment of mortgage-money, is and continues to be the owner of the property entitled to possession and to the use and enjoyment of the property as an absolute owner. [p. 903, col. 2.]

Where, therefore, the manager of an undivided family mortgaged the family properties to the plaintiff on the 26th October 1900, and in October 1905, certain trees growing on the properties were cut and carried away by third parties, and the mortgagee sued on 26th July 1909, to enforce his mortgage security:

*Held*, (1) that this was not a suit to enforce payment of money charged on immoveable property within the meaning of Article 132 of the Limitation Act, for if that were the case, the plaintiff mortgagee would be entitled to claim payment out of the portion of the security or its value in the hands of third parties irrespective of the sufficiency or insufficiency of the remainder of the security in the hands of the mortgagor; [p. 905, col. 1; p. 902, col. 1.]

(2) that the only cause of action which the plaintiff had was for damages for the depreciation of the security, the measure of damages being the amount by which the security was rendered insufficient, and the plaintiff in such an action would have to prove that the security was, as a matter of fact, rendered insufficient; [p. 905, col. 1; p. 902, col. 1.]

(3) that the proper Article of the Limitation Act applicable to the case would be either Article 36 or 49, but that whichever applied, the suit was time-barred as it was not brought till nearly 4 years after the date of the cutting and appropriation. [p. 905, col. 2; p. 902, col. 1.]

*Berhamdeo Pershad* v. *Tara Chand*, 33 C. 92; 9 C. W. N. 989; *Heera Lall Chowdry* v. *Janokeenath Mookerjee*, 16 W. R. 222; *Umatara Gupta* v. *Uma Charan Sen*, 3 C. L. J. 52; *Kamala Kant Sen* v. *Abul Barkat*, 27 C. 180; *Joyeshur Bagat* v. *Ghanasham Dass*, 5 C. W. N. 356; *Gosto Behary Pyne* v. *Shib Nath Dut*, 20 C. 241; *Shyam Chand Kundu* v. *Land Mortgage Bank*, 12 C. L. R. 440; 9 C. 695; *Barhamdeo Prasad* v. *Tarachand*, 21 Ind. Cas. 981; 15 M. L. T. 62; (1914) M. W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 C. 654; 41 I. A. 45; *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*, 6 I. A. 145 at p. 160; 5 C. L. R. 213; 5 C. 198; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; *Joala* v. *Hurbuns*, (1853) S. D. N. W. P. 669; *Ram Kant Chowdry* v. *Brindabun Chunder Doss*, 16 W. R. 246; *Padmanabh Bombshenvi* v. *Khemu Komar Naik*, 18 B. 684 at p. 687; *Venkata Viraragavayyangar* v. *Krishnasami Ayyangar*, 6 M. 344 at p. 347; 7 Ind. Jur. 358; *Arumugam* v. *Sivagnana*, 13 M. 321; *Byjnath Lall* v. *Ramoodeen Chowdry*, 1 I. A. 106; 21 W. R. 283; *Faqueer Soonar* v. *Khuderun*, 2 N. W. P. H. C. R. 251; *Hutchins* v. *King*, 17 U. S. Supreme Court Law Ed. 544 at p. 548; 1 Wallace 53; *Usborne* v. *Usborne*, 1 Dickens 75; 21 E. R. 196; *Hampton* v. *Hodges*, 8 Vesey 105; 32 E. R. 292; *Humphreys* v. *Harrison*, 1 J. & W. 581; 21 R.R. 238; *Ex parte National Mercantile Bank, In re Phillips*, (1880) 16 Ch. D. 104; 50 L. J. Ch. 231; 44 L. T. 265; 29 W. R. 227, referred to.

*Gosto Behary Pyne* v. *Shib Nath Dut*, 20 C. 241; *Kristo Dass Kundoo* v. *Ramkant Roy Chowdhry*, 6 C. 142; 7 C. L. R. 396; *Ramakrishnama Chetty* v. *Vayvati Chengu Aiyar*, 25 Ind. Cas. 643; 16 M. L. T. 502; 27 M. L. J. 494; *Aiyappa Reddi* v. *Kuppusami Reddi*, 28 M. 208, followed.

Appeal against the decree of the District Court of Nellore, in Original Suit No. 28 of 1909.

Mr. *S. Varadachariar*, for Mr. *A. Krishnaswamy Aiyar*, for the Appellant.

Mr. *T. V. Venkataramaa Aiyar*, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—This is an action by a mortgagee against the mortgagor and various other persons to enforce a mortgage,

dated the 26th October 1900. The only question that arises in this appeal relates to the liability of the appellants, the 12th and 13th defendants. The facts are briefly these. The mortgaged property contained a plantation of casuarina trees, said to be twenty thousand in number. The allegation against the 12th and 13th defendants is that they in concert with the mortgagor cut and removed the trees and thereby depreciated the value of the plaintiff's mortgage security by a thousand rupees. It is abundantly clear that such an act on their part might very well give rise to an action of tort. But that will not avail the plaintiff, for such cause of action is admittedly barred by limitation, and he can only succeed if he can establish that they are properly sued in an action brought to enforce the mortgage, which would fall under the longer period of limitation prescribed by Article 132 of the Limitation Act.

The learned Judge has held that the suit falls within Article 132 on the ground that the appellants appropriated a part of the plaintiff's security and converted it into money, which in their hands he is entitled to treat in equity as part of the security, or as security substituted for the original one. This is a well-recognized principle and has been frequently applied in India. See for example *Berhamdeo Pershad* v. *Tara Chand* (1). In my opinion to apply this principle to the present case would be wholly fallacious. The mortgage was a mortgage of immoveable property and not of any chattel interest, whether existing at the date of the mortgage or capable of being created subsequently. The mortgagor was entitled to the standing timber and turned it into chattels; and the only remedy against him would be an action for damages for the depreciation of the mortgage security if it can be shown that he has, in fact, by his action lowered the value of the mortgage security below the statutory minimum. (See section 66 of the Transfer of Property Act.) It may well be that if the defendants Nos. 12 and 13 had aided and abetted the mortgagor in so depreciating the security, they would be equally liable with him. No such cause of action is alleged or could be alleged in the present case. In my opinion as soon as the trees were cut and converted into timber, they ceased to be part of the mortgage security; and nonetheless so because their removal had *pro tanto* detracted from the value of the security.

Mr. Venkataramier put forward another argument which I have very great difficulty in following. It appears that the mortgage specifically included the casuarina trees *eo nomine* as part of the security, which, of course, is immaterial to his other contention as the Transfer of Property Act, section 8, includes all things attached to the earth as passing on a transfer of immoveable property. But he says the specific mention of the casuarina trees in the mortgage has this further effect: it imports by implication a covenant by the mortgagor not to cut or sever the trees without the consent of the mortgagee. This in itself seems to me to be a very questionable proposition. But I will assume it to be correct for the purposes of the argument. He then contends that such a covenant would run with the land and attach to the land in the hands of any alienee; the land for this purpose is the trees and the covenant runs with them in the hands of the person who acquires them as timber. I am quite unable to follow this reasoning. The land is not the trees, but the land with the trees on it; and when the trees were severed, they ceased to be part of the land and became chattels, and so far as they were concerned there was no land for the covenant to run with. I confess that my imagination boggles at the conception of a covenant running with a tree trunk. I am of opinion that the only cause of action, if any, that the plaintiff ever had against the appellants was an action in tort to which the Act of Limitation would be a complete answer, and that his attempt to make them liable in an action to enforce the security is wholly misconceived. The appeal must be allowed with the plaintiff's suit dismissed as against the appellants with costs here and below.

SRINIVASA AIYANGAR, J.—This is an appeal by the 12th and 13th defendants. They contend that the suit as against them (if there was a cause of action) was barred by limitation. The facts which give rise

(1) 33 C. 92; 9 C. W. N. 989.

to this contention are shortly these :—On the 26th of October 1900, the 1st defendant, the manager of the undivided family consisting of defendants Nos. 1 to 9, mortgaged certain immoveable properties to the plaintiff to secure a loan of Rs. 5,000. Among the properties so mortgaged was a casuarina plantation. At the time of the mortgage, the plants were young and were not fit to be cut. In October 1905, when they were fit to be cut, the 12th and 13th defendants cut and carried away the wood then standing on the land. The action was brought on the 26th July 1909 against the mortgagors Nos. 1 to 9 to enforce the security. The claim against defendants Nos. 12 and 13 is stated in paragraph 11 of the plaint and is in the following terms :—"The defendants Nos. 12 and 13 are alienees from defendants Nos. 1 to 9 of a casuarina plantation..... These defendants have in concert with defendants Nos. 1 to 9 cut and removed all the trees and have appropriated them to their own use. These defendants were aware of the mortgage in favour of the plaintiff at the time of their sale and have by their acts impaired the value of the mortgage security available to plaintiff in a sum of Rs. 1,000." Defendants Nos. 12 and 13 contend that the action in so far as they are concerned is not an action to enforce the security governed by Article 132 of the Limitation Act, but is one for damages for a tort governed by Article 36 or at the best by Article 49, in which case the suit would obviously be barred by limitation.

The Judge finds that the 12th and 13th defendants in collusion with the 1st defendant depreciated the value of the security by Rs. 1,000. Whether the 12th and 13th defendants were purchasers of the wood from the 1st defendant or whether they were merely assisting him in the disposal of the timber cut without themselves appropriating any portion of it, is not quite clear from his findings in paragraph 22 of the judgment; in paragraph 25 he says clearly that the timber was appropriated by the 12th and 13th defendants. If the defendants Nos. 12 and 13 merely assisted the 1st defendant in cutting and disposing of the timber without themselves appropriating any of it, the suit as against them could not, in any sense, be said to fall within Article 132 of the Limitation Act. In the argument it was assumed that defendants Nos. 12 and 13 had appropriated the wood standing on the land to the value of Rs. 1,000, and it is on this basis that I proceed to decide the question of limitation.

In determining which Article of the Limitation Act applies to this suit it is necessary to ascertain precisely what, if any, are the rights which the plaintiff has against the 12th and 13th defendants. In India a mortgage transaction is merely a security for the re-payment of the debt and in the case of a simple mortgage the mortgagor, both before and after default of payment of mortgage-money, is and continues to be the owner of the property entitled to possession and to the use and enjoyment of the property as an absolute owner. He is at liberty to sell the property subject, of course, to the charge of the mortgagee, and a suit by a mortgagee to realise the debt due by sale of the security in the hands of the alienee would be a suit to enforce payment of money charged upon immoveable property governed by Article 132 of the Limitation Act: it has also been held in this Court that that remedy is available even when the property is in the hands of a trespasser who had acquired a title to the property by adverse possession against the mortgagor. Again the mortgaged property after the date of the mortgage may assume a new form and in that new form may be in the hands of the mortgagor or of a third party. Even in such cases a suit by the mortgagee to enforce payment of his debt may be governed by Article 132. As for example (*a*) the mortgaged property may have been sold for arrears of Government revenue payable by the mortgagor, (*b*) by a landlord for arrears of rent, (*c*) by a

(*a*) *Heera Lall Chowdry* v. *Janokeenath Mookerjee*, 16 W. R. 222; *Umatara Gupta* v. *Uma Charan Sen*, 3 C. L. J. 52; *Kamala Kant Sen* v. *Abul Barkat*, 27 C. 180; *Jogeshur Bhagat* v. *Ghanasham Dass*, 5 C. W. N. 356.

(*b*) *Gosto Behary Pyne* v. *Shib Nath Dut*, 20 C. 241; *Shyam Chand Kundu* v. *Land Mortgage Bank*, 12 C. L. R. 440; 9 C. 695.

(*c*) *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*, 6 I. A. 145 at p. 160; 5 C. L. R 213; 5 C. 198; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; *Barhamdeo Prasad* v. *Tarachand*, 21 Ind. Cas.

first mortgagee under a power of sale or (*d*) through Court in execution of a decree for sale to which mesne encumbrancers are parties. It might have been acquired in the exercise of the right of eminent domain.* For other examples see Ashburner on Mortgages, page 230, and *Joala* v. *Hurbuns* (2). In all these cases the original security in the hands of the purchaser is freed of all encumbrances subsequent to the charge for realising which the property was sold. In fact the charge is transferred to the surplus sale-proceeds (see section 73 and 97 of the Transfer of Property Act); and a suit by an encumbrancer who is entitled to be paid out of it, to follow it in the hands of a person holding it, is a suit to enforce payment of money charged on immoveable property, though at the time of the institution of the suit the immoveable property has assumed the shape of money. In equity the money is still considered to be land. Again, instead of the original security, there may be a substituted security, as for instance in cases where the original mortgage was of an undivided share of immoveable property for which by a subsequent partition a particular portion is allotted. [*Byjnath Lall* v. *Ramoodeen Chowdry* (3).] In all the above cases the person in whose hands the substitute for the original security is, holds it subject to the right of the encumbrancers as if they were alienees of the security. *Berhamdeo Pershad* v. *Tara Chand* (1), confirmed by the Privy Council [*Barhamdeo Prasad* v. *Tarachand* (4)] which has been followed by the lower Court, is a case of this sort. Defendants Nos. 12 and 13 are in no sense alienees of the security or any portion of it. The suit mortgage is not a chattel mortgage of the casuarina plants. It is doubtful whether a person who is both the owner of the land and of the trees growing thereon can make a chattel mortgage of the trees alone before they are severed. However, that question need not be considered in this case, as the suit mortgage was a mortgage of immoveable property. It is said that the mortgage specifically refers to the casuarina plants then growing on the land as being subject to the mortgage. Even without a specific mention they would pass under a mortgage of land: see section 8 of the Transfer of Property Act; *Faqueer Soonar* v. *Khuderun* (5); Jones on Mortgages, section 145; *Hutchins* v. *King* (6), and I do not think for the determination of the question of limitation, that is material. If the question were, whether the mortgagor in the usual course of enjoyment was entitled to cut and utilise it without any liability to the mortgagee, the fact that the standing timber was specifically mortgaged may possibly give rise to an inference of a covenant not to cut and appropriate them without the consent of the mortgagee.

Now coming to the question in dispute in this case, as I have already observed, the mortgagor is entitled to use and enjoy the mortgaged property in any way he likes. He is at liberty to cultivate the lands and take the crops grown on them. He is also entitled to cut and appropriate for his own use underwood, on the same footing as yearly crops. He is also entitled to cut and sell the timber and appropriate the proceeds. All these are merely acts of enjoyment of the property by the owner and are in no sense alienations or conversions of the security: in fact so far as the use or enjoyment of the properties is concerned, the mortgagor is entitled to its unrestricted enjoyment as if no mortgage existed on the property subject only to this qualification that he, by his acts, does not render the security insufficient. This was laid down in England in a series of cases from the earliest times, *Usborne* v. *Usborne* (7); *Hampton* v. *Hodges* (8); *Humphreys* v.

(2) (1853) S. D. N. W. P. 669.
(3) 1 I. A. 106; 21 W. R 283.
(4) 21 Ind. Cas 961; 15 M. L. T. 62; (1914) M. W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 C. 654; 41 I. A. 45.

961; 41 I. A. 45; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R 89; 26 M. L. J. 243; 41 C. 654; (1914) M. W. N. 38; 15 M. L T. 62, referred to.

(*d*) *Ram Kant Chowdhry* v. *Brindabun Chunder Doss*, 16 W. R. 246; *Padmanath Bombsheni* v. *Khema Komar Naik*, 18 B. 684 at 687.

**Venkata Viraraghavayyangar* v. *Krishnasami Ayyangar*, 6 M. 344 at p. 347; 7 Ind. Jur. 358; *Arnujam* v. *Sivagnana*, 13 M. 321.

(5) 2 N. W. P. H. C. R. 251.
(6) 17 U. S. Supreme Court Law. Ed. 544 at p. 546; 1 Wallace 53.
(7) 1 Dickens 75; 21 E. R. 196.
(8) 8 Vesey 105; 32 E. R. 292.

*Harrison* (9). In the last two cases the mortgage was also specifically of the trees. In *Ex parte National Mercantile Bank; In re Phillips* (10), the Master of the Rolls said: "If a mortgage includes timber trees the mortgagor, while he remains in possession, is entitled to cut them down and sell them". Section 66 of the Transfer of Property Act is based on the same principle. A different view appears to have been taken in a case decided by the Supreme Court of the United States. [*Hutchins* v. *King* (6).] In America there seems to be a difference of opinion on this matter; see Jones on Mortgages, sections 144, 453 and 688, the difference depending on the view entertained as to the nature of a mortgage security in particular jurisdictions. But whatever that may be, we are bound by section 66 of the Transfer of Property Act. The only cause of action, therefore, which the plaintiff can have against defendants Nos. 12 and 13 is for damages for the depreciation of the security, the measure of damages being the amount by which the security is rendered insufficient and the plaintiff in such an action must prove that the security as a matter of fact was rendered insufficient. (Ghose on Mortgages, page 319.) Such an action is not one to enforce payment of money charged, for if that were the nature of the action, the plaintiff mortgagee would be entitled to claim payment out of the portion of the security or its value in the hands of the third party irrespective of the sufficiency or insufficiency of the remainder of the security in the hands of the mortgagor. *Gosto Behary Pyne* v. *Shib Nath Dut* (11), *Kristodass Kundoo* v. *Ramkant Roy Chowdhry* (12). I think, therefore, Article 132 of the Limitation Act does not apply. This is the view taken in *Ramakrishnama Chetty* v. *Vuvvati Chengu Aiyar* (13) and *Aiyappa Reddi* v. *Kuppusami Reddi* (14). In the former case trees were cut and appropriated by the alienee from the mortgagor of the mortgaged lands. This was held to be waste and not an alienation of part of the security. In the latter case, which is indistinguishable in principle from this case, there was a mortgage by a tenant-in-common of his interest in certain lands. There were trees on the common lands, the whole of which was cut by the other tenant and appropriated to his own use. The security was rendered insufficient and the mortgagee sued the other tenant for damages. This Court after considering the nature of the action held that the proper Article of limitation applicable to the case was Article 49. It may be a question whether Article 36 is not the more appropriate, Article as the action of the mortgagee is one on the case of damages for injuring the interests of the mortgagee in the mortgaged properties. This is the nature of the action whether the suit is against the mortgagor, or his assignee or against a stranger: Sedgwick on Damages, section 73. But whether Article 49 or Article 36 applies the suit is equally barred by limitation as the action was not commenced till nearly 4 years after the date of the cutting and appropriation of the wood by defendants Nos. 12 and 13. The appeal must, therefore, be allowed and the suit dismissed against 12th and 13th defendants and with costs here and the Court below.

*Appeal allowed.*

(9) 1 J. & W. 581; 21 R. R. 238.
(10) (1880) 16 Ch. D. 104; 50 L. J. Ch. 231; 44 L. T. 265; 29 W. R. 227.
(11) 20 C. 241.
(12) 6 C. 142; 7 C. L. R. 396.
(13) 25 Ind. Cas. 643; 16 M. L. T. 502; 27 M. L. J. 494.
(14) 28 M. 208.

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 12 OF 1910-11 OF MEERUT DISTRICT.

August 19, 1911.

*Present*:—Mr. Reynolds, S. M., and Mr. Tweedy, J. M.

NATHWA—PLAINTIFF—APPELLANT

*versus*

JAGDISH NARAIN—DEFENDANT—RESPONDENT.

*Jurisdiction—Revenue Court—Document, validity of, question as to—Finding, when final—Civil Court, jurisdiction of.*

The Revenue Courts, for the purpose of deciding questions of tenancy, should decide whether or not

a document can be acted upon as void or voidable, and subject to appeal, such a finding is final unless the Revenue Court specially reserves authority of the Civil Court.

Second appeal from the order of the Commissioner of the Meerut Division, dated the 12th November 1911, reversing that of the Assistant Collector, Meerut, in a case of determination of tenure.

JUDGMENT.

TWEEDY, J. M.—(*July 22nd*, 1911.)—I agree with the Commissioner that appellant is not an occupancy tenant. But I am not sure that he is a trespasser. The case turns upon the lease given by the general attorney of the respondent's guardian to the appellant. That lease is admitted and is registered. but it is disputed by the respondent on the ground that it was given by his agent in collusion with the appellant.

It is true that the appellant had been quarrelling with the respondent for years about this land and that the former had been declared more than once to be a trespasser. But it is conceivable that the *zemindar* for the sake of peace might give him a lease although the presumption is certainly against it.

The lease was executed according to law and was given by a person who was *prima facie* empowered to grant it and it cannot be set aside in the way that the lower Appellate Court has done.

As far as the Revenue Courts are concerned, the question of their jurisdiction to determine the validity of documents appears to be *res integra*. At least I can find no decision dealing specially with the point but I think the general rule which has been laid down as to questions of marriage, adoption, etc., must be followed in respect of documents. The Revenue Court must for the purpose of deciding questions of tenancy decide whether or not a document can be acted upon or should be treated as void or voidable. Subject to the result of any appeal that may be made, such a finding will be final in that suit unless the Revenue Court specially reserved authority of the Civil Court.

I can find no evidence, in the proper sense of the word, regarding the validity of the lease. The Commissioner's reasons for rejecting it, although they may be quite sound, appear to rest upon conjecture and not upon evidence. It is said that the general attorney was dismissed directly after the execution of the lease and also that a criminal complaint was pending against him, but there is nothing of the nature of evidence to support these allegations.

I would return the case under rule 25 for a distinct finding in respect of this lease (*i*) whether it was executed by a person legally authorised to grant it in respondent's behalf, (*ii*) whether it is by reason of the fraud of both agent and tenant voidable at the option of the respondent.

REYNOLDS, S. M. I concur.

*Appeal allowed; Issues remitted.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1701 AND 1702 OF 1914 AND RULES NOS. 845 AND 846 OF 1914.

January 5, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

MANMATHA NATH BOSE AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Sreemati* KRISHNA PRAMADA DASI—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. VI, rr. 17, 18—Plaint, amendment of, in appeal—Remand—Appellate Court, power of.*

There are other provisions for remand under the Civil Procedure Code, 1908, than given under Order XLI, rule 23. [p. 907, col. 1.]

When a plaint is amended in appeal under Order VI, rules 17, 18 and a defendant desires to traverse the facts stated in the amendment, the Appellate Court has power to remand the case. [p. 907, col. 1.]

*Peary Mohan Mukherjee* v. *Narendra Krishna Mukherjee*, 5 C. W. N. 273 at p. 279, referred to.

*Nabin Chandra Tripati* v. *Pran Krishna Dey*, 20 Ind. Cas. 39; 18 C. L. J. 613; 41 C. 108, disapproved.

*Zohra Bibi* v. *Zabeda Khatoon*, 7 Ind. Cas. 75; 12 C. L. J. 368, approved.

Appeal against the decree of the Subordinate Judge, Additional Court of Khulna, dated the 25th of November 1913, reversing that of the Officiating Munsif, 3rd Court, Satkhirah, dated the 19th of May 1913.

Babus *Sarat Chandra Roy Choudhry* and *Probodh Chandra Rai*, for the Appellants.

Babu *Provas Chandra Mitter* and Babu *Satis Chandra Bose*, for Babu *Susil Madh b Mullick*, for the Respondents.

BELI RAM *v.* SOHAN SINGH.

JUDGMENT.

IN APPEAL No. 1702 OF 1914.

We do not think that this is a case for interference of this Court. The defendants themselves asked for a remand when the plaint was allowed to be amended, and as was pointed out by this Court in the case of *Peary Mohan Mukherjee* v. *Narendra Krishna Mukherjee* (1), the Law Reports show many cases in which amendments have been allowed by the Appellate Court and suits have been sent back for re-trial on amendment of the plaint even under the old Code. In the present Code of Civil Procedure we may observe, *firstly*, that section 564 has been omitted, and whatever might have been the view taken in a recent case, *Nabin Chandra Tripati* v. *Pran Krishna Dey* (2), that opinion is contrary to the case of *Zohra Bibi* v. *Zabeda Khatoon* (3), and the learned Judges did not act upon their own opinion but treated the mistake of the Subordinate Judge as a mere irregularity under section 99 of the Code and held that the merits of the case were in no way affected by the remand. But even that case is strictly confined to Order XLI, rule 23, and we do not agree that there are not and cannot be other provisions for remand under the Code of Civil Procedure; the new rules 17 and 18, Order VI, admittedly render a remand necessary when the plaint is amended in appeal and the defendant desires to traverse the facts stated in the amendment. That there is power to remand, therefore, in case of amendment of the plaint is perfectly clear and there always has been this power on the authority of the case we have already cited *Peary Mohan Mukherjee* v. *Narendra Krishna Mukerjee* (1) and the numerous other cases cited.

The defendant's objection to this remand seems to be that it is unnecessary and puts the parties to inconvenience, because he admits the facts which the Subordinate Judge held ought to be added to the plaint by way of amendment. That might very well be so, had it not been that he himself asked for the remand. He cannot be heard in appeal against the decision in his favour. Moreover, the opposite side were perfectly willing to go on with the case before the Subordinate Judge, but having gone to the extent of amending their plaint and putting in fresh proceedings before the Munsif they are not now prepared to support the defendant's request that the Subordinate Judge should decide the matter himself. We do not quite see how this appeal came to be made, but in any case it is incompetent, and must be dismissed with costs.

This judgment will also govern Second Appeal No. 1701 of 1914.

The question of jurisdiction having been decided in the course of our judgment the Rules (Nos. 845 and 846 of 1914) are discharged.

*Appeals dismissed; Rules discharged.*

(1) 5 C. W. N. 273 at p. 279.
(2) 20 Ind. Cas. 39; 18 C. L. J. 613; 41 C. 108.
(3) 7 Ind. Cas. 75; 12 C. L. J. 368.

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 171 OF 1916.

January 24, 1916.

*Present*:—Mr. Justice Shadi Lal.

BELI RAM—APPELLANT

*versus*

SOHAN SINGH AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 71, 84—Auction sale in execution—Failure of purchaser to deposit—Re-sale—Defaulting purchaser, when liable for loss.*

In case of a default on the part of a purchaser at an auction sale to deposit the purchase-money, the property must be re-sold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation of sale is necessary. [p. 908, col. 2.]

*Bhim Singh* v. *Sarwan Singh*, 16 C. 33; *Vallabhan* v. *Panyunni*, 12 M. 454, followed.

Where, therefore, a period of nearly six months intervened between the default of the auction-purchaser and the final sale:

*Held*, that the requirements of Order XXI, rule 84, had not been complied with and the auction-purchaser could not be called upon to pay the deficiency in price. [p. 908, col. 2.]

Second appeal from the order of the District Judge, (New) Jhelum, dated the 10th February 1915, affirming that of the District Judge, (Old) Gujrat, dated the 21st May 1914, taxing the appellant with Rs. 203 on account of deficiency in the amount of resale of a house attached in execution of decree.

Rai Sahib Lala *Moti Sagar*, for the Appellant.

Sardar *Teja Singh*, for the Respondents.

MARIMUTHU PILLAI *v.* VELU PILLAI.

JUDGMENT.—The facts of this case are briefly as follows. In execution of a decree obtained by Hazara Singh against Jai Singh, a house belonging to the latter was put up to auction, and the highest bid was that of Beli Ram, appellant, who offered Rs. 1,210 for it. On being required, however, to make the necessary deposit, Beli Ram refused to do so, and the house was, accordingly, forthwith put up to auction again, but could not be sold inasmuch as no bidders came forward. Subsequently after a fresh proclamation the house was again auctioned and was eventually sold to the same Beli Ram for Rs. 1,007. These two auctions took place on the 21st August 1913 and the 14th February 1914, respectively, and between these two dates there was another infructuous sale on the 19th November 1913, when one Muhammad Ali offered Rs. 835 but his bid was not accepted by the Court.

The decree-holder has now made an application under Order XXI, rule 71, for the recovery of Rs. 203 from Beli Ram on account of the loss sustained by reason of his default in making the deposit required by law. The Court below has directed him to pay the money, and the question of his liability depends upon the interpretation to be placed upon Order XXI, rule 84, which is in the following terms:

"On every sale of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold."

Now, I have no doubt that the bid of Beli Ram was accepted by the officer conducting the sale and this is apparent from the fact that Beli Ram was called upon to make a deposit of twenty-five per cent. He was, therefore, declared to be the purchaser within the purview of the aforesaid rule, because the law does not require any special form of declaration.

I am, however, of opinion that in default of such deposit, the property was not sold "forthwith." As pointed out in *Bhim Singh* v. *Sarwan Singh* (1) at p. 38, "the word 'forthwith' is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit." It seems to me that the sale need not necessarily take place on that very day, but the law contemplates that the fresh bids should be invited soon afterwards, and it is clear that a fresh proclamation of sale is not required. See *Vallabhan* v. *Pangunni* (2).] The whole thing is expected to be one continuous transaction.

In the case before me there was, as stated above, a second sale after a fresh proclamation, and then there was a third sale and the appellant was finally declared as the auction-purchaser. A period of nearly six months intervened between the default and the final sale, and the deficiency in the price may be due to deterioration in the property or fluctuation in the market. The loss cannot, therefore, be properly attributed to the omission of the plaintiff to make the deposit. Accordingly, I hold that the requirement of Order XXI, rule 84, has not been complied with, and that the order of the Court below cannot be upheld. I, therefore, accept the appeal and set aside the order calling upon the appellant to pay the deficiency. In view of the circumstances of the case I direct the parties to pay their own costs in all the Courts.

*Appeal accepted.*

(1) 16 C. 33.

(2) 12 M. 454.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2205 OF 1914.

December 22, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

MARIMUTHU PILLAI—PLAINTIFF—APPELLANT

*versus*

VELU PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court, when can admit fresh evidence—"Substantial cause," interpretation of—Necessity, proof of—Recitals in documents, whether enough.*

MARIMUTHU PILLAI *v.* VELU PILLAI.

An Appellate Court has no power to call for fresh evidence in cases where no evidence has been adduced in the lower Court in respect of any issue and where there is consequently no room for any doubt. It can do so only when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent. [p. 910, cols. 1 & 2; p. 912, cols. 1 & 2.]

Where, therefore, the defendants adduced no evidence in the original Court and gave no explanation for the omission to do so and in appeal made no application for further evidence:

*Held*, that there being no evidence on record, the lower Appellate Court could and should have given judgment against the party on whom the onus lay, and that the provisions of Order XLI, rule 27, did not justify the Court in ordering fresh evidence to be recorded. [p. 912, cols. 1 & 2.]

*Kessowji Issur* v. *Great Indian Peninsula Railway Company*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115 (P. C.), followed.

*Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114; 3 M. L. T. 308; *Midnapore Zemindary Co. Ltd.* v. *Muktakeshi Dasi*, 16 Ind. Cas. 776; 40 C. 402; 17 C. W. N. 615; *Garden Reach Spinning and Manufacturing Company Ltd.* v. *Secretary of State for India in Council*, 28 Ind. Cas. 865; 19 C. W. N. 401; *Subba Naidu* v. *Ethirajammal*, 12 Ind. Cas. 673; 10 M. L. T. 409; 22 M. L. J. 14; (1911) 2 M. W. N. 440; *Andiappa Pillai* v. *Muthukumara Thevan*, 14 Ind. Cas. 140; 11 M. L. T. 241; 36 M. 477; (1912) M. W. N. 450; *Arasappa Pillai* v. *Manika Mudaliar*, 25 Ind. Cas. 587; 16 M. L. T. 301; *Ambuja Ammal* v. *Appadurai Mudali*, 30 Ind. Cas. 402; 38 M. 414; *Venkatachela Pillai* v. *Ranga Pillai*, 28 Ind. Cas. 694; 28 M. L. J. 334; 17 M. L. T. 220, referred to.

Recitals in documents as to the existence of necessity are not by themselves evidence of necessity in the absence of any other evidence *aliunde*. [p. 909, col. 2; p. 912, col. 2.]

*Brij Lal* v. *Musammat Inda Kunwar*, 23 Ind. Cas. 715; 1 L. W. 794; 26 M. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; 36 A. 187; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352 (P. C.), followed.

Per *Phillips, J.*—In interpreting the words "for other substantial course" in Order XLI, rule 27, the facts of each case must be taken into account and an answer supplied accordingly subject to the principles governing the case. [p. 912, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore, in Appeal Suit No. 473 of 1913, preferred against that of the Court of the District Munsif of Mayavaram, in Original Suit No. 318 of 1911.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *K. Sundara Rao*, for the Respondents.

JUDGMENT.

KUMARASWAMI SASTRI, J.—Plaintiff is the appellant. He sued to set aside certain alienations made by his grandmother purporting to act as his guardian during his minority. His allegations were that there was no necessity for the sales referred to in the plaint and that they were fraudulent and for grossly inadequate consideration. The present appeal relates only to the alienation in favour of the respondents under Exhibit 4. The respondents stated that the sale was *bona fide* for consideration and for purposes of discharging the debts mentioned in the sale-deed and that it is binding on the plaintiff. The District Munsif held that the alienation evidenced by Exhibit 4 was not binding on the plaintiff, as there was no evidence adduced to show that the sale-deed was for the purpose of discharging the debts mentioned therein. An appeal was filed against the decree of the District Munsif: but neither in the grounds of appeal nor in any other proceedings was any reason given for the defendants not examining witnesses to prove the necessity for the sale. Even before the Subordinate Judge no application seems to have been filed by the parties requesting permission to adduce further evidence, nor is any explanation, so far as I can see, offered as to why the defendants did not call witnesses to prove that the recitals in Exhibit 4 were correct. On appeal, the Subordinate Judge commented on the fact that the creditors, to whom money under Exhibit 4 is alleged to have been paid, would be important witnesses and directed the District Munsif to record evidence adduced by both the parties as regards the necessity for the alienation and submit it to him.

It is argued by the appellant's Vakil that the Subordinate Judge had no power to call for further evidence. The question for determination is whether an Appellate Court has power to call for further evidence in cases where there is no evidence on record in respect of the issue under consideration.

There can be little doubt that the recitals in documents as to the existence of necessity are not by themselves evidence of necessity in the absence of any evidence *aliunde*. I need only to refer to the decision of their Lordships of the Privy Council in *Brij Lal* v. *Musammat Inda Kunwar* (1), where

(1) 23 Ind. Cas. 715; 1 L. W. 794; 26 M. L. J. 443; 18 C. W. N. 649; 12 A. L. J. 495; 36 A. 187; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352 (P. C.).

they observe as follows :—"Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*."

I am of opinion that the District Munsif rightly held that Exhibit 4 was not binding on the plaintiff as there was no evidence of necessity.

As I have already pointed out, there is absolutely no explanation on record as to why witnesses were not called to prove 'necessity,' nor does the judgment of the Subordinate Judge throw any light on the matter. "That this evidence is necessary for a proper determination of the question" is a truism : but the point is whether there were any materials before the Subordinate Judge which would in law empower him to call for further evidence. I do not think that Order XLI, rule 27, of the Code of Civil Procedure empowers the Appellate Court to call for further evidence of its own motion in regard to a question on which no evidence was adduced in the lower Court and no explanation offered for the omission. The cases referred to by the respondents' Vakil, to which I shall refer later on, do not really touch the question. Rule 27 (1) of Order XLI runs as follows :—

"The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined."

There has been no change in the law so far as this section is concerned and rule 27 (1) is in terms identical with section 568 of the Civil Procedure Code, 1882.

The powers of the Appellate Court were considered by their Lordships of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (2), where it was held that "the legitimate occasion of section 568 is when, on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in section 623."

In *Krishnama Chariar* v. *Narasimha Chariar* (3), Sir Arnold White, C. J., and Mr. Justice Miller, after quoting the observations of their Lordships of the Privy Council above referred to, held that the Appellate Court can admit further evidence only if the conditions laid down by the Privy Council are satisfied. The facts, as reported, show that the documents which were admitted in evidence in appeal were not filed in the lower Court.

*Krishnama Chariar* v. *Narasimha Chariar* (3) was followed by Mookerjee and Holmwood, JJ., in *Midnapore Zemindary Co., Limited* v. *Muktakeshi Dasi* (4).

In *Garden Reach Spinning & Manufacturing Co. Ltd.* v. *Secretary of State for India in Council* (5), Fletcher and Richardson, JJ., held that Order XLI, rule 27, confers on Courts only a restricted power of admitting further evidence, and that the Appellate Court ought not to admit fresh evidence, documentary or oral, whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court, after examining the evidence on record, comes to the conclusion that it requires additional evidence in order to enable it to pronounce judgment.

In *Subba Naidu* v. *Ethirajammal* (6), the question arose as to whether an Appellate Court can call for a document for the purpose of coming to the conclusion as to whether the oral evidence in the case is true. The question for decision was whether

(2) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115 (P. C ).

(3) 31 M. 114; 3 M. L. T. 308.

(4) 16 Ind. Cas. 776; 40 C. 402; 17 C. W. N. 615.

(5) 28 Ind. Cas. 865; 19 C. W. N. 401.

(6) 12 Ind. Cas. 673; 10 M. L. T. 409; 22 M. L. J, 14; (1911) 2 M. W. N. 440.

Article 85 of the Limitation Act applied (it being alleged that the accounts were mutual, open and current). The facts of the case, as stated in the judgment of Phillips, J., are that oral evidence of the transactions between the parties was given but the account books were not filed although a summons had been taken out for their production. It also appears that the plea of limitation was not raised before the District Munsif but was, for the first time, raised before the Appellate Court. On the facts Mr. Justice Abdur Rahim was of opinion that the District Judge had no power to admit further evidence, but Mr. Justice Phillips took the contrary view. A Letters Patent Appeal (No. 118 of 1911*) was preferred and Justices Benson, Sankaran Nair and Sundara Aiyar were of opinion that on the facts stated by Mr. Justice Phillips, the District Judge was justified in admitting additional evidence. Their Lordships rested their decision on the facts of the particular case. The facts set out in the judgment of Mr. Justice Phillips show that this was not a case where there was no evidence but was a case where there was oral evidence, and a wilful default in the production of account books which had been subpœnaed for and which would have thrown light on the evidence.

In *Andiappa Pillay* v. *Muthukumara Thevan* (7), Benson and Sadasiva Aiyar, JJ., differed from the view taken by Abdur Rahim, J., in *Subba Naidu* v. *Ethirajammal* (6) above referred to, and held that an Appellate Court has power to admit further evidence under the clause 'or any other substantial cause' in section 568, Civil Procedure Code, which cause need not be *ejusdem generis* with the causes stated in the previous part of the section. This was a case where the District Judge wanted further evidence, as the District Munsif had not sufficiently considered Exhibit I filed in the case and had only exhibited part of that document. Benson, J., was of opinion that the words 'or for any other substantial cause' in section 568 of the Civil Procedure Code, 1882, should not be construed in the narrow sense suggested by the doctrine of *ejusdem generis* so as, in effect, to confine them to causes of the same kind as those stated in the earlier part of the section. Sadasiva Aiyar, J., was inclined to take a wider view that the Appellate Court had power to admit evidence and will admit evidence if it thought that it was necessary. He observed that the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (2) did not mean to give lesser powers to an Appellate Court to admit fresh evidence than the Original Court would have had in the case of a review. With all deference I am of opinion that section 568 will be rendered nugatory if the Appellate Court is invested with the same powers as the Original Court to admit further evidence. The language of the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (2), followed in *Krishnama Chariar* v. *Narasimha Chariar* (3), is clear and limits the powers of the Appellate Court considerably.

In *Arasappa Pillai* v. *Manika Mudaliar* (8), Spencer and Hannay, JJ., were not prepared to go to the length of a holding that the powers of the Appellate Court and Original Court were the same as regards the admission of evidence. There the question was whether a certain document was fraudulent and collusive. The defendant examined no witnesses and filed no documents to prove his case, and on appeal the District Judge *suo motu* made an order remanding the case for fresh evidence to be taken and calling for a finding upon the issue whether the sale was for grossly inadequate consideration. It was argued that the District Judge was wrong in remanding the suit for fresh evidence when the defendant had deliberately stated in the lower Court that he had no witnesses to call. Their Lordships were of opinion that there was no inherent *lacuna* or defect in the evidence as it stood, for, so far as the defendant was concerned, it was a case of no evidence at all. The order of the District Judge was set aside and he was directed to deal with the case on the evidence on record.

* See *Subba Naidu* v. *Ethirajammal*, 28 Ind. Cas. 640.—*Ed.*

(7) 14 Ind. Cas. 140; 11 M. L. T. 241; 36 M. 477; (1912) M. W. N. 450.

(8) 25 Ind. Cas. 587; 16 M. L. T. 301.

MARIMUTHU PILLAI v. VELU PILLAI.

In *Ambuja Ammal* v. *Appadurai Mudali* (9), Sundara Aiyar and Sadasiva Aiyar, JJ., were of opinion that the words "any other substantial cause" confer a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done.

It appears from the facts of that case that a petition was presented to the Subordinate Judge for the admission of certain documents in evidence, but it does not appear whether it was either a case where there was no evidence in the lower Court or a case where the evidence was insufficient to satisfy the Appellate Court without further light being thrown on the question.

In *Venkatachella Pillai* v. *Ranga Pillai* (10), Ayling and Sadasiva Aiyar, JJ., were of opinion that the expression "for any other substantial cause" in Order XLI, rule 27, gives power to the Appellate Court to admit fresh evidence on the same grounds as would justify the Court of first instance in granting a review. This was a case where fresh evidence was discovered after filing the appeal and was not known to the parties at the trial in the lower Court.

If in cases where there has been no evidence in the lower Court the powers of the Appellate Court are to be restricted to the grounds specified in Order XLVII relating to review, it is difficult to see how the Appellate Court can, without any proof of facts sufficient to bring it under Order XLVII, admit documents *suo motu* or call for evidence.

Whatever doubts or difficulties may exist, where there is some evidence on record and further evidence is required by the Appellate Court in order to satisfy itself, I think that Appellate Court has no power to call for fresh evidence in cases where no evidence has been adduced in the lower Court in respect of any issue and where there is consequently no room for any doubt. I would reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this as well as in the lower Courts.

(9) 30 Ind. Cas. 402; 38 M. 414.
(10) 28 Ind. Cas. 694; 28 M. L. J. 334; 17 M. L. T. 220.

PHILLIPS, J.—The sole question for determination is, whether, when a party has deliberately omitted to adduce evidence on an issue in the original Court, an Appellate Court is justified under the provisions of Order XLI, rule 27, in ordering the party to adduce his evidence. It cannot be said that such evidence is necessary to enable the Court to pronounce judgment, for when the burden of proof is on a party who fails to adduce evidence, it is perfectly clear that judgment should go against him, and such a judgment can be pronounced without further evidence. It has then to be seen whether the Subordinate Judge had any other substantial cause for calling for further evidence. There was no evidence on record to prove the necessity for which the alienation under Exhibit IV was made, for the recital in the document is in itself not evidence, when there is no other evidence to support it, [*Brij Lal* v. *Mussummat Inda Kunwar* (1)], and in this case we have only the evidence of an attesting witness who remembers nothing about the execution of the document. I have read my learned brother's judgment and, therefore, I need not again discuss the several cases which have been very carefully reviewed by him, for in these cases the several learned Judges are not in entire agreement as to the limits within which an Appellate Court is empowered to call for further evidence when there is already some evidence on record, but in interpreting the words "substantial cause" the facts of each case must be taken into account and an answer supplied accordingly subject to the principles governing the case. In this case, however, defendants Nos. 1 to 4 adduced no evidence in the original Court, and gave no explanation for the omission to do so and in appeal made no application for further evidence. There being no evidence on record on the question of necessity the Subordinate Judge could and should have given judgment against the party on whom lay the burden of proving necessity, and I have no doubt but that in these circumstances the provisions of Order XLI, rule 27, did not justify him in ordering further evidence to be recorded. I, therefore, concur in the order proposed.

*Appeal allowed.*

BAJRANGI LAL *v.* GHURA RAI.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1352 OF 1914.

February 10, 1916.

*Present:*—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

BAJRANGI LAL AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

GHURA RAI—PLAINTIFF—RESPONDENT.

*Sale-deed, suit to set aside—Sale of occupancy and fixed rate holding by one deed—Contract, validity of—Transfer, effect of—Contract for sale—Deed of transfer—Plaintiff, if can set up illegality of his own contract—Fraud, effect of—Contract Act (IX of 1872), ss. 23, 24—Agra Tenancy Act (II of 1901), s. 20—Transfer of Property Act (IV of 1882), ss. 58, 54—Infants Relief Act of 1874, 37 & 38 Vic. Ch. 62, s. 1.*

A transferor is not entitled to a decree declaring the transfer of a fixed rate holding void because the deed purported to transfer an occupancy holding (not transferable by law) as well as a fixed rate holding unless he would have been entitled to a decree for possession of the fixed rate holding if the transferee had obtained possession after the transfer. [p. 914, col. 2.]

A contract for sale is one thing and a deed of transfer another and a transfer is not void merely because the contract is unenforceable. [p. 914, col. 2; p. 915, col. 1.]

A plaintiff should not be allowed to set up the illegality of his own contract as a ground for defeating a valid transfer on the principle of *ex turpi causa non oritur actio*. [p. 915, col. 1.]

Where, therefore, the plaintiff sued to set aside a sale-deed executed by him both of a fixed rate holding and an occupancy holding on the ground of the illegality of the contract:

*Held*, that in the absence of fraud the plaintiff was not entitled to set aside the transfer of the fixed rate holding. [p. 915, col. 2.]

*Semble.*—An occupancy tenant who executes a transfer of his interest can, notwithstanding the transfer, recover the holding not because the contract is illegal, but because the interest is an interest which the transferor (by the express words of the Agra Tenancy Act) is not capable of passing. [p. 915, col. 1.]

Second appeal from the decision of the District Judge, Ghazipur, dated the 23rd of July 1914.

FACTS.—The plaintiff brought a suit for cancellation of a sale-deed of certain fixed rate holdings, on the allegation that the defendant had fraudulently obtained the sale-deed instead of a usufructuary mortgage and that the sale was void because it included certain occupancy holdings also. The defence was that no fraud had been practised and that the defendant was entitled to the fixed rate holdings and was willing to forego all the consideration which he had advanced for the occupancy holdings, which had been sold through the mutual mistake of the parties.

The Court of first instance decreed the suit, holding that the sale deed was void inasmuch as it included certain occupancy holdings. The lower Appellate Court confirmed the decree.

The defendant appealed to the High Court.

Dr. *Tej Bahadur Saprn* (with him Dr. *Sundar Lal* and Messrs. *Lakshmi Narayan* and *Kailash Nath Katju*), for the Appellants.—The plaintiff is not entitled to any declaration. So far as the sale of the fixed rate holding is concerned, there is nothing illegal in it. The illegal part of the contract can be separated from the legal one. Moreover the plaintiff cannot succeed unless he is able to show that he is entitled to possession of the fixed rate holding. This he is clearly not entitled to say, inasmuch as the transfer of a fixed rate holding is not forbidden by law. The plaintiff is clearly not entitled to set up the illegality of his own contract.

Mr. *Sital Prasad Ghosh*, for the Respondent.—The contract being one which is forbidden by law, the plaintiff is entitled to the declaration he seeks. The consideration for the contract being indivisible, the whole contract is unenforceable. The parties to this agreement are in fact in *pari delicto*.

JUDGMENT.—This appeal is connected with Second Appeals Nos. 1354 of 1914 and 1511 of 1914. The suit out of which the appeals arise was brought by Ghura Rai against Lala Bajrangi Lal and Chatarpati Ojha. The plaintiff alleged that defendant No. 1 had fraudulently obtained from him a sale-deed on misrepresentation. He also alleged that the sale-deed was void because it included a transfer of part of an occupancy holding. As against defendant No. 2 he claimed to have a mortgage-deed set aside on the ground that it was mortgage of an occupancy holding which was void by law. He claimed accordingly that the sale-deed and the mortgage-deed might be declared void. Alternative relief was claimed that if for any reason the two documents should be held to be genuine, then he should get Rs. 1,600, part of the consideration which was not paid. The present appeal is the appeal of the defendant No. 1. Second Appeal No. 1354 of 1914 is an

appeal by the same defendant on the question of costs. The third appeal is that of defendant No. 2, who complains that the Court below has not decided whether or not he should get back the Rs 400 which he alleges he paid as consideration for the mortgage.

The Court of first instance has found many of the issues in favour of defendant No. 1. In his case that Court found that the sale-deed was duly executed for good consideration and that there was no fraud. It, however, declared the sale-deed void because it included a transfer of a portion of an occupancy holding. As against defendant No. 2 it held that the mortgage of an occupancy holding was bad in law and (apparently) that the Rs. 400 was not paid.

The lower Appellate Court held that the mortgage in favour of defendant No. 2 was void. It also decided a question of costs, the correctness of which decision depends on the ultimate result in the case. It also held that defendant No. 2 was not entitled to get back the Rs. 400 he alleged he paid. All other questions were left undecided.

The Court of first instance decreed that the sale-deed, dated the 20th January 1914, executed in favour of Bajrangi Lal was void and the learned Judge upheld this part of decree of the first Court, on the ground that the plaintiff had in the same deed purported to sell part of his occupancy holding. The decision is based on the provisions of sections 23 and 24 of the Indian Contract Act. Section 23 provides that every agreement of which the object or consideration is unlawful is void. Section 24 provides that if any part of a single consideration for one or more objects, or any part of any one of several, considerations for a single object, is unlawful, the agreement is void. The contention is that under the provisions of the Tenancy Act an occupancy tenant is prohibited from transferring his occupancy holding. It is said that because the sale-deed included the transfer of part of an occupancy holding the contract was void and, therefore, the plaintiff was entitled to the decree he sought. In considering the force of the contention we must bear in mind that we are not dealing with a case in which the Court is asked to decree specific performance or even to enforce a contract. We must deal with the question without any regard to the allegations of fraud or of non-payment of the consideration. We must assume that the plaintiff comes into Court admitting that he duly executed the deed of transfer after receiving the consideration and contending that the mere fact that the deed purported to transfer an occupancy holding as well as a fixed rate holding entitles him to the declaration. We think it is clear that the plaintiff is not entitled to a decree declaring the transfer of the fixed rate holding void unless he would have been entitled to a decree for possession of the fixed rate holding if the transferee had obtained possession after the transfer. Let us suppose that after the transfer the transferee had entered into possession by receiving profits, collecting rents from the sub-tenants or in any other legal way and the transferor had brought a suit for ejectment. Could such a suit be successful? The plaintiff's case would be: "I have received the money I bargained for. I executed a deed of transfer sufficient in law to pass my interest in the fixed rate holding, but because I myself purported at the same time to transfer other property which I could not transfer, the transfer of the interest in the fixed rate holding is also invalid and I can get the holding back." It may here not be out of place to refer to certain provisions of the Transfer of Property Act. By section 5 the expression "transfer of property" is defined as an act by which a living person conveys property in present or in future to one or more living persons or to himself and one or more living persons. The expression "to transfer property" means "to perform such an act". Section 8 is as follows: "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof". By section 54 "sale" is defined to be a transfer of ownership in exchange for a price paid or promised or part paid and part promised. By the same section it is enacted that a contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. "It does not of itself create any interest in or charge on such property". It thus appears that a contract for sale is one thing and a deed of transfer another and it does not neces-

sarily follow that because the contract was unenforceable that the transfer is void. In the case we have supposed the transferor would have got all that he bargained for, and something more and every part of the consideration passing from the transferee to the transferor for the transfer of the interest in the fixed rate holding was perfectly legal. It may be urged that an occupancy tenant who executes a transfer of his interest can, notwithstanding the transfer, recover the holding. This is so, but the reason is not because the contract was illegal, but because the interest was an interest which the transferor (by the express words of the Tenancy Act) was not capable of passing (see section 8 of the Transfer of Property Act and section 21 of the Tenancy Act.) In the case of the interest in the fixed rate holding the transferor was capable of passing the interest and the effect of the deed of transfer was to vest the interest in the transferee. Suppose that in pursuance of a contract for the sale of an interest in a fixed rate holding and of the interest in an occupancy holding for a lump sum of Rs. 1,000 the contract was completed by two separate deeds, one being a transfer of the interest in the fixed rate holding and the other a deed purporting to transfer the other interest. The contract would have been exactly the same, carried out and completed by two deeds instead of one. Could the transferor succeed in a suit in which he asked to have the deed of transfer of the fixed rate interest declared void and delivered up to be cancelled? It seems contrary to justice that the plaintiff should be allowed to set up the illegality of his own contract as a ground for defeating a valid transfer. It seems a violation of the well-known maxim "*ex turpi causa non oritur actio.*"

By section 1 of the Infants Relief Act, 1874, all contracts, whether by speciality or by simple contract, henceforth entered into for the re-payment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries)and all accounts started with infants shall be absolutely void. In the case of *Valentini* v. *Canali* (1) the plaintiff, an infant, agreed with the defendant to become tenant of a house and to pay a certain sum for the furniture. The plaintiff paid part of the sum in cash and gave a promissory note for the balance. The contract was set aside and the promissory note was ordered to be cancelled, but it was held that the plaintiff could not recover back the money he had paid after he had enjoyed the use of the furniture. In *Kearley* v. *Thomson* (2), it was held that where money was paid under an illegal contract which had been partially carried into effect the money could not be recovered. Fry, L. J., quotes the words of the Lord Chief Justice in *Collins* v. *Blantern* (3): "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again, you shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back."

There is the maxim "*In pari delicto potior est conditio possidentis.*" In Broom's Legal Maxims the learned author says: "Upon the whole, then, it seems that the true test for determining whether or not the objection that the plaintiff and defendant were in *pari delicto* can be sustained is by considering whether the plaintiff can make out his case otherwise than through the medium and by aid of the illegal transaction to which he himself was a party". In the present case on the assumption that there was no fraud it is only by proving and relying on the illegality of his own contract that the plaintiff can hope to succeed. In our opinion, in the absence of fraud the plaintiff was not entitled to set aside the transfer of the fixed rate holding and the view taken by the learned Judge was not correct.

We have mentioned that the Court below has held that defendant No. 2 was not entitled to get back the Rs. 400 he alleged he paid. The Court has not decided the question whether defendant No. 2 paid this sum. Nor has it decided the question whether defendant No. 2 got possession of the occupancy holding mortgaged to him or whether the mortgage was obtained

(1) 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731; 38 W. R. 331; 54 J. P. 295,

(2) 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150; 38 W. R. 614; 54 J. P. 804.

(3) (1765) 2 Wils. K. B. 341; 1 Sm. L. C. 7th Ed. 369; 95 E. R. 847.

by fraud. We may mention that if defendant No. 2 got possession the plaintiff should have sued for possession and not merely for a declaration. In our opinion the case must be remanded.

We allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number on the file and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the same cause. Costs in this Court will include fees on the higher scale. This remand is under Order XLI, rule 23.

*Appeal allowed; Case remanded.*

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COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 44 OF 1913-14 OF ALLAHABAD DISTRICT.

August 4, 1915.

*Present:*—Mr. Holms, S. M.

RAHMAT—DEFENDANT—APPELLANT

*versus*

B. SIDH NARAIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Agra Tenancy Act (II of 1901), s. 22—Minor's tenancy—Guardian—Co-sharer in cultivation.*

A guardian of a minor tenant, who looks after the minor's cultivation, can be deemed to be sharing in the cultivation of the holding within the meaning of section 22 of the Tenancy Act.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 17th June 1914, reversing that of the Assistant Collector, Allahabad District, in a case of ejectment.

FACTS appear from the following extract from the judgment of the Commissioner:—"For the appellant it is urged that she was a minor at the time of her death and that respondent Rahmat *could not*, therefore, co-share in cultivation with her. The Board's order on Petition No. 10 of 1908-09, *Sobha Ram* v. *Chandra Jugal Kishore*, is clear on this point . . Rahmat, the respondent, was a cousin of her father. It is in evidence that he *lives*—his house is—10 or 12 miles away from where *Musammat* Hafizan lived. His mother, it appears, lived with Hafizan.... .....I am satisfied myself that she was still a minor, a mere child, perhaps 9 or 10 years old when she died and I cannot see how Rahmat can be held even to have really co-shared in cultivation with her. The fact that he had a separate holding and home of his own ten miles away makes co-sharing in cultivation very improbable. He probably did help in settling the fields with others on her behalf, but it is most improbable that he even actually did any cultivation himself."

JUDGMENT.—The respondent does not produce the Board's decision of Petition No. 10 of 1908-09 mentioned by the Commissioner, and I am not prepared to hold that a guardian of a minor who looks after the minor's cultivation cannot be deemed to be sharing in the cultivation of the holding within the meaning of section 22. Indeed the Board recently held to the contrary.

Apart from this the Commissioner has held that the appellant did not share in the cultivation. This is then an appeal on the facts and does not lie. Dismissed with costs.

*Appeal dismissed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2603 OF 1914.

February 14, 1916.

*Present:*—Mr. Justice Shah Din.

*Musammat* MALAN AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

*Musammat* JIWAN—PLAINTIFF—RESPONDENT

*Hindu Law—Mitakshara—Alienation by mother of last male-holder—Half-sister, if can object.*

According to the Mitakshara School of Hindu Law only females expressly named in the text can inherit. The half-sister of a deceased Hindu being not so named is not entitled to succeed to his estate. Therefore, she is not competent to question an alienation made by his mother, the sole surviving heir. [p. 917, col. 2.]

*Gauri Sahai* v. *Rukko*, 3 A. 45; *Jagat Narain* v. *Shea Das*, 5 A. 311; A. W. N. (1883) 51; *Jagan Nath* v. *Champi*, 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87; *Mangat Ram* v. *Devi Chand*, 20 P. R. 1906; 69 P. L. R. 1906, referred to.

MALAN *v.* JIWAN.

Second appeal from the decree of the District Judge, Sialkot, dated the 20th August 1914, affirming that of the Munsif, First Class, Sialkot, dated the 10th July 1914, decreeing the claim.

Mr. *Morton* and Pandit *Jawala Parshad*, for the Appellants.

Mr. *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—The following pedigree-table is material for the purposes of this appeal:—

| | | | | |
|---|---|---|---|---|
| First wife *Musammat* Atma Devi | = | Bhagwan Das *alias* Bhana. | = | Second wife *Musammat* Malan, defendant No. 1 |
| *Musammat* Jiwan, plaintiff. | | Puran Chand, died 13 or 14 years ago. | | |

Puran Chand, who was the last male owner of the land in dispute, died some 13 or 14 years before suit; and his estate devolved upon his mother, *Musammat* Malan. On the 7th of July 1913 *Musammat* Malan made a gift of 19 *kanals* 8 *marlas* in dispute in favour of the temple of Swami Radhenath in Kila Soba Singh, of which *Musammat* Radhi is the manager. On the 14th of February 1914 *Musammat* Jiwan, half-sister of Puran Chand deceased, instituted the present suit against *Musammat* Malan and *Musammat* Radhi for a declaration that the gift above referred to was invalid and shall not affect the reversionary rights of the plaintiff. On behalf of the defendants it was pleaded that *Musammat* Jiwan was not the daughter of Bhagwan Das *alias* Bhana and, therefore, not the half-sister of Puran Chand deceased; that even if she was proved to be the half-sister of Puran Chand, she was not an heiress to his property after the death of *Musammat* Malan; and that, in any case, the gift in question was binding on her and she was not entitled to contest it.

Both the Courts below have concurred in holding that *Musammat* Jiwan is the half-sister of Puran Chand; thataccording to the Mitakshara School of Hindu Law, which admittedly governs the parties, she would succeed as an heir, after the death of *Musammat* Malan, to the estate of her half-brother, Puran Chand; and that as such heir she had a right to contest the gift made by *Musammat* Malan in favour of the temple. Upon these findings the plaintiff's claim has been decreed by the lower Courts.

The defendants have preferred a second appeal to this Court, and the sole question argued before me by their learned Counsel is that *Musammat* Jiwan being half-sister of Puran Chand deceased is not an heir, according to the Mitakshara School of Hindu Law, to the estate left by him, and that she is not, therefore, entitled to contest the gift of part of Puran Chand's land which was made by *Musammat* Malan in favour of the temple on the 7th July 1913. The question has been argued at some length before me by the learned Counsel on both sides, and I have consulted the authorities bearing upon it. It is unnecessary for me to discuss the matter at any length, as the result of my examination of the authorities is that under the Mitakshara School of Hindu Law, by which admittedly the parties in this case are governed, the plaintiff, *Musammat* Jiwan, who is half-sister of the last male owner Puran Chand, is not an heir to his estate after the death of the deceased's mother, *Musammat* Malan. There is a decided weight of authority in favour of the view that, according to the Law of Mitakshara, none but females expressly named in the text can inherit; and since the half-sister of a deceased Hindu is not so named, it follows that she is not entitled to succeed to his estate. The authorities in support of this view are *Gauri Sahai* v. *Rukko* (1), *Jagat Narian* v. *Sheo Das* (2), *Jagan Nath* v. *Champa* (3), *Mangat Ram* v. *Devi Chand* (4), Mayne's Hindu Law, 8th Edition, pages 741 to 743 and 751 to 753; Mulla's Hindu Law, 2nd Edition, page 50; and Trevelyan's Hindu Law, 1912, pages 350 and 377. The question of the right of a Hindu female governed by the Mitakshara system of Hindu Law to inherit to the male owner was also considered in a very recent case, Civil

(1) 3 A. 45.
(2) 5 A. 311 (F. B.); A. W. N. (1883) 51.
(3) 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87
(4) 20 P. R. 1905; 69 P. L. R. 1905.

SEWARAM GOKALDAS *v.* BAJRANGDAT HARDWAR.

Appeal No. 1598 of 1913, in this Court, and the decision given was in accordance with the view propounded by the above authorities.

I may note here that admittedly Puran Chand has left no male heirs, and that his mother *Musammat* Malan is in possession of his estate as the sole surviving heir under Hindu Law. The Counsel for the plaintiff has argued that in the absence of other heirs his client is entitled to succeed to Puran Chand's estate upon the death of *Musammat* Malan; but the Hindu Law according to the Mitakshara School affords no justification for this view. The fact that, upon the view taken by me, on the death of *Musammat* Malan the undisposed of residue of Puran Chand's estate in her possession would go to the Crown by escheat, affords no ground for holding that the plaintiff is an heir under Hindu Law to Puran Chand's estate. But, even assuming for the sake of argument that the plaintiff should be held entitled to succeed to Puran Chand's estate as a relation of the half blood, since she is not an heir expressly named in the text of Mitakshara it follows that she has no right to control *Musammat* Malan's power of disposition as regards the estate in possession of the latter as an heir under Hindu Law.

For the foregoing reasons, I accept this appeal and setting aside the decree of the lower Appellate Court dismiss the plaintiff's suit with costs throughout.

*Appeal accepted.*

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BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT No. 875 OF 1915.
September 20, 1915.
*Present*:—Mr. Justice Macleod.
SEWARAM GOKALDAS AND OTHERS—PLAINTIFFS
*versus*
BAJRANGDAT HARDWAR POTDAR—DEFENDANT.

*Cause of action*—Hundi *executed for balance of account due in respect of transactions effected elsewhere—Transactions no part of cause of action—Jurisdiction—Letters Patent* (*Bom.*), *cl.* 12—*Leave, when given and when refused.*

A *hundi* was executed at Bassam. The consideration for it was the balance of account due in respect of transactions effected in Bombay. The *hundi* was not made payable at Bombay. In a suit on the *hundi*:

*Held*, that the Courts at Bombay had no jurisdiction and that it was not necessary to prove the transactions out of which the claim arose as the claim on those transactions was satisfied by the passing of the *hundi*, and thus the transactions did not form a part of the cause of action in the case. [p. 919, col. 1.]

Under clause 12 of the Letters Patent, in suits on *hundis*, leave will be given when the money is payable in Bombay and when it is not payable in Bombay, leave will be refused. [p. 919, col. 1.]

Mr. *Strangman*, for the Plaintiffs.

Mr. *Desai*, for the Defendant.

JUDGMENT.—The plaintiffs, carrying on business in Bombay, had dealings with the defendant, who is said to carry on business at Bassum in Akola under the style of Chatandas-Shankardas. The plaintiffs say that the account was settled in 1912 between the parties. The defendant, after paying a certain amount in cash, passed two *hundis* for Rs. 900 and Rs. 1,000, respectively, drawn on his own firm by the defendant payable in Bombay 181 and 361 days after sight, respectively. As those *hundis* were not met when they fell due, the plaintiffs brought this suit for the recovery of the amount.

Paragraph 5 of the plaint states that the defendant resides at Bassum; that the *hundis* were passed at Bassum but the consideration of the *hundis* was the balance of the account due by the defendant to the plaintiffs in respect of transactions effected in Bombay and the moneys were payable to the plaintiffs in Bombay and a material part of the cause of action arose in Bombay.

Leave was obtained under clause 12 of the Letters Patent to file the suit in Bombay.

The question has now arisen whether any part of the cause of action has arisen within the local limits. It must be admitted, on an inspection of the *hundis*, that the statement in the plaint that the *hundis* were payable in Bombay is incorrect. But it is contended that the consideration for the *hundis* was the balance of account due by the defendant to the plaintiffs in respect

of transactions effected in Bombay. The question is whether that was a part of the cause of action. The point apparently does not seem to have arisen before; but if the whole cause of action consists of those facts which it is necessary for the plaintiffs to prove in order to succeed in getting a decree, then it was not necessary to prove the transactions out of which the present claim arose, as the claim on those transactions was satisfied by the passing of the *hundis* and under the Negotiable Instruments Act the consideration for the *hundis* must be presumed, so the plaintiffs are entitled to a decree merely on production of the *hundis* unless the defendant can show that there was no consideration. In giving leave under clause 12 of the Letters Patent in suits on promissory notes, or *hundis*, I have always given leave when the money was payable in Bombay, and refused leave when the money was payable out of Bombay; and, in my opinion, if there are transactions in Bombay, which result in a credit in favour of the Bombay merchant against an upcountry merchant, and if the Bombay merchant goes to settle his account up country and accepts a promissory note or *hundi* in satisfaction of his account, then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay.

Unfortunately, the plaintiffs, when they applied for leave, made a misstatement in the plaint upon which I relied in granting the leave. If I had been aware that the facts stated in the plaint were incorrect, I should have refused the leave.

Therefore, I must hold now that the Court has no jurisdiction. The plaint should be returned to the plaintiffs for presentation in the proper Court.

The plaintiffs to pay the defendant's costs.

*Plaint returned.*

## MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2057 TO 2066 OF 1912.

August 3, 1914.

*Present*:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

C. V. C. T. CHIDAMBARAM CHETTY—PLAINTIFF'S ASSIGNEE—APPELLANT

*versus*

AYYAVU *alias* MUTHUKARUPPAN THEVAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Madras Rent Recovery Act (VIII of* 1865)—Kanganam *or* kulavettu, *nature of—Tenant, liability of.*

A tenant is not bound to pay anything for *kanganam* or *kulavettu* in reference to *samudayam* lands inasmuch as they are in the nature of voluntary payments. [p. 922, col. 1.]

Second appeals against the decree of the District Court of Ramnad, in A. S. No. 628 of 1910 and No. 31 of 1911, No. 622 of 1910 and No. 26 of 1911, No. 624 of 1910 and No. 27 of 1911, No. 625 of 1910 and No. 28 of 1911, No. 626 of 1910 and No. 29 of 1911, No. 627 of 1910 and No. 30 of 1911, No. 629 of 1910 and No. 32 of 1911, No. 630 of 1910 and No. 33 of 1911, No. 632 of 1910 and No. 34 of 1911, No. 634 of 1910 and No. 35 of 1911, preferred against the decrees of the Court of the Special Deputy Collector of Ramnad, in S. S. Nos. 697, 673, 689, 691, 693, 696, 699, 703, 712 and 714 of 1909, respectively.

FACTS appear from the following order of the lower Appellate Court:—

"These are appeals and counter-appeals in a batch of suits in which the land-holders sued certain *ryots* of lands in Kila-rangian village for arrears of rent claimed to be due for *Faslis* 1315, 1316 and 1317.

2. The principal issue in the case was whether the landlords were entitled to treat the suit lands as wet lands and claim *waram*. I consider that the lower Court was wrong in its finding on this point. There is no doubt that the *ryots* have held these lands at a money rent for a long time and there is absolutely no reliable evidence to prove that they have ever cultivated them with wet crops or paid *sarasari waram*. The lower Court has discussed at considerable length the question whether the lands were *fysal nunjas* and has apparently accepted the arguments on which a similar point was decided in

regard to some other lands in the village in a suit in the Civil Court. There are no old accounts to settle this question and Exhibits A and C series appear to be entirely inconclusive; nor is Exhibit M of any value in my opinion. On the other hand it is virtually admitted that the lands have always, so far as any certain information goes, been held as dry. I consider, therefore, that the land-holders have failed to establish their right to charge a wet rate now, whether or not he has repaired the tank and made a supply of water available. Reference is made to *Lakshmanan Chetti* v. *Kolandaivelu Kudumban* (1) but the circumstances of the case there dealt with were not parallel. There is in the case no satisfactory evidence that the lands were ever cultivated as wet or that the charge of a dry rate in money was ever made as a concession. Both these points are essential if the specific provisions of section 11 of the Rent Recovery Act are to be superseded. In the present case it is not impossible that the lands in question once lay in a wet ayacut, but the only certain fact is that they have been held as dry and paid a money rent as such for an indefinite time. If the landlords now wish to charge a wet rate it is open to them to bring a suit under section 30 (2) of the Madras Estates Land Act.

3. I find accordingly that for the *faslis* in question the plaintiffs are only entitled to money rent as collected in previous years. The exact amount of this must be ascertained by the Divisional Officer. These suits will accordingly be remanded for a fresh finding on the 11th issue in the light of the above remarks. The plea of the *ryots* that only a money rent was due should not have been accepted without a deposit of the amount admitted as required by section 195. They are now directed to file a statement showing the amount of rent which they admit to be due on the lands and to deposit that amount in the Court of the Sub-Divisional Officer within 20 days. Parties will bear their own costs in these appeals so far. The findings should be submitted within six weeks."

(1) 6 M. 311.

In pursuance of the above order, the Divisional Officer of Ramnad submitted the following findings:

"The only points taken with regard to the rate of rent were whether the correct charge was $3\frac{1}{4}$ *panams* per *kurukkam* or *sarasari*. The District Judge having ruled that *sarasari* is not leviable, the only remaining alternative is the rate of $3\frac{1}{4}$ *panams* per *kurukkam*. The finding on the 11th issue will accordingly be altered calculating rent at the rate of $3\frac{1}{4}$ *panams* per *kurukkam*. The claim for *Fasli* 1315 is time-barred and is disallowed accordingly."

These appeals coming on for final hearing before the District Judge, the Court delivered the following judgment:—

"Appeals from rent suits Appeal Suits Nos. 622 to 634 of 1910 are appeals by the land-holder. Appeal Suits Nos. 26 to 35 of 1911 are cross-appeals by the tenants. There are no cross-appeals corresponding toAppeal Suits Nos. 623, 631 and 633. Appeal Suits Nos. 631 and 633 of 1910 were withdrawn by the appellant's Vakil during the arguments.

2. The appeals came up before Mr. Evans who decided that money rent alone was payable and directed the lower Court to ascertain the exact amount of such rent. The lower Court has returned a finding to which the land-holder has put in an objection memo.

3. The 1st point argued before me was as to whether I should go behind my predecessor's finding and hear the appeal on the merits or whether I was entitled to proceed with the appeals from the point at which my predecessor left them. I held on the authority of *Wise* v. *Ishan Chunder Banerjee* (2) and *Sucrendro Pershad Dobey* v. *Nundun Misser* (3) that I was entitled to assume the correctness of my predecessor's order. The ruling reported as *Jammalamadaka Subba Lakshmamma* v. *Jammala Venkatarayadu* (4) lays down the same principle in respect of final remands.

(2) 14 W. R. 380.
(3) 21 W. R. 196 at p. 198.
(4) 32 M. 318; 5 M. L. T. 75.

In *Lachman Prasad* v. *Jamna Prasad* (5) the opinion disregarded was apparently passed without hearing arguments. There is nothing to show that the learned Judge who sent down some issues for findings in *Mubarak Husain* v. *Bihari* (6) himself passed any decision on any of the matters under appeal.

4. The lower Court has sent up a finding that $3\frac{1}{4}$ *panams* per *kurukkam* is the proper rate of rent. It is objected on behalf of the land holder that this is indefinite as it is his case that there are $3\frac{1}{8}$ *kurukkams* to the *chei* whereas the tenants put forward the contention that there are 4 *kurukkams* to the *chei*. On behalf of the tenants it is pointed out that their contention would give the land-holder more and not less rent per *chei* and that the tenants have no objection to the rate being expressed in *cheis* at 13 *panams* per *chei* to avoid ambiguity. The rent will be accordingly expressed and calculated in *cheis* at 4 *kurukkams* to the *chei*.

5. The evidence let in by the land-holder in the lower Court was to the effect that 13 *panams* per *chei* were paid for cotton and that all other crops used to pay *waram*. The evidence for the defendants was that 13 *panams* per *chei* were payable for all dry crops. The land-holder also wished to put in the evidence of two men, who he says are dead and of whom one stated in the Munsif's Court of Manamadura that a higher money rent was paid for chillies. I have refused to admit this evidence as there is before me no proof of the death of the deponents. I may further add that I would not consider the evidence of the one dead man who speaks to higher rate as of greater value than the defendants' evidence in the matter. The evidence of living witnesses could easily have been secured by the land-holder if what was stated was true. I, therefore, find 136 *panams* per *chei* to be the correct rate.

6. It is objected before me that it has not been decided what the proper rate for paddy is. The tenants' Vakil admits before me that the money rate found is not the correct rate for paddy. The defendants' 2nd witness and the plaintiff's own witnesses, however, stated that no paddy was raised on the suit lands.

In these circumstances it appears to be unnecessary to come to a finding as to the correct rate for paddy.

7. The land-holder also wishes to collect various minor dues such as *kanganam* in grain. These dues appear to be incidents of *waram* tenure and I do not think it necessary for me to decide whether they are payable. My predecessor has already come to a finding that the land-holder is entitled to money rent only and I cannot add odds and ends in grain to such rent.

8 The next point argued before me is as to whether the suit is barred as regards that rent for *Fasli* 1315. The question is whether rent was due at the harvest or at the end of the *fasli*. It is for the land-holder to prove that he is in time, and he has proved no custom or contract that rent should be paid at the end of the *fasli*. I, therefore, find that the rent for *Fasli* 1315 is barred.

9. Appeal Suits Nos. 631, 633 and 623 of 1910 are dismissed with costs. The decrees in the other suits will be amended in accordance with this judgment. The plaintiffs will bear the defendants' costs in both Courts and for both sets of appeals."

Messrs. *T. Rangachariar* and *K. V. Krishnaswami Iyer*, for the Appellant."

Mr. *B. Sitarama Rau*, for the Respondents.

JUDGMENT.—In these second appeals the District Judge is apparently of opinion that Issue II covers all the lands in dispute. The defendants in the various suits have not denied the correctness of the account annexed to the plaint except with reference to the *samudayam* lands. For the purpose of this appeal we must take it that the dispute between the parties is confined to the *samudayam karisal* lands on which dry crops were raised.

Mr. T. Rangachariar argues that as it has been found by the Sub-Collector that the *samudayam* lands were included in the wet ayacut and as the said finding has not been upset in appeal, it follows that when

(5) 10 A. 162; A. W. N. (1887) 295.
(6) 16 A. 306; A. W. N. (1894) 97.

the landlord repairs the tank and makes it possible for the tenants to cultivate *nanjah* crops, wet assessment is payable. The decision in *Lakshmanan Chetti* v. *Kolandaivelu Kudumban* (1) which he relies upon is no authority for this contention. In that case it was found that an original wet assessment was payable which was given up owing to the tanks not being repaired. The learned Judge held that the landlord was entitled to go back to the wet rate after the repair. There is nothing in the case before us to revert to. The entire evidence shows that for a long time a definite and uniform rate of money payment was made regarding chillies and cotton. Therefore, the principle in *Venkatagopal* v. *Rangappa* (8) applies, and the Court below was justified in presuming an implied contract. The decision in *Parthasarathi Appa Row* v. *Chevandra Venkata Narasayya* (9) has no bearing. In that case there was no uniform rate of payment.

We agree with the District Judge that the tenants are not bound to pay anything for *kanganam* or *kulavettu* in reference to *samudayam* lands. They are in the nature of voluntary payments. Mr. T. Rangachariar says that Second Appeal No. 2062 of 1912 has been settled and does not press it. It is dismissed with costs.

We dismiss the other second appeals with costs subject to the modifications that the parties will bear their own costs up to the order of remand. (*Vide* Mr. Evan's order in paragraph 3 of the order of remand.)

*Appeals dismissed.*

(8) 7 M. 365.

(9) 6 Ind. Cas. 988; 33 M. 177 (P. C.); 22 M. L. J. 596; 14 C. W. N. 938; 20 M. L. J. 596; 8 M. L. T. 141; 12 Bom. L. R. 648; 12 C. L. J. 238; (1910) M. W. N. 466; 37 I. A. 110.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2359 OF 1913.

February 10, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

THE HON'BLE *Maharaja* RANAJIT SINHA —DEFENDANT—APPELLANT

*versus*

SAJJAD AHMAD CHOWDHARY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Res judicata—*Land Acquisition Act (I of 1894), ss. 18, 31 (2)—Reference—Party to reference, not pressing his claim to compensation before Special Judge, if debarred from claiming it in civil suit.*

A person, who having been made a party to a reference under the Land Acquisition Act had the opportunity and duty of litigating his claim before the Special Land Acquisition Judge but did not then press his claim to any part of the compensation, is not entitled to come again to the Civil Court and re-open the question. [p. 924, col. 2.]

*Bhandi Singh* v. *Ramadhin Roy*, 10 C. W. N. 991; 2 C. L. J. 359, explained and followed.

Appeal against the decree of the District Judge, Berhampore, dated the 26th April 1913, confirming that of the Subordinate Judge, Berhampore, dated the 30th March 1912.

FACTS will appear from the following extracts from the judgment of the District Judge:—

"Plaintiffs-respondents claim to be *patnidars* of land that was acquired by the provisions of Act I of 1894. There was a reference on the subject of apportionment of the compensation money. Plaintiff No. 1 was named in the letter of reference, but at the hearing in this Court, his Pleader withdrew his claim on the ground that the plaintiff No. 1 had no *locus standi* in the proceedings. The result was that the compensation money was distributed between two *zemindars* in whose *zemindaris* the acquired land was found to fall. Plaintiffs in this suit sought to recover from one of these *zemindars* the sum of money that represented the compensation for the *patni* interest. The suit has been decreed and the defendant appeals."

The principal questions raised in the appeal were whether the withdrawal by plaintiff's Pleader of his claim in the reference amounted to a waiver, and whether recovery of the sum claimed by the plaintiff was barred by the

principle of *res judicata*. In deciding these questions the District Judge observed as follows :—"It would appear from the Collector's proceedings, Exhibit 5, that for the land with which we are here concerned, he awarded Rs. 3,170-11-9 jointly to Raja Jogendra Narain Roy as proprietor and to the present respondent as *patnidar*, and that this sum was placed in civil deposit. In respect to this sum, he made a reference under section 18 of the Act. In it he stated that the land in question was situate near the boundaries of Estates Touzi No. 1152 of Birbhum and Touzi No 2721 of Murshidabad, belonging respectively to Raja Ranajit Sinha (the present appellant) and Raja Jogendra Narain Roy of Lalgola. Each claimed it as lying in his estate.

* * * * *

"It seems to me that all that was referred was the question between the two rival proprietors. No one appears to have raised the question of the apportionment of the sum awarded between the proprietor and the *patnidar*, and this question was not the subject of the reference under section 18. The present respondent, therefore, who was not interested in the question referred was no party to the proceedings in this Court, and the action of his Vakil, who realised that his client had no *locus standi* in this Court, in withdrawing his claim did not, in my opinion, amount to a waiver. The proceedings under Act I of 1894 came to an end without the relative rights of the *patnidar* and proprietors ever having been raised or decided. That being so, the respondent is, in my opinion, entitled to the advantage of the third proviso of section 31 of the Act." The learned Judge then discussed the cases of *Raja Nilmoni Singh Deo Bahadur* v. *Ram Bandhu Rai* (1); *Chowakaran Makki* v. *Vayyaprath Kunhi Kutti Ali* (2) and *Bhandi Singh* v. *Ramadhin Roy* (3), and confirmed the decree of the lower Court with a slight modification in favour of one of the plaintiffs.

Babu *Satish Chandra Ghosh* (with him Babus *Basanta Kumar Bose* and *Priya Sankar Mozumdar*), for the Appellant, contended that as the plaintiff did not press his claim in the reference, his claim was barred by *res judicata* and the doctrine of waiver. He referred to *Bhandi Singh* v. *Ramadhin Roy* (3).

Babu *Dwarkanath Chakravarty* (with him Babu *Upendra Narayan Bagchi*), for the Respondents.—The case reported as *Bhandi Singh* v. *Ramadhin Roy* (3) is not at all applicable. There the party making the reference did not appear at the time when the reference was taken up for hearing and it was held that a civil suit by such a party was not maintainable.

Moreover, in this case the reference was obtained by the respondent Maharaja and it was a reference under section 18 of the Land Acquisition Act and the question referred did not relate to the apportionment of the amount of compensation money awarded by the Collector as between the appellant and the respondent, nor was there any objection with regard to the amount of compensation awarded. The plaintiff-respondent was a *patnidar* under both the present respondent and the Raja of Lalgola in respect of two different *touzis*. The Land Acquisition Collector decided that the whole of the land acquired fell within the *zemindari* of the Raja of Lalgola. Against this the present appellant obtained the reference. The present respondent did not appear before the Land Acquisition Deputy Collector and was not a proper party to the reference. From the order of reference it will be found that the only objection was that the land is included in the *zemindari* of Raja Ranajit Sinha Bahadur and that the award should have been made in his favour. The respondent was not at all concerned as to whose *zemindari* the land be found to belong, as he could claim the amount he is legally entitled to from the *zemindar*.

The respondent can maintain this suit under section 31, clause 2.

JUDGMENT.—This appeal arises out of a claim made by the plaintiffs as *patnidars* of land under the provisions of Act I of 1894 to the compensation money which has been taken away by the appellant, Maharaja Ranajit Sinha. Both the lower Courts decreed the claim and in appeal it is urged that the doctrine of *res judicata* applies, that the respondent Sajjad Ahmed Chowdhry

(1) 7 C. 388; 10 C. L. R. 393; 8 I. A. 90; 4 Shome L. R. 263; 4 Sar. P. C. J. 234; 5 Ind. Jur. 388.
(2) 29 M. 173.
(3) 10 C. W. N. 991; 2 C. L. J. 359.

*patnidar* was a party to the reference in the Land Acquisition Court and that he did not press his claim to any part of the compensation.

It appears to us that at law this contention must prevail. The observations of Mr. Justice Mookerjee in the case of *Bhandi Singh* v. *Ramadhin Roy* (3) apply to this case and do not confine the decision, as was sought to be argued by the learned Vakil for the respondent, to the case of a person who himself obtains the reference from Collector. It is true that in that particular case the parties who were held to be barred had themselves obtained the reference, but the law as laid down by the Court covered the case of every person who was made a party to the reference and who had the opportunity and the duty of litigating his claim before the Special Court. As pointed out by Mr. Justice Mookerjee, a person who disputes the claim of the plaintiff to compensation occupies the position of a defendant and the jurisdiction of the Special Court ought to be regarded as exclusive.

The facts of this particular case are that an award was made in favour of Raja Jogendra Narain Rai Bahadur of Lalgola and Sajjad Ahmad Chowdhry *patnidar*, the Collector holding that the land acquired lay exclusively in the estate of the Raja of Lalgola and Sajjad Ahmad was the *patnidar* of the whole of the land. Maharaja Ranajit Sinha put in an objection that the land was included in his *zemindari* and that the award should have been made in his favour; in other words, as the Collector says, it was an apportionment dispute arising from a boundary dispute between two Rajas. The reference was then made and it was stated that the persons interested in addition to the objector who had obtained the reference were Raja Jogendra Narain Bahadur and Sajjad Ahmad Chowdhry. As a matter of fact, as the plaintiff now claims in his plaint, the *patnidar* was entitled to the whole of the compensation money, Rs. 1,431-15-8, inasmuch as it is not contended that any reduction has been made in his rent. The parties then went before the Special Land Acquisition Judge who was the District Judge of Murshidabad and the Judge said that the only question before him was how the amount awarded should be apportioned between the three parties, the first party claiming as proprietor of the Estate Touzi No. 1152, the second party claiming as proprietor of the Estate Touzi No. 2721 and the third party, that is, present respondent not pressing his claim. Now the third party was properly represented by a learned Pleader and he stated that he did not press the case. What was the case? The case was that the two *zemindars* were entitled each to a portion of the compensation money; and it was decided that the first party was entitled to Rs. 846-5-3 and the second party to Rs. 780-13-1. That made up the whole of the Rs. 1,431-15-8 with the additional compensation of 15 per cent. under section 23. The Judge went further and said that the *zemindars* were entitled in addition to this to the capitalized value of the Government revenue in the case, which of course is exclusively their own right. It was, therefore, clear to the respondent that he was bound to ask for his share of the compensation money which consisted of a lump sum specifically awarded to the two *zemindars* in his presence. How he can say that he is entitled to come again to the Civil Court and re-open the question we are at a loss to see. At the same time there is no doubt that the Maharaja and the Raja are morally bound to pay him compensation money as far as his *patni* covers the land, subject to his getting registered upon which a fee of 2 per cent. is leviable and on his furnishing security for half the amount of the rent. But even if he did this a large portion of the compensation must still be due to him, and he alleges that Raja Jogendra Narain Rai Bahadur has already given him what he is entitled to. In all honesty and fairness the other party, the present appellant, ought to have done the same.

In decreeing the appeal and in dismissing the plaintiff's suit we do so without costs in any Court to the appellant on account of the failure of the appellant to honestly fulfil his clear duty to the plaintiffs.

*Appeal decreed.*

KANJI JETHSI *v.* ADVOCATE-GENEAL.

BOMBAY HIGH COURT.
ORIGINAL CIVIL SUIT NO. 95 OF 1913.
September 7, 1915.
*Present*:—Mr. Justice Beaman.

KANJI JETHSI AND ANOTHER—PLAINTIFFS
*versus*
THE ADVOCATE-GENERAL AND OTHERS—DEFENDANTS.

Cy pres *doctrine*, *Court's power to apply*, extra territorium—*Remedy*.

Where objects of a charity lie without the jurisdiction of a Court, the most the Court can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are. [p. 926, col. 1.]

A Court has no jurisdiction to apply the *cy pres* doctrine *extra territorium*. [p. 926, col. 2.]

Where a Court has by its decree so applied the doctrine, a Court of concurrent jurisdiction is competent to vary the decree as passed and to direct application of the funds to the intended objects within the limits of the country where those objects are, and should there be no scope for those uses, to leave to the Courts of the same country on the *cy pres* doctrine to divert the funds to other like charitable uses. [p. 926, col. 2.]

Messrs. *Desai* and *Kanga*, for the Plaintiffs.

Mr. *Bahadurji*, for Defendant No. 1.

Messrs. *Wadia* and *Davar*, for Defendants Nos. 2 and 3.

Mr. *Taraporevalla*, for Defendants Nos. 4 and 5.

Messrs. *Taleyarkhan* and *Jinnah*, for Defendant No. 7.

JUDGMENT.—No issues are raised in this suit because none of the parties are disposed to take up a contentious attitude. The position with which I am confronted is certainly very unusual. In form the present suit may be defective. I think that the relief that is asked for is too large. I do not think that I am in a position, or have jurisdiction, to set aside the decree of a Court of concurrent authority. Nevertheless, the plaintiffs are suffering what appears to be a substantial injustice, and there must be some remedy.

It appears that a *Jain* of some wealth died, bequeathing considerable sums of money to two charities. The first of these was merely described as Jiva Daya, that is, in the ordinary sense, the feeding of animals or insects. The other half was the bestowal of clothes and food upon *sadhus* and *sadhavis*, *shravaks* and *shravikas* within the territorial limits of the State of Palitana, and, doubtless according to the intention of the trustor, while performing the sacred pilgrimage to the temples on Satrinja. In 1910, an originating summons was taken out before Mr. Justice Robertson. The trustees were the plaintiffs. The Advocate-General was made a defendant and so were four members of the *Jain* community, one residing in Bombay, one in Poona, one in Cutch and one in the State of Palitana. It is quite clear that this originating summons was not a suit under section 92 of the Civil Procedure Code. It is also quite clear that the four *Jain* defendants were not representing the intended beneficiaries under Order 1, rule 8. But it is not at all clear what this rather heterogeneous array of parties really meant or what it conveyed to the learned Chamber Judge. The Advocate-General merely submitted to the decision of the Court and appears to have taken no interest whatever in the subject-matter of the summons. Affidavits were put in by the *Jain* defendants supporting the suggestion of the trustees that the designated objects of the testator's bounty were already amply supplied, and that as regards the first half of the charitable bequests, the meaning of the words 'Jiva Daya' might and ought to be extended so as to include benefits to the soul, of which not the least was primary education. Accordingly, the learned Chamber Judge made an order directing the trustees to apply all the funds at their disposal *cy pres* to a certain local educational institution situated in Bombay.

The present plaintiffs have come in under Order I, rule 8, as representing the intended beneficiaries in the territorial limits of the State of Palitana. We have now the Advocate-General, the trustees of the charity and the trustees of the local School amongst the defendants and there is a 7th defendant, who has taken up a position of his own and claims that the interpretation put upon the words 'Jiva Daya' in the proceedings before Mr. Justice Robertson was entirely wrong and that that learned Judge's order has, through the incorrect

information supplied by these affidavits, wholly misapplied that part of the charity. The difficulty which I have felt throughout lies in the fact that there is a decree, in form, seemingly a decree *in rem*, of a Court of co-ordinate authority and concurrent jurisdiction, directing the trustees to apply the entire funds of this charity to a particular local object. With respect, I am clearly of opinion that had the matter been properly represented by the Advocate-General to the learned Judge sitting in Chambers, he would have seen at once that touching, at any rate, so much of the charity as was in the plainest and most unmistakable language intended to be given within the limits of foreign territory it was not competent for him, applying the *cy pres* doctrine, to divert the charitable funds from their destined object to a totally different object within the jurisdiction of his own Court. The principle has long been established and is perfectly well settled in the English Courts that where the charitable objects lie without the jurisdiction of the Courts, the most the Courts can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are. If that principle had been represented to Mr. Justice Robertson he could hardly have taken upon himself, as a Judge on the Original Side of this Court, the territorial jurisdiction of which is restricted to the town and island of Bombay, to determine, first, upon the question whether certain charitable objects in the State of Palitana were or were not already sufficiently supplied, and assuming that they were, then, on the *cy pres* doctrine to divert the funds to other like charitable uses. That is clearly a matter for the Courts of the State of Palitana and one lying wholly without the jurisdiction of the Original Side of this Court. The case in its present development is very much the same as that in which this Court may have construed a Will in such a way as to direct the executors to distribute all the funds to named persons and thereafter a suit be brought by a legatee who was not a party to those proceedings proving that he himself was entitled to the money in the hands of the executors. In such a case notwithstanding the decree of the first Court, a Court of concurrent jurisdiction might, and indeed in my opinion ought to, make a decree in the second suit which would necessarily operate to modify, if not wholly annul, the decree first made. So here the result of Mr. Justice Robertson's decree has been to deprive the intended beneficiaries residing within the limits of the Palitana State of the bounty intended to be conferred upon them by the founder of this charity. They were no parties to the proceedings in which that decree was made. It is contended that the Advocate-General was a party and that the Advocate-General represents all charities. That is true, and that is a point which has occasioned me the most difficulty. But for the purposes of such a matter as was under the consideration of Mr. Justice Robertson it may be thought that the functions of the Advocate-General were restricted to safeguarding the funds within this Court's jurisdiction. Certainly the Advocate-General seems to have made no attempt to protect the interests of the intended objects of the testator's bounty. Nor did the Advocate-General point out, as he well might have done, at the time that the learned Judge had no jurisdiction to apply the *cy pres* doctrine *extra territorium*.

In these circumstances and keeping in view the considerations I have briefly outlined, I think that I shall be within my competence in so far varying the decree made on the Chamber summons as to direct that the trustees shall expend half the charitable funds in their hands upon the purposes for which they were intended, that is, the feeding and clothing of *sadhus* and *sadhavis* and *shravaks* and *shravikas* in the Palitana State; and should there be no scope for these uses, then it will be for the trustees to apply to the Courts of the Palitana State for directions as to the manner in which the funds in their hands may best be applied *cy pres*.

As to the other half of the charity, it is not contended that it has been limited definitely to any locality, and, therefore, I

cannot say that the order of Mr. Justice Robertson in dealing with so much of it was without jurisdiction, or that I have any authority, whatever my own opinion may be as to the correctness of his application of the *cy pres* doctrine to the matter before him, to interfere in any way in this suit with so much of the decree he passed upon the Chamber summons.

Decree will now be drawn in the suit directing the trustees to apply half the charitable funds in their hands to the purposes I have mentioned, that is to say, feeding and clothing of the *sadhus*, etc., in the Palitana State, or should it appear that the money cannot be usefully so expended, then to apply to the Courts of the Palitana State for directions how best to apply it *cy pres*.

The costs of all parties to this suit may come out of the charitable funds, those of the Advocate-General and defendants Nos. 2 and 3 as between attorney and client and of the plaintiffs and defendants Nos. 4, 5 and 7 being party and party costs.

*Order accordingly.*

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 64 OF 1914.

January 11, 1916.

*Present*:—Mr. Justice Srinivasa Aiyangar.

A. K. T. K. M. NARAYANAN NAMBUDRIPAD—PETITIONER

*versus*

TAWKER J. MEGAJI SEIT AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 63, O. XXI, r. 90—Sale in execution—Property also under attachment in execution of superior Court's decree - Purchaser not in fault—Sale, whether can be impeached—Irregularities, how corrected.*

A sale held in contravention of the first clause of section 63, Civil Procedure Code, is not null and void but merely irregular. [p. 928, col. 1.]

The mere fact that the Court ordering the sale had notice of an attachment by a superior Court does not oust the jurisdiction of the former Court and the sale cannot be treated as a nullity. [p. 928, col. 2.]

The title of a purchaser at a judicial sale not himself in fault cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by way of collateral attack on the purchaser's title. [p. 928, col. 2.]

There cannot be a collateral impeachment of a judicial sale and a direct impeachment is possible only to the parties to the proceedings or persons interested therein in the manner prescribed by the Code. Persons not parties to such proceedings cannot impeach a judicial sale on the ground that it was held in contravention of section 63 of the Code of Civil Procedure. [p. 930, col. 1.]

*Abdul Karim* v. *Thakordas Tribhovandas*, 22 B. 88 at p. 92; *Ashutosh Sikdar* v. *Bihari Lal Kritania*, 35 C. 61 at p. 77; 11 C. W. N. 1011; 6 C. L. J. 320 (F. B.), referred to.

*In the matter of the petition of Badri Prasad* v. *Saran Lal*, 4 A. 359; A. W. N. (1882) 69, not followed.

*Patil Naranji Morarji* v. *Haridas Navalram*, 18 B. 458; *Kunhayan* v. *Ithu Kutti*, 22 M. 295; 9 M. L. J. 1, followed.

A sale of certain immoveable properties was held under the orders of the Munsif's Court of Calicut in execution of a decree of that Court, while the properties were also under attachment in execution of a decree of the Subordinate Judge's Court at Calicut. The decree-holder of the latter Court applied to the Munsif to set aside the sale under Order XXI, rule 90:

*Held*, that he was not entitled to have the sale set aside merely on the ground that it was in contravention of section 63, Civil Procedure Code. [p. 930, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of South Malabar, in Civil Miscellaneous Appeal No. 17 of 1913, preferred against the order of the Court of the District Munsif of Manjeri, in Civil Miscellaneous Petition No. 2293 of 1912. (Original Suit No. 96 of 1900, on the file of the Court of the Principal District Munsif of Calicut.)

Mr. *T. R. Ramachandra Aiyar*, for the Petitioner.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—This case raises a question of some difficulty on the construction of section 63 of the Civil Procedure Code.

There was a sale of certain immoveable properties under the orders of the Principal Munsif's Court of Calicut in execution of a decree of that Court, in which the properties were purchased by one V. Ahmad. The sale was in September 1912. When the order for sale was made and when the sale took place the properties were also under attachment in execution of a decree of the Subordinate Judge's Court, Calicut. It appears that attachments in execution of decrees in both the Courts were made in March 1912. Prior to the sale, in a petition put in by the judgment-debtor

opposing an application for permission to bid by the decree-holder, the fact of the attachment by the superior Court and an order by the superior Court directing the sale of the same properties were set out and were thus brought to the notice of the District Munsif's Court which directed the sale. But the sale was, as a matter of fact, held in spite of the objections of the judgment-debtor in contravention of the first clause of section 63 of the Code. The decree-holder in the Sub-Court suit applied to the District Munsif to set aside the sale under Order XXI, rule 90, and it was stated in the petition that the properties fetched a low price in consequence of the irregularity in the sale. The first Court dismissed the application on the ground that the second clause of section 63 rendered the sale valid and that the Court, therefore, cannot set it aside. It further held that no substantial loss by reason of any irregularity was proved in this case. There was an appeal to the District Court which was dismissed; and this application is to revise that appellate order.

If the petitioner was entitled to apply under Order XXI, rule 90, as in fact he did, then the concurrent finding of both the Courts that no loss had been proved by the petitioner by reason of the irregularity complained of would be conclusive against him, and this petition would be incompetent. But it is difficult to say that the complaint in this case was an irregularity in the conduct of the sale; it is not clear that the irregularity was in the order for sale which was antecedent to the publication or the conduct of the sale; nor is it clear that the petitioner was a person who was entitled to apply under that rule. But as the main question as to the validity of the sale in the circumstances above mentioned has been argued on both sides I prefer to deal with it, more especially as the present petition, though directed against the appellate order, can, if necessary, be amended and treated as an application to revise the original order of the District Munsif.

It is quite clear that a sale held in contravention of the first clause of section 63 is not a nullity. Even prior to the enactment of clause 2 of section 63, under section 285 of the old Code, it was held by this Court and by the Calcutta and Bombay High Courts that such a sale was not a nullity but was only irregular. The enactment of clause 2 places the matter now beyond all argument. The result, therefore, is that the title of a purchaser in such a sale cannot be impeached collaterally, but that the proceedings irregularly taken can only be set aside either by appeal or by other proceedings prescribed for that purpose. Mr. Ramachandra Aiyar contends that if the Court which ordered the sale had notice of an attachment by a superior Court, as was the case here, the sale is void or at least one which must be set aside by the Court which held it, on an application made to it by a party interested in getting rid of the sale. Mere notice to the Court which ordered the sale cannot oust the jurisdiction, and the sale in this case cannot, therefore, be treated as a nullity. [See *Abdul Karim* v. *Thakordas Tribhovandas* (1), per Farran, C. J.] Treating, therefore, the sale in this case as being merely irregular, in so far as the purchaser is concerned his title cannot be affected unless he was in fault. As stated in Freeman on Void Judicial Sales, page 87, the general principle is "that the title of a purchaser not himself in fault cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected they cannot be made available by way of collateral attack on the purchaser's title." Whether mere notice of irregularity to the purchaser makes him a purchaser in fault, is a question which it is unnecessary to decide, as the purchaser in this case has not had such notice. It would have been competent for one of the parties to the suit in the Munsif's Court to have applied to that Court to vacate the order for sale, on the ground that at the time when the order for sale was passed the property directed to be sold was under attachment by order of a superior Court or that after the order for sale, an attachment had been made under such an order; and if the inferior Court does not set it aside the same may

(1) 22 B. 88 at p. 92.

be ordered in appeal or in revision, as the case may be. It may be that the decree-holder in the superior Court who may be affected by the sale, if held, may also apply to set aside the order for sale though it may be difficult to bring his application within any specific provisions of the Code, as I think that section 47 may not cover a case of that sort. However, that is not the case here as no application was made to set aside the order for sale. After the sale has taken place it can be set aside on an application under Order XXI, rules 72, 89, 90 or 91 by persons competent to make an application under one or other of these rules and on the conditions set forth in them. The question on which I have felt a difficulty is, whether those provisions are exhaustive or whether the Court had power to set aside a sale held in contravention of the prescribed rules, on a motion made in the proceedings in which the sale was held. Suppose a purchase is made in contravention of rule 73. Has not the Court power to set aside the sale? I think the Court can and must set it aside. It may be said that the prohibition contained in that rule is one based on public policy (*cf.* the similar provision in section 136, Transfer of Property Act) and a purchase made in contravention of that rule is illegal and void. .....The better opinion, however, seems to be that such a sale is not a nullity, at any rate after confirmation. (Freeman, page 113.) Has not the Court then the same power, where the sale is in contravention of another rule? There is, of course, this difference between the two cases that in the one case the purchaser must be in fault, while in the other, he is not, or at any rate he need not be. All the same if proceedings are taken in contravention of the prescribed rules of procedure, there must be a power in the Court to set aside the irregular proceedings if the appropriate action is taken by the person or persons affected by those proceedings, unless they have waived their right. See *Ashutosh Sikdar* v. *Bihari Lal Kritania* (2), *et seq* per Mookerjee, J. The judgment-debtor then in the Munsif's Court decree can, I think, apply under section 47 to set aside the sale, and would be entitled so to have it set aside merely on proving the irregularity without proving any loss. It is clear that the decree-holder in the Subordinate Court may be prejudiced, if, for example, he cannot get any portion of the sale-proceeds under section 73. Unless the superior Court can get hold of the sale-proceeds (it is suggested in one of the cases that it can be transferred under the order of the District Judge), the decree-holder in the superior Court cannot share in the distribution, while by the sale being set aside, and a fresh sale held by the superior Court, the decree-holder in the inferior Court cannot suffer. The purchaser might, no doubt, lose his bargain, but he has no right to it at least till confirmation. I should, therefore, be inclined to hold that the petitioner was entitled to apply to set aside the sale; and as I do not find any specific provision in the Code enabling him so to apply, he was entitled to invoke the inherent powers of the Court.

There are, however, two cases decided under section 285 of the old Code which are directly in point. One is *In the matter of the petition of Badri Prasad* v. *Saran Lal* (3) and the other *Patel Naranji Morarji* v. *Haridas Navalram* (4). In both the above cases an application was made by the decree-holder in the superior Court to set aside a sale held under the order of the inferior Court; it does not, however, appear whether the applications were made under any specific provision of the Code or under the inherent powers of the Court. There is a reference to section 311 of the old Code in the case of *In the matter of the petition of Badri Prasad* v. *Saran Lal* (3), but the learned Judges point out that that section does not apply. The Allahabad High Court held that the sale was a nullity and set it aside. The Bombay High Court arrived at precisely the opposite conclusion. The view of the Allahabad High Court has not been followed in this Court, which has followed the Bombay and Calcutta High Courts in this matter. It is no doubt true that in the later case of *Abdul Karim* v. *Thakardas*

(2) 35 C. 61 at p. 77; 11 C. W. N. 1011; 6 C. L. J. 320.

(3) 4 A. 359; A. W. N. (1882) 69.
(4) 18 B. 458.

BAGESHRA *v.* SHEO NATH.

*Tribhovandas* (1) where there was a contest between two rival purchasers the Bombay High Court upheld the title of the later purchaser in the sale by the superior Court, on the ground that the earlier purchaser under the sale by the inferior Court had notice of the attachment by the superior Court. It appears to me that that was a case of collateral impeachment. But, however that may be, the decision in *Patel Naranji Morarji* v. *Haridas Navalram* (4) was cited with approval in that case and the principle of that decision has been followed in this Court in *Kunhayan* v. *Ithu Kutti* (5). It was pointed out in this case that the question of notice can arise only between the parties to the proceedings and that third parties are not entitled to impeach the proceedings as being in contravention of section 285. This decision, if I understand it right, decides, *first*, that there cannot be a collateral impeachment of such a sale and *second*, that a direct impeachment is possible only to the parties to the proceedings or persons interested therein, in the manner prescribed by the Code. Clause 22 of the new section was evidently intended as an enactment of this principle. I have, therefore, come to the conclusion, though not without hesitation, that the petitioner is not entitled to apply to set aside the sale merely on the ground that that sale was in contravention of section 63 of the Code. The petition must be dismissed with costs.

*Petition dismissed.*

(5) 22 M. 295; 9 M. L. J. 1.

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1492 OF 1914.

January 4, 1916.

*Present*:—Mr. Justice Walsh.

*Musammat* BAGESHRA AND ANOTHER—DEFENDANTS—APPELLANTS

*versus*

SHEO NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Arts.* 144, 91—*Suit for possession and cancellation of document*—*Limitation.*

The plaintiff sued for possession of a property basing his title under a grant executed in his favour. In the plaint he also prayed for the cancellation of a document executed by his grantor in favour of the defendant subsequent to his own:

*Held*, that the suit was not one for cancellation and was governed by Article 144 and not by Article 91 of the Limitation Act. [p. 931, col. 1.]

Second appeal from the decision of the District Judge of Benares, dated the 28th April 1914.

Mr. *Harendra Krishna Mukerji*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—This is a suit for possession by the plaintiffs, as to whom it is found that they are the owners of the property in question and that they have succeeded in showing their title. The defendants at the commencement of the plaintiffs' suit were in possession of the property. They claimed title under a document granted long subsequently to the document under which the plaintiffs claim their title, *viz.*, some time in December 1902.

The first Court dismissed the plaintiffs' suit on the ground that the plaintiffs or their predecessors-in-title had been out of possession for more than 12 years. The lower Appellate Court, *i.e.*, the District Judge, overruled this finding and held that the suit was one for possession, that the time for bringing the suit dated from 1902 and that the period applicable was 12 years under Article 144 of the Indian Limitation Act. I am not sure that any point of law really arises. After hearing the judgments of the Courts below, it seems to me that substantially the questions raised were entirely questions of fact from which there is no second appeal. However an ingenious argument has been advanced before me by the appellants' Counsel, suggesting that in this case the plaintiffs' suit is barred, it being in substance a suit for cancellation of the document granted to the defendants and that, therefore, it ought to have been brought within the three years provided by Article 91 of the Indian Limitation Act. His argument is to some extent based upon section 39 of the Specific Relief Act and it does appear though I have not been able to form a decided opinion about the matter that a person, in the position of the plaintiffs here, who leaves another person, who is in possession under a void lease, in possession as ostensible owner, might have a right to take proceedings under that section for cancellation. It is perfectly clear, however, that he is not compelled to do so. He may,

as was said by their Lordships of the Privy Council in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) cited before me, treat the document as a nullity without the intervention of any Court. It is perfectly true that his suit for possession involves the document, under which the defendant claims to enjoy the property, being treated as null and void, and to that extent being cancelled, but the suit is not one for cancellation in the ordinary sense of the term. I do not think it necessary to go through the authorities; the dividing line is perfectly clear. Where a person who claims title finds something done either by himself or by some one through whom he claims standing, so to speak, upon his title and preventing him from the full enjoyment thereof, he has got to get rid of it before he can fully enjoy the property; in other words, his title is defective and he must take proceedings, if he can, to remove the defect from his title. That is not the position of one who comes with a title altogether unstained, complete in itself, but finds somebody in possession claiming under a void or voidable document. In this case it happens to be a document subsequently granted by the same grantor as the grantor of the plaintiffs. It may be possible, but it is certainly not necessary, for such a person to take proceedings to set aside or cancel such a document under which a person wrongfully claims to be in possession. It is sufficient for him to show title. The moment he does that, he is entitled to possession; he need take no steps with regard to the voidable document held by the defendant or the trespasser, until that person relies upon it and sets it up in the suit, then he makes his answer to it and alleges that it is void. That is all that has happened in the present case. The plaintiffs sued for possession; they incidentally asked for cancellation; they have succeeded in proving their title and they are entitled to possession. Article 144 applies to that claim and it is admitted that under that Article their claim is not barred. It is quite immaterial that they also asked for cancellation of the document and it is also immaterial that they have succeeded in getting it cancelled.

(1) 34 C. 329; 9 Bom. L. R. 602; 4 A. L. J. 329; 5 C. L. J. 334; 11 C. W. N. 424; 17 M. L. J. 154; 34 I. A. 87 (P. C.); 2 M. L. T. 133.

In my opinion the decree of the District Judge is right and must be affirmed and this appeal must be dismissed with costs.

*Appeal dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 480 OF 1914.

January 26, 1916.

*Present*:—Justice Sir Herbert Holmwood, KT., and Mr. Justice Imam.

KARTIC CHANDRA MONDAL AND OTHERS —DECREE-HOLDERS—APPELLANTS

*versus*

NILMANI MONDAL AND ANOTHER— JUDGMENT-DEBTORS—RESPONDENTS.

*Execution of decree—Pendency of appeal, if gives right to defer execution—Application for execution, prevention of—Fraud—Suspension of execution.*

The mere pendency of an appeal from a decision which has removed all obstacles from a decree-holder's way to execute his decree, cannot give him a right to defer execution for an indefinite period. [p. 932, col. 2.]

Where there is no intervention of fraud or force which prevented the consideration of a previous application for execution, there is no suspension of execution. [p. 933, col. 1.]

Appeal against the order of the District Judge, 24-Parganas, dated the 21st July 1914, reversing that of the Munsif, 1st Court, Baruipur, dated the 25th of April 1914.

Babu *Atul Krishna Roy*, for the Appellants.

Babu *Sudhangsu Sekhar Mookerjee*, for the Respondents.

JUDGMENT.—The facts upon which this appeal arises have only to be stated to show that the principles which have been held by the Courts in India to relieve decree-holders of their duty to bring the application for execution within three years of the last application do not apply to this case. After numerous applications for execution of a decree which was passed in December 1901, the 4th application was made on the 21st July 1908 in Execution Case No. 1443 of that year. On the 16th September 1908 the present respondent, the judgment debtor, applied before the Court stating that the decree had been satisfied

by payment which should be certified. On this a miscellaneous case was started. It appears that on the same day substitutions were made of an heir of one decree-holder and of one judgment-debtor and notices were issued under section 248, Code of Civil Procedure, fixing the 4th of November for hearing of the execution case. The miscellaneous case came up again on the 31st October and it was ordered that the execution case should come up too on that date. But in the meanwhile on the 4th November the decree-holder took no step after service of notices under section 248, and the execution proceeding was, therefore, struck off on the 5th November. Meanwhile the miscellaneous case as to certifying the payment was continued and the Munsif allowed the judgment-debtor's application on the 17th July 1909. So far, therefore, the principles laid down in the cases which we had to consider would apply for the benefit of the decree-holder. But on appeal the finding of the Munsif was reversed by the learned District Judge on the 6th August 1909 and it was declared that the decree-holder had not been paid anything and that it was open to him to execute the whole decree. He took no step to renew the application for execution. Sometime afterwards the judgment-debtor appealed to the High Court. This appeal was rejected on the 11th January 1912. The present application for execution was not made till the 12th September 1913, that is, nearly two years after the High Court's decision.

It is contended that the decree-holder is entitled to the whole period during which he was *bona fide* litigating or resisting the judgment-debtor's application to have the satisfaction certified. Reference is first made to section 14 of the Limitation Act. It is, however, frankly conceded that that section can have no application, inasmuch as there was no proceeding in another Court which proved fruitless for want of jurisdiction or some similar cause. We are then referred to what is said to be a general principle that a decree-holder is not bound to proceed with execution during the pendency of an appeal and that the limitation under Article 182 should apply and the present proceedings should be considered to be in continuation of the previous application. As regards the first branch of this contention, the authorities which have been laid before us do not seem to go further than to deal with the particular facts of the cases then before them and to hold that when a decree-holder is obstructed by violence or fraud and litigation is necessary to get rid of such obstruction the execution is suspended during such litigation. It is nowhere laid down that mere pendency of an appeal from a decision which has removed all obstacles from the decree-holder's way can give him a right to defer execution for an indefinite period; and were we to hold so the parties could spend three years in the High Court and six years in the Privy Council and the decree-holder would be able to revive his execution after a lapse of more than 12 years. The case which goes nearest to the general proposition put before us is a decision in *Sheikh Mahomed* v. *William Alfred Thomas* (1), which is not reported. But the general proposition therein laid down is limited by the consideration of the facts of that case and the learned Judges who decided that case added a rider to the general proposition that a decree-holder can have his rights suspended, more especially when the amount for which execution has been taken is contingent on the decision in appeal. Here there was no contingency at all. The District Judge had given the decree-holder a right to execute the decree in full and at that time there was no knowing whether the judgment-debtor would appeal or would not appeal. The mere fact of appealing could not possibly take away the decree-holder's right. Nor could it relieve him of the ordinary duty of a decree-holder. There was absolutely no reason in our opinion why he should sleep on his right pending the appeal to the High Court, which in the end made no change whatever in the District Judge's order. The responsibility for getting the execution stayed for that period was with the judgment-debtor and had the decree-holder taken out execution it would have been open to the judgment-debtor to apply to this Court for a stay. This Court might have refused to stay. But for the decree-holder to say that

(1) 11 Ind. Cas. 972.

he was in no way bound to take out execution of the decree after the order of the District Judge appears to us to be wholly untenable. The observation of Mr. Justice Banerjee and Mr. Justice Geidt in the case of *Ashrafuddin Ahmed* v. *Bepin Behari Mullick* (2) and the principle laid down by Mr. Justice Mookerjee in the case of *Madhab Moni Dasi* v. *Pamela Lambert* (3) make it quite clear that where there is no intervention of fraud or force which prevented the consideration of the previous application, there is no suspension of execution.

Now with regard to the contention that the present application may be regarded as the continuation of the previous application, we need only point out that the previous application was finally disposed of on the 5th November 1908. So that that branch of the contention has no substance in it.

The result is that this appeal is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

*Appeal dismissed.*

(2) 30 C. 407 at p. 413.
(3) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.

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## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 198 OF 1915.

November 16, 1915.

*Present*:—Mr. Justice Batchelor and Mr. Justice Shah.

MAHOMED BEG AMIN BEG—LEGAL REPRESENTATIVE OF PLAINTIFF NO. 2—APPELLANT

*versus*

NARAYAN MEGHAJI PATIL AND OTHERS—DEFENDANTS—RESPONDENTS.

*Muhammadan Law—Pre-emption—Khandesh District—Equity, justice and good conscience.*

There is no custom of pre-emption recognized in the District of Khandesh, nor can the right of pre-emption according to Muhammadan Law be enforced there solely as a matter of justice, equity and good conscience. [p. 934, col. 2; p. 936, col. 1.]

Second appeal from the decision of the Assistant Judge, Khandesh, in Appeal No. 162 of 1911, confirming the decree passed by the Subordinate Judge, Nandurbar, in Civil Suit No. 730 of 1910.

Mr. *D. C. Virkar*, for the Appellant.

Mr. *P. B. Shingne*, for Respondent No. 1.

JUDGMENT.

BATCHELOR, J.—The plaintiffs, who are the appellants before us, are two Muhammadan women, and they brought this suit to enforce their right of pre-emption in respect of two agricultural survey numbers which were sold by the 2nd defendant, a Muhammadan woman, to the 1st defendant, a Hindu. The plaintiffs own the fields adjoining the land sold.

The suit is from a village in the Nandurbar *Taluka* of the Khandesh District. Both Courts have held that the Muhammadan right of pre-emption does not exist in the Khandesh District and have accordingly dismissed the suit.

It is to be observed that no attempt was made in the Trial Court to prove the right of pre-emption as a special custom or usage; but the plaintiffs relied exclusively on the doctrine of Muhammadan Law. It is now contended on behalf of the plaintiffs in this appeal that the Muhammadan rule of pre-emption exists in the District of Khandesh and should be enforced here, notwithstanding that the purchaser was a Hindu. This contention is based on clause 26 of Regulation IV of 1827 and the reference there occurring to "the law of the defendant." Seeing that the principal defendant here, the purchaser of the property, is a Hindu, the appeal, it seems to me, would be exposed to many difficulties, even if the Court conceded the appellants' primary argument that the Muhammadan rule of pre-emption was operative in Khandesh. But, in my opinion, that argument cannot be conceded.

Clause 26 of the Regulation of 1827 is as follows:—

"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of special law and usage, justice, equity and good conscience alone."

It is admitted in argument that the phrase "Regulations of Government" must to-day include the Acts of the Indian Legislature governing the sale of immoveable

property, that is to say, the Indian Contract Act and the Transfer of Property Act. That being so, there does not here exist that absence of Regulations which alone permits the Court to have recourse to "the law of the defendant," and the appeal must be decided by reference to the Acts, not by reference to the defendant's personal law. It is urged that the Transfer of Property Act and the Indian Contract Act are merely silent upon the question whether the rule of pre-emption survives. But the answer, in my opinion, is that that rule cannot be recognized unless the provisions and principles of these Acts are disregarded. For the rule is a clog or fetter upon that freedom of sale for which the Acts provide. This becomes, I think, the more clear if a comparison is made between Chapter III of the Transfer of Property Act, which deals with sales, and Chapter II, which deals with the general principles of the transfer of property and contains provisions regarding vested and contingent interests, or Chapter VII, which deals with gifts. By section 2 (*d*) of the Act it is enacted that "nothing in the second chapter shall be deemed to affect any rule of Muhammadan Law," and section 129 of the Act contains a similar provision saving the rules of Muhammadan Law in regard to gifts. But the sections as to sales are quite general and contain no such restriction. Therefore, I do not think that the appellants can succeed by virtue of this doctrine as a naked rule of law. The pertinent rules of law, as I think, are those to be found in the Statute. This view is in accordance with the judgment of the Acting Chief Justice Holloway in *Ibrahim Saib* v. *Muni Mir Udin Saib* (1) and, in my opinion, that decision is applicable generally to this Presidency with the exception of Guzerat. It is true that the Muhammadan rule of pre-emption, at least as between Musalman litigants, is accepted by the High Courts of Allahabad and Calcutta. But this circumstance, so far from assisting the present appellants, really supplies, as I think, another sufficient reason for dismissing the appeal. For in the United Provinces and Bengal, owing to local conditions which are not reproduced in this Presidency, there has been a course of judicial decisions in favour of the recognition of pre-emption; whereas in this District of Khandesh there is admittedly not a discoverable instance in which this right has been either allowed by the Court or even asserted by any litigant. And this fact, which I think is true of the Presidency generally except Guzerat, affords conclusive evidence that to enforce the rule of pre-emption now would be to introduce into the law of property an innovation which is as foreign to the practice of the people as it is to the Statutory Law. I desire to say nothing as to what the result would be if there were evidence in this case establishing a local custom in favour of the rule of pre-emption. For a custom is a local common law as it existed before the time of legal memory, as was said by Jessel, M. R., in *Hammerton* v. *Honey* (2). And I see nothing in clause 26 of the Regulation which would prohibit the Court from giving effect to the established local custom in modification of the provisions of the Act, though whether the Court would do so or not is a matter which it is not now necessary to determine.

From what I have already said it follows that, in my opinion, the appellants could not succeed under the Regulation even if they were able to show that the rule of pre-emption should be accepted by us as a rule of justice, equity and good conscience. Out of respect, however, to the arguments which have been heard upon the point, I will state that my own opinion is that this Court cannot recognize such a rule as a rule of justice, equity and good conscience. The decisions in *Dada Honaji* v. *Babaji Jagushet* (3) and *Waghela Rajsanji* v. *Shekh Masludin* (4) are authorities for the view that it is to the English Law in general that we must look for guidance as to what is a principle of justice, equity and good conscience. And this particular rule, as I have said, is not in accordance with the principles of English Law. On this point I desire to express my concurrence with what was said by Mr. Justice

(1) 6 M. H. C. R. 26.

(2) (1876) 24 W. R. (Eng.) 603.
(3) 2 B. H. C. R. 36.
(4) 11 B. 551 at p. 561; 14 I. A. 89.

Phear in *Nusrut Reza* v. *Umbul Khyr Bibee* (5): "The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Muhammadan family arising out of their minute sub-division and inter-division of ancestral property; and as the result of its exercise is generally adverse to public interest, it certainly will not be recognized by this Court beyond the limits to which those necessities have been judicially decided to extend." It seems almost unnecessary to add that the rational basis and justification for the rule of pre-emption has largely, if not entirely, disappeared in the *mofussil* on this side of India. As to the position in Guzerat upon which much was said in argument, that is now not so clear as it was, since the earlier decisions have been questioned by Mr. Justice Beaman and Mr. Justice Macleod in *Dahyabhai Motiram* v. *Chunilal Kishoredas* (6). Whether the earlier decisions should still be followed is a question upon which, since the point does not now arise, it would be improper for me to express an opinion. I may, however, say just this, as the result of considerable experience as District Judge of Ahmedabad, that the judicial recognition of pre-emption in Guzerat, particularly amongst Hindus in that province, has always appeared to me anomalous and artificial.

On these grounds I am of opinion that the appeal fails and should be dismissed with costs.

SHAH, J.—I am of the same opinion. I desire to state briefly the grounds upon which I have arrived at the same conclusion.

The lower Courts have rejected the plaintiffs' claim for pre-emption, and the dispute now is substantially between the pre-emptors and the purchaser of the agricultural lands in suit.

Under clause 26 of Regulation IV of 1827, "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and in the absence of specific law and usage, justice equity and good conscience alone."

On behalf of the purchaser it is urged that the Transfer of Property Act and the Indian Contract Act are applicable to this case, that there is no saving clause in favour of the Muhammadan Law of pre-emption, that the provisions of the Acts are inconsistent with the right of pre-emption, and that the rules as to pre-emption must be deemed to have been abrogated by these Acts. There is considerable force in this argument. But Mr. Shingne has not been able to suggest any satisfactory answer to the two difficulties which present themselves in the way of accepting it. *Firstly*, in spite of these Acts, the right of pre-emption according to Muhammadan Law has been enforced in virtue of the usage of the country in certain parts of India outside this Presidency, and in Guzerat, or at least in certain parts of Guzerat, in this Presidency. *Secondly*, Chapter III of the Transfer of Property Act, which relates to sales of immoveable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and the buyer, in the absence of a contract to the contrary. I, therefore, hesitate to accept Mr. Shingne's contention.

Assuming, however, without deciding, that there is no statutory provision applicable to the case, it is clear that the plaintiffs cannot rely upon the usage of the 'country', as both the lower Courts have held that there is no custom of pre-emption recognised in the District of Khandesh and that there has been no instance of the right of pre-emption having been exercised in that District.

The law of the defendant cannot justify, in my opinion, the application of a special rule of Muhammadan Law to a case of this kind, in which there are two defendants, one a Muhammadan and the other a Hindu, the latter being substantially interested in his own right. There has been some difference of opinion in other parts of India as to whether a non-Muhammadan purchaser buys the property subject to the right of pre-emption according to the Muhammadan Law. It may be that there

(5) 8 W. R. 309.
(6) 22 Ind. Cas. 289; 38 B. 183; 15 Bom. L. R. 1136.

is good reason for the view that the non-Muhammadan purchaser buys the property subject to the right of pre emption in those parts of the country where such a right is enforced on the ground of usage or as a rule of Muhammadan Law. But that reason, as I understand it, is not that it is 'the law of the defendant,' but that it is in accordance with justice, equity and good conscience to enforce the right of pre-emption against the non-Muhammadan purchaser in such a case.

Lastly, it is argued by Mr. Virkar that the right of pre-emption should be enforced as a rule of justice, equity and good conscience. I am quite unable to accept this argument. I agree generally with the observations relating to this point in *Ibrahim Saib* v. *Muni Mir Udin Saib* (1) and hold that the right of pre-emption according to Muhammadan Law cannot be enforced solely as a matter of justice, equity and good conscience.

Mr. Virkar has relied upon the case of *Gobind Dayal* v. *Inayatullah* (7). The conclusions of Mahmood, J., in that case cannot apply to the present case, as the words of section 24 of the Bengal Civil Courts Act upon which they are based are materially different from the words of section 26 of Bombay Regulation IV of 1827. The other Judges in that case apparently based their conclusion upon the ground stated in the judgment of Oldfield, J., that on grounds of equity the Muhammadan Law in claims of pre-emption had always been held to bind Muhammadans and had always been administered between them. The Muhammadans were found as between themselves to hold property subject to the rules of Muhammadan Law, and it was not considered equitable that persons, who were not Muhammadans but who had dealt with Muhammadans in respect of property knowing perfectly well the conditions and obligations under which the property was held, should merely, by reason that they were not themselves subject to Muhammadan Law be permitted to evade those conditions and obligations. This reasoning cannot apply to cases arising in a district where the right of pre-emption is not shown to have been exercised even as between Muhammadans, and where the persons not themselves subject to Muhammadan Law cannot be properly held to know that a Muhammadan holds the property in that District subject to the obligation of offering it to his neighbours before selling it to a stranger.

*Appeal dismissed.*

(7) 7 A. 775 at p. 784; A. W. N. (1885) 228.

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 125 OF 1915.

February 1, 1916.

*Present*:— Mr. Justice Piggott and Mr. Justice Walsh.

BAIJ NATH—DEFENDANT—APPELLANT

*versus*

*Syed* WALI HASAN AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal—Date of hearing postponed—Date not communicated—Default—Dismissal of appeal—Restoration of appeal—Sufficient cause.*

An appeal set down for hearing was ordered to be put up for hearing on the following day, but there was nothing on the record to show that this order was communicated to any of the parties concerned. The appeal was dismissed for default of appearance on the part of appellant:

*Held*, that there was sufficient cause for the restoration of the appeal. [p. 937, col. 1.]

First appeal from the order of the District Judge, Moradabad, dated the 19th March 1915.

The Hon'ble Mr. *Gokal Prasad*, for the Appellant.

Mr. *Agha Haider*, for the Respondents.

JUDGMENT.—The question for determination is whether the appellant before us, who was appellant in the Court below, should be permitted to have his appeal to the lower AppellateCourt re-admitted and decided on the merits, or whether the order refusing to re-admit his appeal which has been passed by the learned District Judge should be allowed to stand. The appeal in the Court below was set down for hearing on February 16th, 1915. It was postponed because the pressure of work was too great to admit of the Courts disposing of the day's list. An order was passed that the appeal should again be put up for hearing on February 17th, 1915. There

is nothing on the record before us to show that this order was communicated to any of the parties concerned, or their legal representatives. There is an affidavit by the defendant himself to the effect that no intimation of the next date of hearing was given. On February 20th, 1915, the appellant presented an application to the Court below, supported by this affidavit, asking for a re-hearing. The Legislature has provided no appeal from an order dismissing an appeal for default under Order XLI, rule 17 of the Code of Civil Procedure, but it has provided an appeal from an order refusing to re-admit an appeal dismissed for default. In our opinion this appeal must succeed. The appellant has shown sufficient cause for his absence on February 17th in that he has shown that he did not know that his appeal was set down for hearing on that day. We accept this appeal and, setting aside the order of the Court below, direct that the appeal of Lala Baijnath dismissed by that Court on February 17th, 1915, be re-admitted to the file of pending appeals and dispose of according to law. We think that the appellant is entitled to his costs of the present hearing in any event, and we order accordingly.

*Appeal allowed.*

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 455 OF 1914.

February 28, 1916.

*Present*:—Mr. Justice Chapman and Mr. Justice Mullick.

GOPINATH BHAGAT—PLAINTIFF—APPELLANT

*versus*

*Raja* LAKSHINARAIN SINGH—DEFENDANT—RESPONDENT.

*Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3, 12A—"Heir", meaning of—Contract Act (IX of 1872), ss. 2 (d), 68—Necessity—Money required for* sradh *of mother—Consideration, promise to defer bringing suit on void contract if.*

The provision in section 3 of the Chota Nagpur Encumbered Estates Act of 1876 contemplates the existence of an heir of the holder of a property under management under that Act, during his life-time; and a contract made by such an heir of the holder during his life-time which may involve them or either of them in pecuniary liability is void. [p. 938, col. 1.]

A promise to defer bringing a suit upon a contract which is void, does not amount to a consideration. [p. 938, col. 2.]

During the life-time of his father money borrowed by a person incapable of entering into a contract, to pay for the *sradh* of his mother, is not a necessary within the meaning of section 68 of the Contract Act. [p. 938, col. 2.]

Appeal against the decree of the Subordinate Judge, Manbhum, dated the 6th August 1914.

Sir *Rash Behari Ghose* and Babu *Bepin Behari Ghose*, for the Appellant.

Sir *S. P. Sinha*, Babus *Jyotee Prosad Sarbadhikary* and *Monmotha Nath Mukherjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit originally instituted for the recovery of money alleged to be due upon two bonds. The suit was decreed so far as it related to one bond. The claim upon the other bond was dismissed. The plaintiff appeals against the latter part of the decision.

The facts may be stated shortly as follows:—The estate of one *Raja* Baikunth Narain Singh was under management under the Chota Nagpur Encumbered Estates Act, 1876, from May 1888 till August 1907. *Raja* Baikunth Narain Singh was then alive and, during his life-time, in August 1899, his son *Raja* Radha Mohun Deb Singh executed a bond in favour of the plaintiff for a sum of Rs. 7,500. After the estate had been restored and Government management had been withdrawn in the year 1907, the defendant in the present suit, who is the son of *Raja* Radha Mohun Singh, executed a bond which refers to the loan taken by *Raja* Radha Mohan Singh in 1899 and recites that "a portion of that debt has been remitted and that the defendant promises to pay the remainder in instalments in a period of ten years." This is the bond which has been sued upon in this case. The learned Subordinate Judge has held that the defendant is protected, on the ground that there was no consideration for the bond sued upon inasmuch as his father *Raja* Radha Mohun Singh was at the time he entered into the contract in 1899 incapable of entering into any contract which involved him in pecuniary liability. Section 3 of the Chota Nag-

pur Encumbered Estates Act was relied upon. The first argument that has been advanced before us is with reference to the wording of that provision which is to this effect: "The holder of the property and his heir shall be incapable of entering into any contract which may involve them or either of them in pecuniary liability." At the time when the contract was entered into, the holder of the property, *Raja* Baikunth Narain Singh, was alive. It is argued that *Raja* Radha Mohun Singh who entered into the contract did not legally become the heir until his father's death and that, therefore, at the time he entered into the contract, he was not the heir and was not protected by this provision. No doubt, it is correct shortly speaking, to say that no person can become an heir until after the death of his ancestor, but, on the wording of the provision itself, it seems impossible to attach that strict meaning to the word 'heir.' The provision is to the effect that the contract shall not involve them, that is, the holder and his heir or either of them in pecuniary liability. The provision, therefore, appears to contemplate the existence of an heir during the lifetime of the holder. We hold, therefore, that the provision did protect *Raja* Radha Mohun Singh at the time when he entered into this contract.

It is then argued that the contract was not void contract but was only voidable; and in support of this argument reference is made to section 124 of the Act, which was added by a recent amendment which provides a special protection against promises made after possession is restored to the holder. It is argued that this would be unnecessary if the contract made during the management were void. In our opinion, it is impossible to say that the contract made by a person incapable of entering into a contract is not void. We hold, therefore, that the contract was void.

It is then contended that inasmuch as there was a new consideration for the contract entered into by the defendant, the contract was a good one, although there was no consideration so far as the recognition of the liability under the bond entered into by *Raja* Radha Mohun Singh was concerned. The consideration is said to be the remission of a portion of the debt and the permission to pay in instalments in a period of ten years. The new consideration, therefore, consisted merely of a promise to defer bringing a suit upon the void contract. We do not think that that amounts to a consideration.

It is then said that the bond entered into by *Raja* Radha Mohun Singh in 1899 was partly to provide for necessaries and reference is made to the fact that a part of the money is said to have been borrowed to pay for the *sradh* of his mother. Even if we were to hold that section 65 of the Contract Act is applicable, we would be unable to say that this was a necessary during the life-time of *Raja* Radha Narain's father, *Raja* Baikunth Narain Singh.

The result, therefore, is that the appeal is dismissed with costs, one hundred and forty rupees.

*Appeal dismissed.*

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BOMBAY HIGH COURT.
SECOND CIVIL APPEAL NO. 840 OF 1914.
December 3, 1915.
*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.
JAGJIVAN MULJI—DEFENDANT No. 3—APPELLANT
*versus*
NATHJI JAGESHWAR—PLAINTIFF—RESPONDENT.

*Evidence Act (I of 1872), s. 92 - Written agreement —Addition of new terms, if permitted—Transfer of Property Act (IV of 1882), s. 40.*

Criminal proceedings between the parties were compounded on certain terms arranged between them and set forth in great detail and with much care and elaboration in a written agreement. The agreement contained no reference to the subject-matter of the suit which the plaintiff subsequently instituted, alleging in the plaint that the said subject-matter formed part of the consideration for the compromise in the criminal proceedings:

*Held*, that in putting forward the case as alleged in the plaint, the plaintiff was attempting to add a new term to the written agreement which settled the terms of the compromise, and that, therefore, under the provisions of section 92 of the Indian Evidence Act, the plaintiff could not be permitted to do so. [p. 939, col. 2; p. 940, col. 2; [p. 941, col. 1.]

Second Appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 396

of 1912, confirming the decree passed by the Subordinate Judge, Umreth, in Civil Suit No. 303 of 1911.

Mr. *H. V. Divatia*, for the Appellant.
Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—The plaintiff sued for the removal of what is styled in the plaint a curved heap of clay projecting beyond the *otta* of a house formerly belonging to defendants Nos. 1 and 2 and subsequently transferred to defendant No. 3. He alleged that in a complaint lodged before the 3rd Class Magistrate against defendants Nos. 1 and 2, it was agreed that the heap projecting beyond the *otta* was to be removed and that owing to an undertaking accepted by defendant No. 4 the complaint was withdrawn; and later on he says that defendant No. 3 has been joined as he purchased the plaint house, that is, the house to which the *otta* appertained mentioned above in the plaint, and defendant No. 4 was made a party because of his *kabuliyat* to get the heap removed. The defendant No. 4 in his written statement denied being a surety to the compromise between the parties and said that in the criminal proceedings he was working as a *mukhtyar* on behalf of defendants Nos. 1 and 2, and that finally an amicable settlement was arrived at and mutual documents were passed whereby defendants Nos. 1 and 2 had agreed to remove so much of the *otta* as might be found to have been newly enlarged, and that he had been unnecessarily joined.

Upon the evidence the learned Trial Judge states: "It appears that a charge was framed against defendant No. 1 on the 9th January 1910, and the agreement was entered into two days later, *i. e.*, on the 11th January 1910. But the defendants were acting under legal advice. Messrs. Harishankar D. Joshi and Mulji Narottam, *mukh yar*, were their advisers in the Magistrate's Court. The written agreement, Exhibit 44, is proved by the latter, and in his written statement, Exhibit 7, he supports the oral agreement set up in the plaint." That is a misstatement of defendant No. 4's written statement which, as already observed, states that an amicable settlement was arrived at and mutual documents were passed whereby defendants Nos. 1 and 2 agreed to remove so much of the *otta* as might be found to have been newly enlarged. Exhibit 44, which was the document drawn up by the legal advisers of the parties in compromise of the criminal proceedings, commences with the recital of disputes relating to a privy and land and other matters concerning the old houses of the plaintiff and the 1st defendant adjoining each other, and after that recital it states: "Ultimately I filed a complaint. The same is this day compounded, *i. e.*, a settlement is come to as follows." Then follow elaborate provisions with regard to a privy and passage between the two houses without any reference whatever to any projection from the *otta*, and it is stated and also proved to the satisfaction of the lower Court that this document was prepared in duplicate, one counterpart being signed by each of the contesting parties. Therefore, we have a full and elaborate statement of the consideration for the withdrawal of the criminal proceedings. The plaint, however, is entirely silent as to all the considerations stated in Exhibit 44, and states that owing to an undertaking accepted by defendant No. 4 the complaint was withdrawn, the undertaking being with reference to the removal of the projecting part of the *otta*. It appears to me that in putting forward the case that the complaint was withdrawn in consideration of the compromise to remove the *otta*, the plaintiff is attempting to add a new term to the agreement, Exhibit 44, which settled the terms of the compromise. The point appears to have escaped the notice of the lower Courts, and we have, therefore, now had a prolonged argument on the part of the plaintiff's Pleader, and since the adjournment yesterday he has addressed us again upon the same point, but nothing that he has urged has in any way shaken my conviction that the alleged agreement sued upon is without consideration.

In this view of the case, it is not necessary to consider another important and difficult question of law, which also appears to have escaped notice in the lower Courts, and that is whether an affirmative agreement to do certain work

can be enforced against the purchaser with notice of the agreement so as to justify a mandatory injunction calling upon him to do the work. It apparently could not be enforced in England upon the authority of *Tulk* v. *Moxhay* (1) and subsequent cases. Whether it could be enforced under section 40 of the Transfer of Property Act is a point which, in view of the failure of the plaintiff to prove consideration for the agreement set up, it is not necessary now to decide. I would, therefore, reverse the decree of the lower Appellate Court and dismiss the suit with costs throughout.

BEAMAN, J.—I concur. This suit has been brought to enforce an obligation arising out of contract under section 40 of the Transfer of Property Act. It is plain then that if we cannot look at the contract under section 92 of the Indian Evidence Act, it would not be open to us to give the plaintiff the relief he seeks. And the question which has to be answered is whether we are permitted by the terms of section 92 of the Indian Evidence Act, in the state of facts alleged in the pleadings and held proved by the Courts below, to look at the oral agreement upon which the plaintiff relies.

Briefly his case is this, that owing to certain disputes between himself and defendants Nos. 1 and 2 he had instituted criminal proceedings, and those proceedings were compounded on certain terms arranged between himself and the said defendants Nos. 1 and 2 and set forth in great detail and with much care and elaboration in a written agreement, which is Exhibit 44 in this case. That agreement contains no reference to the subject-matter of this suit, and the plaintiff in bringing his suit has to rely upon an oral agreement, which we find in his plaint is referable to the consideration expressed in, and presumably, therefore, exhausted by, the following terms of the writing Exhibit 44. He seeks to evade this difficulty, *first*, by saying that the oral agreement upon which he relies does not fall within the general prohibition of the opening part of the section. In my opinion it very clearly does. It cannot be anything less than an addition, and a very material addition, to the promises or undertakings exacted from defendants Nos. 1 and 2 in consideration of the plaintiff withdrawing his criminal prosecution. That hardly admits of argument.

The plaintiff *then* fell back upon proviso 2 to that section and contended that this was a separate oral agreement upon which the writing is silent and which is not inconsistent with its terms. But having regard to the fact that the plaintiff himself refers its consideration to the consideration set forth in the writing, it becomes perfectly evident that the oral agreement now relied upon must be inconsistent with the terms of the writing Exhibit 44, as that is to be regarded as a complete expression of the contract then entered into between the parties. It might be simply illustrated in this way, that a writing which shows that *A* bought from *B* an article X for a given sum of £ 10, is inconsistent with the subsequent averment of *A* that he likewise bought from *B* an article Y for the same consideration. For the effect of that would be that while the writing expresses that the article X was bought for £ 10, *A* now seeks to show that the price was less than £ 10 or that nothing at all was paid for Y. In the former case a separate oral agreement set up would clearly be inconsistent with the writing, and in the latter case it would leave the agreement sought to be enforced without any consideration at all.

*Lastly*, I understand the plaintiff relies upon proviso 4, which permits any subsequent oral agreement which rescinds or modifies the writing to be proved. But again it is the plaintiff's own admission, and it is proved beyond doubt, that this was not a subsequent oral agreement, but was part of a single transaction to which expression was given in Exhibit 44. It must have been arrived at before that writing was drawn up. The writing is not one of an informal or careless character in favour of which any presumptions could be drawn in order to make proviso 2 applicable. It appears to have been drawn under the careful supervision of the legal advisers

(1) (1848) 2 Phill. 774 at p. 778; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 13 Jur. (o. s.) 89; 12 L. T. (o. s.) 469; 41 E. R. 1143; 78 R. R. 289.

of the parties. In these circumstances I am of opinion that the order proposed by my Lord the Chief Justice is unquestionably right that we are precluded from looking at the oral agreement upon which the plaintiff relies by section 92 of the Evidence Act, and as a consequence his suit fails and must be dismissed with all costs.

*Decree reversed.*

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 96 OF 1914.

November 10, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

*Sree Raja Dantalooru* PEDA VENKATA JAGANNADHA RAJU BAHADUR GARU AND ANOTHER—PLAINTIFFS NOS. 1 AND 2 —APPELLANTS

*versus*

KARLAPATI RADHAKRISHNAIAH AND ANOTHER—DEFENDANTS NOS. 1 AND 2— RESPONDENTS.

*Registration Act (XVI of 1908), s. 17 (v) (2)—Agreement to execute a deed of release in favour of lessor collateral to the lease—Admissibility in evidence—Evidence Act (I of 1872), s. 92—"Collateral", meaning of—Plaint not properly framed—Points at issue well known to parties—Court, whether can grant relief.*

Where plaintiffs, in consideration of the defendants procuring them a loan, leased out to the defendants a considerable piece of property at a specially favourable rental, and the defendants, in their turn, executed on the same date a document whereby they agreed to surrender the property and execute a deed of release in favour of the lessors on the failure of the said consideration, and the loan not having been procured, the plaintiffs sued to compel defendants to execute a deed of release:

*Held*, (1) that the document executed by the defendants, though forming a part of the larger transaction of which the lease formed another part, was wholly independent of the lease or of any of its terms; [p. 943, col. 2.]

*Subramanian Chettiar* v. *Arunachalam Chettiar*, 25 M. 602; 29 I. A. 138; 12 M. L. J. 479; 6 C. W. N. 865; *De Lassalle* v. *Guildford*, (1901) 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384, followed.

(2) that it was entirely collateral to the lease and was within the terms of sub-section *(v)*, clause (2), of section 17 of the Registration Act, and was, therefore, admissible in evidence without registration; [p. 943, col. 2.]

(3) that being only collateral to the lease, it was outside the operation of section 92 of the Evidence Act, whether regarded as itself the contract or as evidence of an oral agreement to the same effect. [p. 944, col. 1.]

One agreement is said to be "collateral" to another when it subserves in some part the same purpose as the other. [p. 943, col. 2.]

Where defendants are perfectly well aware of what is in issue between them and the plaintiffs, a Court will grant plaintiffs the relief to which they are in law entitled, even though the plaint does not properly frame the relief. [p. 944, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Bezwada, in Original Suit No. 18 of 1912.

Messrs. *P. Narayanamurthi* and *B. Somayya*, for the Appellants.

Messrs. *T. Rangachariar*, *Visvanatha Sastri*, *G. Krishnaswami Aiyar* and *K. Krishnaswamy Aiyangar*, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—This is an appeal by the plaintiffs from the judgment of the Subordinate Judge of Bezwada dismissing their suit and refusing them the reliefs they asked. The facts out of which the suit arose are these: The plaintiffs are the proprietors of an estate known as the Gundepalli Estate, which was apparently of considerable extent, and in the year 1911 they were extremely hard pressed for money. Their lands were mortgaged to the extent of something like two lakhs and they were indebted to sundry personal creditors in sums which amounted more or less to another lakh; and they were naturally anxious to borrow money in order to discharge those liabilities and disencumber their lands. Sometime in the early part of 1911 they seem to have got in touch with the defendants who are *sowcars* in Madras. Various proposals were made, *first* by sale, and *then* by mortgage, for a comparatively modest loan of Rs. 15,000, and then as the negotiations developed, it became obvious that so modest a sum could afford no substantial relief to the embarrassments of the plaintiffs and thereupon a proposition was set on foot, of the defendants finding a lender of three lakhs of rupees for which the defendants were to receive a commission. The original figure seems to have been fixed at 4 per cent. The negotiations went on. The plaintiffs were continually pressing for news as to whether the loan had been arranged and the defendants were constantly holding out hopes

that a loan would very soon be arranged, and so matters went on until the 11th of September 1911. In that month the plaintiffs leased to the defendants a considerable piece of property out of their *kamatam* lands at a rental of Rs. 500 per annum. On the same date, according to the plaintiffs' case, they were given by the defendants a document, which is Exhibit S in the case, of which the important clause is the last which is in these terms: —"If the said loan (that is, the loan of three lakhs to which I have alluded) could not be given to you for any reason, I shall have the said *patta* and *muchilika* (that is, the lease of even date to which I have referred) cancelled and execute a deed of release in your favour." That was signed by the 2nd defendant. It is not disputed that he had authority to bind his co-defendant. Now the plaintiffs' case is this: that the lands comprised in the *patta* yielded a revenue very greatly in excess of the Rs. 500 rental to be paid by the defendants, and that the difference between the rent they were paying and the realizable rent, which they put at Rs. 1,500 and which the learned Judge accepts as worth at least Rs. 1,200, was to be in lieu of the commission which would otherwise have been payable to the defendants on finding the desired lender. Now in fact the lender was never found. The defend ants suggested that one of them had a wealthy father-in-law who was on the verge of lending money. Whether that be so or not, it is impossible now to say. Having regard to the fact that hopes were held out to the plaintiffs, who, it is obvious from the correspondence, were very helpless and unbusinesslike people, that the loan would be given at a rate of not more than 4 per cent. per annum, I think it extremely questionable whether the whole of the defendants' story as to the readiness of the father-in-law to come forward was not a mere bait to induce the plaintiffs to do that which they did. In fact, as I have said, the loan was never made, so that the plaintiffs got nothing and the defendants were, of course, never in a position to earn their commission. The case of the plaintiffs is based upon Exhibit S. They ask that, as the loan has never been granted to them, the Court should relieve them by ordering the defendants to carry out their covenant in Exhibit S and execute a deed of cancellation of the lease and a deed of surrender to the plaintiffs.

The defendants' case raises two issues, one of fact and one of law. The issue of fact is as to the genuineness of Exhibit S, which the defendants ask us to believe was a forgery. It is conceded, and we think it is manifest to the eye, that if the signature of Exhibit S is a forgery, it is an extremely good one, its likeness to the admitted signatures of the 2nd defendant is extremely striking so much so that the learned Judge in stigmatising this document as a forgery does not suggest that the signature is forged, but make the suggestion, which, as far as I can see, was never suggested in the cross-examination and of which there is nothing even in outline in the evidence-in-chief for the defence, that it is not unlikely that the 2nd defendant may have given one of the witnesses for the plaintiffs a blank paper with his signature in connection with certain criminal proceedings that were then in the air. All I can say is that, that seems to me a wholly gratuitous suggestion and one which a Court of Law ought not to indulge in for the purpose of branding litigants with the inculpation of a criminal forgery. The person upon whom this stigma is personally cast, the 5th witness for the plaintiffs, was never asked a single question about it in cross-examination, nor was any question put to the 1st plaintiff who went into the box imputing complicity in any such scheme. I think that it would be acting contrary to judicial principle to hold Exhibit S on the materials before us to be a forged document. The probabilities seem to me to be all against its being a forged document. If it were, then we must suppose that the plaintiffs handed over these valuable lands to the defendants without a farthing's worth of security that they would get anything whatever in return for them. It is quite true, as Mr. Rangachari said, that they were in bad grace. It is quite true that they were un-businesslike people; and it is quite possible that the defendants were ready to take any possible advantage of them that they could. But at the same time I cannot bring myself to believe that they went so far as to give away the whole of the lands

that were the recompense of the defendants without a saving clause to ensure that they got something in return for what they gave. It is said that the letters contain no reference to this agreement Exhibit S either before or after the 11th September. I have perused those letters, and it is quite true that they do not refer to this agreement. But they bear the stamp of being written by men hard pressed for money solely anxious to beseech the defendants to try and get a loan and extricate them out of the mire into which they have fallen. I hold that Exhibit S was a genuine document and represented a genuine transaction.

Then Mr. Rangachari says, even if it be so, it is in law void and of no effect, because he says the lease is a registered document and it cannot have its effect varied or altered by an unregistered document, which Exhibit S admittedly is; and he relies for that proposition upon various portions of section 17 of the Registration Act. He says that the effect of Exhibit S is to limit or extinguish a right, title or interest in immoveable property of the value of Rs. 100, (that is, sub-section (*b*) of section 17). He further says that if it does not fall within that, it falls within sub-section (*c*) of the same section as being an instrument acknowledging the receipt of consideration on account of the declaration or extinction of such right or interest in immoveable property. The plaintiffs' case is that the apt clause of the section is sub-section (*v*) of clause 2 of section 17, which exempts from the necessity of registration a document which does not itself create or extinguish any right, such as I have described, in immoveable property but merely creates a right to obtain another document which will, when executed create or extinguish such right. He also relies on section 92 of the Evidence Act, and says that Exhibit S is a violation of the rule, there laid down, that the lease is a document which contains all the terms of the contract, and that Exhibit S falls within the mischief of that section, because it is called in evidence for the purpose of adding to or subtracting from, it does not matter which way it is put, the terms of the lease He cited a great many authorities to the effect that an unregistered document is not admissible in evidence, which qualifies the effect of a registered document or adds to or varies its terms. With that proposition I am in complete accord. The only point where I differ is, that I do not think that any of these cases apply, because I do not think the present case can properly be put in any way as a violation of the principle laid down either in the Registration Act or section 92 of the Evidence Act In my opinion Exhibit S, though no doubt in the widest sense part of the same transaction as the lease, and indeed the word that I am going to apply, namely, 'collateral', implies in itself that it subserves in some part the same purpose, though, as I say, it forms a part of the larger transaction of which the lease forms another part, is, in my opinion, wholly independent of the lease or of any of its terms. For that view of the document, I rely upon two decisions, one a decision of the Privy Council, *Subramanian Chettiar* v. *Arunachalam Chettiar* (1), and the other the well-known case of *De Lassalle* v. *Guildford* (2). Mr. Rangachariar pointed out that *De Lassalle* v. *Guildford* (2) was not a suit for specific performance but an action sounding in damages for breach of contract. That seems to me in no way to detract from its authority as to when in contemplation of law, one document will be held to be a variance or derogation of another, and when it will be held to be embodying a collateral and distinct agreement. In my judgment Exhibit S is entirely collateral to the lease and was a document within the very terms of sub-section (*v*), clause (2), of section 17 of the Registration Act, namely, a document which does not itself create or extinguish a right in immoveable property, but a document which gives the right to obtain another document which, and which only, will have that effect. If the words of Exhibit S are examined, they seem to me quite incapable of any other construction. The words used are: "I shall have the said *patta* and *muchilika* cancelled and execute a deed of release in your

(1) 25 M. 603; 29 I. A. 138; 12 M. L. J. 479; 6 C. W. N. 865.

(2) (1901) 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; 49 W. R. 467; 17 T. L. R. 384.

favour." That is the only operative portion of the document and how anybody can contend that the moment it was found that the loan could not be given, these documents became *ipso facto* void and of no effect I cannot conceive. If they were void and of no effect, there was not the slightest reason for the *patta* and *muchilika* being cancelled by the defendants, and still less is there any need for a deed of release in favour of the plaintiffs. In my opinion this contention of the respondents is quite untenable, and I, therefore, hold that Exhibit S is not a document requiring registration, and since it is only collateral to the lease, I think it is outside the operation of section 92 of the Evidence Act, whether it be regarded as itself the contract, or as evidence of an oral agreement to the same effect.

The result is that Exhibit S being an enforceable contract, the plaintiffs are entitled to the relief claimed. It is said that the plaint does not properly frame the relief to which the plaintiffs, on the construction this Court has adopted, are in law entitled. I think that is very likely right. I think the exactly appropriate relief was not asked for, although the second head of the relief claimed comes very near it inasmuch as the plaintiffs ask for cancellation of the *patta* and delivery of it to them. That is at any rate an appropriate statement of a portion of the relief they are entitled to. But even if I thought that the plaint wholly failed to ask in apt terms of art that which the plaintiffs are entitled to, that would not be the slightest obstacle to doing them justice in this case, because it is perfectly obvious that the defendants knew absolutely clearly what it was that was in issue between them and the plaintiffs, and what the plaintiffs wanted; and the precise way in which it is framed is after all a mere question of words.

The result will be that the judgment of the lower Court will be reversed and the defendants will be ordered to cancel and deliver up the *patta* and *muchilika* and to execute a deed of release in favour of the plaintiffs. But they cannot, of course, obtain specific relief without putting the other parties in the position they were in before the transaction in question. The evidence of the defendants is that, at the request of the plaintiffs, they paid them two years' rent, namely, Rs. 1,000 in advance, and they got a receipt for the Rs. 1,000. The plaintiffs do not attempt to deny that they gave the receipt. They admit they gave the receipt, but they ask us to believe that they gave that receipt without getting the money. We do not accept that story. Whether it is true or not it is impossible to determine; but if parties choose to execute formal documents acknowledging receipt of moneys which they have not received they have only themselves to thank if a Court of Justice binds them to their written word. Therefore, the relief granted to the plaintiffs will be conditional on their refunding to the defendants the sum of Rs. 1,000 with interest at 6 per cent. per annum from the 4th October 1911 till payment. The appeal is allowed with costs throughout.

SRINIVASA AIYANGAR, J.—I agree. I desire to add only this. I doubt whether section 92 of the Evidence Act can have any application to this document, Exhibit S. Exhibit S, as I read it, is an agreement in writing. The plaintiffs do not desire to let in evidence of any oral agreement, because I think Exhibit S is an agreement in writing and not merely a memorandum of a previously concluded oral agreement.

*Appeal allowed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 1013 AND 1014 OF 1914.

November 11, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri.

PRABHALA NARASIMHASOMAYAJULU GARU—PLAINTIFF—COUNTER-PETITIONER—PETITIONER IN BOTH

*versus*

IN C. R. P. No. 1013 OF 1914

MUTTURY SOMAPPA—PLAINTIFF—PETITIONER—RESPONDENT

IN C. R. P. No. 1014 OF 1914

KOLLURY LAKSHMINARAYANA—PLAINTIFF—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908),*

MURLIDHAR *v.* DEWAN CHAND.

*XXXVIII, r.* 10 - *Sale of mortgaged property—Subsequent attachment of sale-proceeds by puisne mortgagee, effect of—Attachment before judgment by simple creditor—No application for execution prior to realisation—Simple creditor, whether entitled to rateable distribution.*

A puisne mortgagee does not lose his rights under the mortgage simply by attaching the sale-proceeds in Court after the sale of the mortgaged property at the instance of a prior mortgagee.

An attachment before judgment cannot by itself give a simple creditor priority over a mortgagee, nor can the former come in for a rateable distribution under section 73 of the Code of Civil Procedure, when not only is there no application by him for execution of the decree but the money is realized before attachment.

*Arunachellum Chettiar* v. *Haji Sheik Meera Rowther*, 7 Ind. Cas. 856; 8 M. L. T. 226; 34 M. 25; (1910) M. W. N. 688; *Srinivasa Ayyangar* v. *Seetharamayyar*, 19 M. 72; 5 M. L. J. 151, followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the Principal District Munsif of Peddapur, in Civil Miscellaneous Petitions Nos. 778 and 773 of 1914, in Small Cause Suits Nos. 926 and 917 of 1913, respectively.

Mr. *P. Somasundaram*, for the Petitioner.

Mr. *M. Patanjali Sastri*, for Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—The District Munsif was clearly wrong in thinking that the petitioner lost his rights as mortgagee simply because he attached the surplus sale-proceeds. He is the puisne mortgagee and has a charge over the surplus sale-proceeds in Court after the property was sold at the instance of the prior mortgagee. The proper course was pursued by him when he applied for payment.

The attachment before judgment made at the instance of the counter-petitioner will not affect the petitioner's rights; Order XXXVIII, rule 10, of the Code of Civil Procedure is clear.

It is also difficult to see how the attaching creditor is entitled to rateable distribution, as not only was there no application for execution made by him of the decree, but the money was realised before he attached the property: *Arunachellum Chettiar* v. *Haji Sheik Meera Rowther* (1) and *Srinivasa Ayyangar* v. *Seetharamayyar* (2).

(1) 7 Ind. Cas 856; 34 M. 25; 8 M. L. T. 226; (1910) M. W. N. 688.

(2) 19 M. 72; 5 M. L. J. 151.

It is argued by the counter-petitioner's Vakil that the order for payment was obtained by the petitioner by fraud and that apart from any other consideration the Judge had power to vacate the order. I can find nothing in the record to show that the petitioner or his Vakil were guilty of any fraud or were responsible for the entry as to notice to attaching creditors made by the execution clerk. As the attaching creditors had absolutely no right to the money which in law was clearly payable to the petitioner as puisne mortgagee, it is difficult to see what motive the petitioner and his Vakil had to perpetrate any fraud. Probably the execution clerk thought that it was his duty to have brought the fact of attachment to the notice of the Court and tried to cover up his negligence.

I set aside the order of the District Munsif with costs throughout. The civil miscellaneous petitions in the lower Court will be dismissed.

*Petitions allowed; Order set aside.*

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## ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 178 OF 1914.

January 24, 1915.

*Present*:—Sir Henry Richards, Kt., Chief Justice, and Mr. Justice Rafique.

MURLIDHAR AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

DEWAN CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Will, construction of—Trust.*

A Will executed by a Hindu in favour of his two nephews contained the following provisions:—

"In the other dwelling house consisting of three sections of *thakurdwara* including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof to daily perform the usual worship of the gods Murlidhar, Raj Rajeshwari and Mahadeo and the worship on Basant Panchmi, etc., and to look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half..... None of the executors shall in any way be entitled to transfer

mortgage or sell this house and if they do so it will be utterly null and void":

*Held*, that the Will created a trust in favour of the two nephews and did not confer an absolute interest upon them. [p. 946, col. 2.]

First appeal from the decision of the Additional Subordinate Judge, Benares, dated the 26th March 1914.

Dr. *S. N. Sen*, for the Appellants.

Mr. *B. E. O'Conor* (with him Mr. *Harendra Krishna Mukerji*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that a certain house was the property of defendant No. 3 and was liable to be sold in execution of the decree against him. It appears that at one time the house belonged to a man called Krishna Aiyar, a *Brahman* Madrasee. He made a Will dated the 7th of September 1886, in which he dealt with a considerable amount of property. The Will recited that he had two nephews Ganpati and Subrai. His Will provided that after his death Subrai should be the absolute owner of one of two houses he mentioned in his Will. The Will then proceeds: "In the other dwelling house consisting of three sections of *thakurdwara* including staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof to daily perform the usual worship of the gods Murlidhar, Raj Rajeshri and Mahadeo and the worship on *Basant Panchmi*, *Ram Naumi*, *Janam Ashtami*, *Nauratra*, *Shivaratri*, *Dhanurmas*, and *Saun* festivals and to look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half and should grant receipts and acquittances as between themselves . . . . . None of the executors shall in any way be entitled to transfer, mortgage or sell this house, and if they do so it will be utterly null and void. In this connection the members of my community and everybody shall be entitled, whenever they come to know that either of these persons or their heirs have in any way sold the said house, to make an application immediately and get the transfer set aside." The house with which the present suit is conversant is this last mentioned house. The lower Court has held that the defendants, or the persons who represent the original devisees, hold the house subject to a charge for the worship of the gods and the observance of the religious festivals and has so far decreed the claim, holding that the house can be sold subject to the charge. The defendants appeal. The case really turns upon the view we shall take as to the true construction of the Will we have mentioned. It will be seen at once that he draws a sharp contrast between the two houses. One he leaves absolutely to Subrai. He places no restriction on Subrai dealing with the house left to him as he should think fit. Idols of the various deities had been set up in different parts of the second house. It is absolutely clear that if a Muhammadan or a Christian or even a Hindu other than a *Brahman* became the purchaser of this house, such purchaser could not possibly carry out the provisions of the Will. The chief profits that would arise to the nephews of the testator and their descendants would probably be the gifts which would be made by the pilgrims. In other words, the nephews would profit by the opportunity of getting offerings from the pilgrims. These offerings would, of course, be personal to themselves. In our opinion the Will created a trust. The only beneficial interest given under the Will to the nephews was the right to take the surplus profits, if any, after the worship had been performed and the festivals duly observed. We have no reason for holding, under the circumstances of the present case, that the bequest was merely colourable and that the intention of the testator was in reality to confer an absolute interest free from any trust upon his nephews. Some point has been made with the Court below upon the dealings with the property by the two nephews. In our opinion such dealings can in no way affect the question which we have to decide, namely, as to whether the nephews took the house as a trust or for their own benefit. The facts of the present case closely resemble the facts in the case of *Benode Behari Mullick* v. *Sita Ram Naik Daji Kalia* (1) and in the case of *Debnarain Bose* v *Sreemutty Comulmonee Dossee* (2). We allow the appeal set aside the decree of the Court below and dismiss

(1) 1 Ind. Cas. 166; 6 A. L. J. 444.
(2) 20 W. R. 39.

the plaintiffs' suit with costs in both Courts including in this Court-fees on the higher scale.

*Appeal allowed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 573 OF 1914.

December 22, 19 5.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Moore.

KUPPARAZU VENKATASUBBIAH AND ANOTHER—DEFENDANTS NOS. 1 AND 2 —APPELLANTS,

*versus*

MURUGULA SHAIK SILAR SAHIB—PLAINTIFF - RESPONDENT.

Inam—*Grant conditioned on performance of certain duties by* inamdars—*Grant, whether constitutes public trust—Lease by certain* inamdars *of property, whether void as a whole.*

An *inam* granted to several people on condition of their performing certain duties for the benefit of the public does not create a public charity. [p. 947, col. 2.]

*Sriranga Chariar* v. *Pranatharthihara Chariar*, 30 Ind. Cas. 74; 2 L. W. 632; (1915) M. W. N. 531; 18 M. L. T. 122, followed.

Where, therefore, an *inam* was granted to the plaintiff and several others on condition of their providing water for the use of travellers passing through that place and certain of the *inamdars* leased the whole of the *inam* lands without the consent or knowledge of the plaintiff who sued for a declaration that the lease as a whole was void and that he along with such *inamdars* who were not parties to the lease was entitled to possession of the property:

*Held*, that the lease was not void as a whole, but it was not binding on the plaintiff's own share of the lands. [p. 947, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore, in Appeal Suit No. 6 of 1913, preferred against that of the District Munsif of Kanigiri, in Original Suit No. 316 of 1911.

Mr. *T. Prakasam*, for the Appellants.

Mr. *R. Rajagopala Aiyar*, for Mr. *T. V. Venkatarama Aiyar*, for the Respondent.

JUDGMENT.

COUTTS TROTTER, J.—The plaintiff in this case was an *inamdar* entitled to a share in certain lands in Kandukur. The *inam* was granted to the plaintiff and several others on condition of their providing water for the use of travellers passing through that place. Certain of the *inamdars*, neither the whole nor apparently the majority, have purported to lease the whole of the *inam* lands for 40 years to 1st defendant, but they neither obtained the consent of the plaintiff nor is it shown that he knew of or assented to it subsequently. The first Court gave him a relief to this extent; it declared the lease which the defendants had executed not to be binding on the plaintiff's own share of the lands. But the plaintiff was not satisfied with that, and proceeded to claim that he was entitled to a decree declaring the lease to be absolutely void as a whole and further declaring that in consequence he, along with such other *inamdars* as had not been the parties to the lease, was entitled to possession of the property. He endeavours to support this claim by contending that the *inam* grant in this case created a public charity and that the *inamdars* ought to be supposed to be the trustees administering that public charity. I suppose it will follow from that that the land will be inalienable; at any rate it is quite clear that an unauthorized lease of a land devoted to a public charity would not pass any portion of the land at all. Speaking for myself I regard the suggestion of a public trust in this case as extravagant, and it seems to me to be an ordinary case of an ordinary service *inam* with certain duties attaching to the holders of the *inam*, which duties no doubt in this case tend to the benefit of the general public, just as the duties of an *archaka* of a temple tend to the benefit of any of the public who may frequent the temple. It has been clearly held in this Court in *Sriranga Chariar* v. *Pranatharthihara Chariar* (1) that an *inam* granted to temple *archakas* on condition of their performing their temple duties is not a religious trust for public purposes at all. So here we are of opinion that although the land no doubt was resumable if the services were not performed and although the services may be of benefit to the public, that does not make the grant a grant for charitable uses. I am, therefore, of opinion that the Subordinate Judge was

(1) 30 Ind. Cas. 74; 18 M. L. T. 122; 2 L. W. 632; (1915) M. W. N. 531.

wrong in making the order he did and the relief granted to the plaintiff must be confined to the relief given in the Court of first instance, and the appeal must be allowed to this extent with costs here and in the lower Appellate Court. The plaintiff will, of course, be entitled to retain the costs allowed to him by the first Court.

MOORE, J.—I agree.

*Appeal partly allowed.*

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## BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT NO. 1251 OF 1914.

July 2, 1915.

*Present*:—Mr. Justice Beaman.

MUKANCHAND RAJARAM BALIA—PLAINTIFF

*versus*

NIHALCHAND GURMUKHRAI—DEFENDANT.

*Contract Act (IX of 1872), s. 47—Bombay Cotton Trade Association Rules, rr. 15, 17—Vendor to tender goods before specified time—Giving Railway receipt, effect of.*

Under a contract governed by the Rules of the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 P. M. of due date. [p. 948, col. 2.]

The practice of giving Railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent. of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in rules 15 and 17. [p. 951, col. 1.]

The framers of the rule 17 meant the word "tender" to have its full legal connotation. [p. 951, col. 2]

Where the vendor has not tendered the goods before the specified time, he fails, under section 47 of the Contract Act, to perform his part of the contract and thus precludes himself from approaching the Court as a plaintiff in a suit for damages on the contract. [p. 951, col. 2.]

Messrs. *Wadia* and *Mehta*, for the Plaintiff.

Messrs. *Setalvad* and *Desai*, for the Defendant.

JUDGMENT.—This case has been brought, as Counsel stated, by way of a test case. The point upon which I understood at first that it was meant to be a test case was, whether the contract between the parties was to be read as containing a clause precluding either of them from cancelling the contract in any event, and, if so, whether that was a good agreement. As the case developed it appeared as though the decision of the Court were required upon another point, namely, whether the plaintiff by giving the railway receipt on the 19th of March 1914 had thereby complied with the condition of the contract made between the parties requiring tender by the vendor. The contract is a cotton contract entered into on the 25th of January 1914 for the purchase by the defendant from the plaintiff of 200 bales of cotton—March delivery—between the 15th and 25th, and expressed to be in all details governed by the Rules of the Bombay Cotton Trade Association, subject only to this exception that in no circumstances was the contract to be cancelled. I have no doubt whatever, notwithstanding the fact that for want of punctuation a different construction has been sought to be placed by the defendant upon the term, that the contract was meant and was expressed to be irrevocable. A very cursory study of the Rules of the Bombay Cotton Trade Association will show why a term of this sort is introduced into almost all cotton contracts between reputable dealers. If we turn to rule 17 of the Rules of the Bombay Cotton Trade Association, we shall find that under a contract of this kind the vendor is bound to tender a delivery order backed by the goods before 1 P. M. of due date. That will be on this occasion before 1 P. M. of the 25th of March 1914. In the event of his failure to do so, the buyer has three courses open to him: (1) to cancel the contract; (2) to buy at seller's risk, and (3) to close at the room-rate of the day. The first of these three courses, if left open, would practically put a stop to all cotton business in Bombay. That is the reason why all these contracts will be found, I believe, certainly the English contracts, to have a clause similar to the clause in this contract stipulating that in no circumstances is the contract to be cancelled. What, then, is the result if the seller does not tender a delivery order for the goods in due course? The buyer

may buy at seller's risk paying the difference if the market has fallen, or he may choose simply to close the contract without taking the goods by paying differences. If the seller refuses or negligently omits to tender, it is obvious that in a falling market the buyer stands in no need of any remedy whatever. The provisions of rule 17, which have the appearance of being optional, must, therefore, be understood, if business is to go on at all, as being imperative upon the other party to the contract. Very unfortunately, expert evidence which might have been available to the Court on the custom of the trade, particularly with reference to the substitution of railway receipts for delivery orders, was objected to by the defendant; and consequently I have not that material on the record which would enable me to give chapter and verse upon the highest authority for the proposition I am now stating as being a proposition generally true, applicable to and governing the cotton trade in this city. There can, I apprehend, be absolutely no doubt that between large firms thousands of deals are entered into under the Rules of the Bombay Cotton Trade Association, every contract including a term that the contract shall not be cancelled in any circumstances; and that the parties thereto settle under rule 17 in the manner I have described; that is to say, it would be the understanding between honest dealers that the party against whom the market had turned would, whether delivery were tendered or not, conclude the contract in the manner made optional to him by rule 17. He could not cancel the contract but he would be obliged, if he were an honest dealer, either to buy at the risk of his vendor and send him a difference note, stating the rates at which he bought and at which he had agreed to buy from the vendor, and pay the difference; or he would adopt the simpler course of merely invoicing the goods back to the vendor at the market rate of the day, again paying the difference. It is perfectly clear that if the contracts were allowed to be cancelled merely for non-tender of goods or delivery order, as is actually provided for in rule 17, a great part of the cotton business done on a large scale by the principal firms here would be paralysed. On the other hand, it is equally clear that the insertion of such a clause in the contracts indicates that they are essentially what the Courts would call wagering contracts, and, therefore, there might be some difficulty in enforcing them in a Court of Law. Doubtless, it is also for this reason that so little stress is laid upon the tender of the delivery order; for the non-tender of the delivery order, for all the purposes which the framers of the Rules had in view, could make no substantial difference to the losses or gains of the parties, once they had contracted themselves out of the liberty allowed to the party not in breach to cancel the contract. So that I do not doubt that in practice very little importance is attached to the actual tender of delivery orders or of goods where the contracts have been made rather for cover than with the object of actually obtaining goods, it being then the well-understood practice of the market that the loser on such contracts will follow out the intentions of the framers of the Rules, whether delivery was tendered or not, by adopting one or other of the two courses laid down in rule 17. The first course, *viz.*, the cancellation of the contract, must, I repeat, be kept out of view altogether.

Now, in a case like the present, the defendant is "bulling" the market, and accordingly on the settling day, the fall having been very heavy, stands to lose a considerable sum to the plaintiff. The plaintiff has goods in his possession and nothing could have been easier for him than to tender a delivery order backed by goods to the buyer. And what was puzzling me throughout the earlier part of the case was how a business man could be so utterly foolish as to neglect a natural precaution of that kind, which would have protected him against all the legal difficulties that have proved so insurmountable here. It was only when I came to read rule 17 much more carefully that I realised that between honest dealers the tender or non-tender of delivery really made no difference whatever. If the other party to the contract, whether delivery was tendered or not, is equally bound, as though upon a breach, to carry out the contract in one

or two ways I have mentioned and is prohibited from cancelling it, it becomes at once clear that nothing really turns upon the tender. Let us suppose that the buyer in a falling market really desired to get the goods he had bought. He cannot seriously pretend that he is damnified in any way by the plaintiff not tendering. All he has to do is to buy the goods in the market where he would get them at a much lower rate than that he was to pay the plaintiff. It is obviously, therefore, fallacious and hypocritical on the part of the defendant here to pretend that there has been a substantial breach of the contract on the plaintiff's part. Technically, no doubt, there has been, and that is the plaintiff's great misfortune. As the defendant had settled honestly in respect of half of the contract, the plaintiff might very reasonably have anticipated that he was an honest man who would settle up in respect of the other half. I cannot find that any tender was made of the 100 bales for which the defendant has paid differences, virtually invoicing them back to the plaintiff at the difference between the purchase rate and the rate of the day; and that is, of course, what he ought to have done in respect of the 100 bales now in dispute, and would have done if he had been acting in the spirit as well as the letter of the Rules of the Bombay Cotton Trade Association. For what appeared to me little short of insanity in a business man, namely, after having goods in his hands which he only had to tender in order to ensure great pecuniary gain he should not have made such a tender, becomes perfectly intelligible as soon as one realises that non-delivery never involves the cancellation of the contract and really leaves the parties practically where they were for settlement at the rate of the day on the day fixed for the performance of the contract. That too explains the class of cases upon which a reference was made by Mr. Hart, when Chief Judge of the Small Causes Court here, to Sir Charles Sargent and Farran, J.: see *Vanmali Hargovind* v. *Tarachand Ganeshamdas* (1). Unfortunately, however, this practice does not take into account the provisions of section 47 of the Indian Contract Act. And the answer given to the reference made by Mr. Hart establishes the simple proposition that any party shown to be in breach cannot approach the Court as a plaintiff in a suit for damages on the contract. That is the unfortunate position of the plaintiff here. Technically he is undoubtedly in breach inasmuch as he did not go through the form of tendering the delivery order backed by the goods to the defendant at his place of business at Kalbadevi before 1 P. M. of the 25th of March. Doubtless, realising the difficulty thus placed in his way, the plaintiff sought to overcome it by pleading that he had given the defendant the Railway receipt for 100 bales of cotton on the 19th of March 1914. He contended that giving a Railway receipt was tantamount to giving possession of the goods, and that, inasmuch as the defendant had accepted the Railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under rule 17. That contention, I am afraid, cannot be sustained. In dealing with Bengal cotton (and the contract here is for Bengal cotton), no doubt if evidence had been called, it would have been found that there is a custom peculiar to this branch of the trade and that that custom gives more importance to Railway receipts than could be given under a contract in common form such as I have to consider. In every contract intended to be governed by that custom of the trade I understand that the letters "R. T." (Railway Terms) ought to be inserted. If I found those terms in this contract, then it would have been open to the Court to invite the opinion of persons conversant with the trade to explain what the meaning of the terms was. But there is nothing in this contract, apart from the quality of the goods, to suggest that it differs in any respect from any other contracts made under the Rules of the Bombay Cotton Trade Association. Now, doubtless a person giving a Railway receipt for goods which he is bound to deliver before due date ordinarily does so with the object of making a partial realisation of the price. It is in

(1) (1891) Chitty and Pattell, Collection of Cases of the Bombay Small Cause Court, p. 305.

evidence here, though the evidence is not so clear as could be wished, that the party tendering the Railway receipt ordinarily expects 90 per cent. cash in advance. But it would still lie on the person bound to make a tender under rule 17 to satisfy himself that the goods covered by the Railway receipt had actually arrived in time. No obligation of that sort appears to be cast upon the takers of the Railway receipt who thereon advance 90 per cent. of the invoice value of the goods. I suppose this practice of giving Railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent. of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in rules 15 and 17. As to that I entertain no doubt whatever, It could not, I think, be otherwise. On a first view, it may seem hard upon a vendor who has given a Railway receipt for the goods which, in ordinary course, should arrive long before due date, that his vendee should hold the Railway receipt and not inform him that the goods had not arrived, so that he might, in the belief that they had, neglect to tender the delivery order backed by the goods before 1 P. M. on due date. I am assuming here that the defendant did not inform the plaintiff that the goods covered by the Railway receipt had not arrived. That is putting the position at the very highest in favour of the plaintiff. But even so, having regard to the practice of advancing 90 per cent. on the Railway receipt, I should still be of opinion that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that if he failed to do so he would not be absolved from the obligation of tendering the delivery order backed by the goods according to his contract.

This being my view of the legal relations existing between the parties, the case appears to be one in the eye of the law of extreme simplicity falling within section 47 of the Indian Contract Act. Under that section, there was a specified time before which the plaintiff agreed to tender the goods sold. When I first read rule 17 I thought perhaps that the word 'tender' had been loosely used by the framers of those Rules without the intention of giving it its ordinary sense or making it mean more than the wider word 'give.' If the word had been 'give' instead of 'tender,' then, no doubt, it would have been an open question whether in the facts disclosed here it was for the defendant to ask for the goods or for the plaintiff to offer them. On a re-consideration of the rule, however, I can entertain no doubt but that the framers meant the word 'tender' to have its full legal connotation; for if he wishes to be on the safe side, the vendor is bound to tender without any demand being made by the purchaser; and if he fails to do so, although should he be dealing with an honest buyer he is in no danger of incurring any loss, yet if he in dealing with a dishonest buyer, as in the present case, he clearly precludes himself from having any access to the Courts of law. He cannot come here and complain that he has been damnified by the breach of the contract made between him and the defendant when on his own admission it is he who has first broken the contract. I have already explained that this is technical rather than substantial; and, according to what I believe to be the universal understanding of the market, the plaintiff, in a case like this, would have committed no fault whatever and all the dishonesty would have been on the side of the defendant. But the law, in its extreme zeal to suppress gambling transactions and in its jealous desire to preserve public morality, always succeeds, in my opinion, in ultimately making itself the instrument of injustice and the protector of the dishonest against the honest gambler. Considering that in all mercantile operations on a large scale there must evidently be a considerable element of what the law calls wagering, we find in an instructive case of this kind how hardly the legal doctrine of wagering may often press against the innocent and shield the guilty. It cannot be doubted that but for the apprehension of those whose transactions must occasionally bring them very close to the domain of wagering and yet who are in every sense perfectly honest dealers, the Rules of this Association would have been worded in a much more simple, direct and satisfactory manner.

Being perfectly satisfied of the real merits of the case and that on the ground of morality all those merits are on the side of the plaintiff, I shall, in dismissing his suit, direct that each party bear his own costs.

*Suit dismissed.*

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MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 52 OF 1914.

January 11, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

BAYYANA RAMAYYA—PETITIONER—APPELLANT

*versus*

NIDAMARTHI KRISHNAMURTHI AND OTHERS—COUNTER-PETITIONERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 16 - Application for execution by transferee of decree—Transferee, what must prove*—Benamidar *transferee, whether entitled to execute.*

Where an alleged transferee of a decree applies for execution under Order XXI, rule 16, Civil Procedure Code, he has first got to prove his right under the transfer set up by him and it is only after he has done so that the question of adjustment of the decree arises. [p. 953, col. i.]

*Agra Bank* v. *Cripps*, 8 M. 455; *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar*, 7 Ind Cas. 55, 12 C. L. J. 312, dissented from.

An alleged transferee of a decree is not entitled to execute the decree when he is found to be only a *benamidar* for the judgment-debtor [p. 953, col. i.]

*Annabattula Venkataratnam* v. *Annabattula Nayudu*, 28 Ind. Cas. 906, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 23 of 1913, preferred against the order of the Court of the District Munsif of Ellore, in Execution Petition No. 506 of 1912 in Original Suit No. 295 of 1910.

Mr. *P. Somasundaram*, for the Appellant.

Mr. *P. Chenchiah* for Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—The appellant, who had obtained transfer of a decree against the 1st respondent and others, applied under Order XXI, rule 16, Civil Procedure Code, for execution and to be recognized as transferee. The application was opposed by the 3rd defendant (1st respondent) on the ground that the transfer was *benami* and that the decree had been satisfied by the 1st defendant paying the decree amount to the original plaintiff.

The finding of the lower Appellate Court was that the appellant did not pay any consideration for the transfer, and that, being only a *benamidar* for the 1st defendant by whom the decree amount had been paid, the Court could not recognise the appellant as transferee decree-holder.

The only point argued in this appeal is that, as the payment was not certified to the Court, Order XXI, rule 3, Civil Procedure Code, operates as a bar to the 1st respondent's plea of no title in the appellant, and that the 1st respondent was not entitled to prove the alleged uncertified payment.

We have been referred to *Ponnuswami Nadar* v. *Letchmanan Chettiar* (1), a case which is in some respects similar to the present one, in which the learned Judges Abdur Rahim and Sundara Aiyar, JJ., differed as to the scope of Order XXI, rule 2.

Mr. Justice Abdur Rahim held that, if the arrangement alleged amounts to an adjustment of the decree and is not certified to the Court, it cannot be pleaded as a bar to execution, and that an assignment is nonetheless an adjustment or satisfaction of the decree because it is obtained in the name of another person as a mere *benamidar* for the judgment-debtor.

On the other hand, Mr. Justice Sundara Aiyar was of opinion that rule 2 of Order XXI, Civil Procedure Code, does not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted.

Speaking with respect, it appears to us that the view taken by Sundara Aiyar, J., as to the applicability of Order XXI, rule 2, Civil Procedure Code, is the correct one, and that the section merely forbids effect being given to an uncertified payment when it is set up as a defence to an application of the execution of decree and when such application is made by a person who is admitted

(1) 12 Ind. Cas. 657, 35 M. 659; 10 M. L. T. 442; (1911) 2 M. W. N. 568; 22 M. L. J. 170.

or proved to be the legal owner of the decree rights, the question of payment towards or adjustment of the decree being left out of consideration for the moment, while deciding the question of the legal ownership in the applicant of the right to execute the decree. In other words, the alleged transferee has first to prove his right under the transfer set up by him, and it is only after he has done so that the question of adjustment of the decree arises.

In so agreeing with Sundara Aiyar, J., we should add that we do not agree with the very wide observations found in *Agra Bank* v. *Cripps* (2) and *Mon Mohan Karmakar* v. *Dwarka Nath Karmakar* (3 (two of the cases referred to by Sundara Aiyar, J., in his judgment) to the effect that uncertified payments can be treated as discharging a decree even when the subsequent transferee of the decree is a transferee for value.

Strictly speaking, it was not necessary for the 1st respondent to do more than allege that the appellant was not the real transferee in order to defeat the appellant's claim to execute the decree and the addition of the allegation that the decree had been legally satisfied might be treated as surplusage. The rule provides that a Court executing a decree shall not recognise a payment or adjustment which has not been certified for any purpose whatsoever. It seems to apply to cases where it is contended that the decree having been satisfied is not executable and no question arises as to whether the applicant is the decree-holder or not. In this case, the applicant's right as transferee was denied by the 1st respondent. We think that the Subordinate Judge was right in holding that the applicant was not entitled to apply to execute the decree on the basis of an assignment in respect of which he is a *benamidar* for one of the judgment-debtors. In *Annabattula Venkataratnam* v. *Annabattula Nayudu* (4), Sankaram Nair and Spencer, JJ., express the opinion that when the alleged transferee of a decree is found to be the *benamidar* of the judgment-debter, the Court "was bound by the second proviso to Order XXI, rule 16, to refuse to allow the decree to be executed" in favour of the alleged transferee. This decision supports the view of Sundara Aiyar, J., above referred to.

The appeal is dismissed with costs.

*Appeal dismissed.*

(2) 8 M. 455.
(3) 7 Ind. Cas. 55 12 C. L. J. 312.
(4) 28 Ind. Cas. 906.

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ALLAHABAD H'GH COURT.

FIRST CIVIL APPEAL No. 411 OF 1913.

January 7, 1916.

*Present*:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Rafique.

NAUBAT RAI AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

*Thakur* DHAUNKAL SINGH—PLAINTIFF—RESPONDENT.

*Registration Act (XVI of 1908), ss. 17 (2), 50 (1)—Unregistered contract of sale Subsequent registered sale-deed—Priority—Burden of proof—Specific Relief Act (I of 1877), s. 27—Specific performance of contract.*

An unregistered contract of sale was executed on 2 th December 1910 in favour of the plaintiff. Subsequently on the 26th of July 1912 the property was sold away to the defendants Nos. 3 and 4 under a registered sale-deed. In a suit for specific performance of contract:

*Held*, that the registered sale-deed had no preference over the unregistered contract for sale. [p. 954, col. 2.]

*Held*, further, that the onus lay upon the defendants Nos. 3 and 4 to show that they had no notice of the contract for sale in favour of the plaintiff. [p. 954, col. 2; p. 955, col. 1.]

First appeal from the decision of the Subordinate Judge of Aligarh, dated the 27th of August 1913.

Dr. *Sunder Lal*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for specific performance of a contract alleged to have been made by the defendants Nos. 1 and 2 in favour of the plaintiff. The alleged contract is dated the 24th of December 1910. It was for the sale of a village called Bimpur Khurd for the price of Rs. 21,000. As part of the consideration the purchaser was to be entitled to set off the amount due for principal and interest upon a certain promissory note, dated the 15th of December 1910. It appears that the village had already been sold in execution of a decree against the vendors and the sale was conditional upon this auction sale being set aside. The auction-sale, we may here mention, was subsequently set aside under a compromise. In the Court

below defendants Nos. 1 and 2 pleaded that there was no real intention ever to sell the property to the plaintiff, but that the transaction between them (which admittedly was executed) was merely for the purpose of strengthening the application to set aside the auction sale on the ground of inadequacy of price. The defendants Nos. 3 and 4 (who are appellants here) pleaded that they were *bona fide* purchasers without notice under a sale-deed dated the 26th of July 1912. They further pleaded that inasmuch as at the time of the alleged contract with the plaintiff the property had already been sold by auction sale the contract was void. The Court below has found that there was no solid foundation for the plea of the defendants Nos. 1 and 2.

They have not appealed and there is now no controversy on the question of the genuineness of the contract of sale made in favour of the plaintiff. The Court below has found that Naubat Rai and Nek Ram were aware of the sale to the plaintiff and has accordingly decreed the plaintiff's claim. In appeal it has been urged that the evidence of knowledge of the defendants is unreliable and unsatisfactory. It is further urged that having regard to the provisions of section 50 of the Registration Act the registered sale-deed in favour of the appellants must have preference over the unregistered contract in favour of the plaintiff and that the onus lay upon the plaintiff of showing that the appellants had knowledge of the contract of sale. There is evidence on the record that Naubat Rai (who had the sale carried out on behalf of himself and his co-purchaser) was actually present at the time the contract in favour of the plaintiff was made and executed. Apart from this it appears that Naubat Rai has two brothers, Banke Lal and Gulzari Lal. They all then lived together. Banke Lal is the *patwari* of the very village which was sold. It has been sworn to by a witness that not only Naubat Rai but this man Banke Lal was present at the time that the contract of sale was made in favour of the plaintiff. It is almost certain that Banke Lal knew of the contract. Banke Lal was not produced. There can be little doubt that these circumstances weighed very much with the Court below when it came to its decision that Naubat Rai and his co-purchaser knew of the contract in favour of the plaintiff. It is of some importance to consider the point of law raised by the appellants. No doubt if the onus lay on the plaintiff of showing that Naubat Rai and Nek Ram were aware of the sale and if we were confined to a consideration of the oral evidence and had to disregard surrounding circumstances and probabilities, the case might present some difficulty. It seems to us, however, that the contention of the appellants that their sale-deed must be preferred to the unregistered contract in favour of the plaintiff has no force. Section 50, clause (1), of the Registration Act of 1908 no doubt provides that a document duly registered takes effect against every unregistered document relating to the same property, whether such unregistered document be of the same nature as the registered document or not. But clause 2 expressly provides that the section shall not apply to any document mentioned in sub-section 2 of section 17 of the Act. One class of documents mentioned in clause (2) of section 17 is "any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of Rs. 100 and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title, or interest." It seems to us that this class includes a contract for sale. If then the provisions of section 50, clause (1), of the Registration Act have no application, we have to look to section 27 of the Specific Relief Act to see what are the rights of the parties. That section provides as follows: "Except as otherwise provided by this chapter, specific performance of a contract may be enforced against (*a*) either party thereto; (*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract."

It seems to us that regard being had to the provisions of this section the onus lay upon the appellants to show that they

had no notice of the contract in favour of the plaintiff. Having regard to the evidence in the case and the surrounding circumstances, we have no doubt whatever that the appellants (or at any rate Naubat Rai who acted for himself and his co-purchaser) were fully aware of the contract for sale in favour of the plaintiff. The result is that the appeal fails and is dismissed with costs including in this Court fees on the higher scale.

*Appeal dismissed.*

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MADRAS HIGH COURT.

CIVIL APPEALS NOS. 277 AND 321 OF 1914.

November 26, 1915.

*Present*:—Mr. Justice Coutts Trotter and Mr Justice Srinivasa Aiyangar.

APPATHURAI AIYER'S DAUGHTER THYALAMBAL—PLAINTIFF—APPELLANT IN A. S. NO. 277 AND RESPONDENT IN A. S. No. 321

*versus*

NANU PATTAR'S SON KRISHNA PATTAR AND OTHERS—DEFENDANTS—RESPONDENTS IN A. S. NO. 277 AND APPELLANT IN A. S. NO. 321.

*Hindu Law—Self-acquired property, whether can be converted into family property—Right of widowed daughter-in-law to be maintained out of family property—Wedding-presents, nature of.*

*Coutts Trotter J.*- If a man has property which he has acquired by his own exertions, but shows by his subsequent conduct and subsequent dealings with that property that his intention was that it should be regarded, and he himself regards it, as being property in which his family has a share, then that becomes thenceforward family property under the Hindu Law. [p. 957, col. 2.]

*Rampershad Tewarry* v. *Sheochurn Doss*, 10 M. I. A. 490; 2 Sar. P. C. J. 177; 19 E. R. 058; *Sudarsanam Maistri* v. *Narasimhulu Maistri*, 11 M. L. J 353; 25 M. 149; *Laldas Narandas* v. *Motibai*, 10 Bom. L. R. 175; *Haridas Velji* v. *Velji Chalurbhuj*, 20 Ind. Cas. 476; 15 Bom. L. R. 584; *Karsondas Dharamsey* v. *Gangabai*, 10 Bom. L. R. 184; 32 B. 479; *Madhavaiya Chetty* v. *Damodaram Chetty*, 17 Ind. Cas. 347; (1912) M. W N. 972, 12 M. L. T. 240, followed.

Where, therefore, in a suit for maintenance by the widow of a predeceased son against her father-in-law, it appeared that the defendant had been constantly associating his eldest son with him on different business transactions and there was no evidence to show that he had any intention of drawing any distinction in tenure between the different classes of property:

*Held*, that the defendant had by his conduct converted the suit properties into family properties out of which the plaintiff had a right to be maintained. [p. 959, col. 2.]

Wedding presents given to a Hindu woman in the shape of jewels and clothes at the time of her marriage are her separate property intended to be enjoyed by herself and there is no presumption that they form part of the family property. [p 960, col 1]

*Srinivasa Aiyangar, J.*—(*Quære*).—Whether a member of a joint Hindu family who owns an immoveable property as his self-acquisition can convert it into joint property, without an instrument in writing registered, in provinces where the Transfer of Property Act is in force? [p. 960, col. 2.]

Appeals against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Pauper Original Suit No. 1 of 1913.

Messrs *T. Rangachariar* and *T. R. Krishnaswami Aiyar*, for the Appellant in Appeal No. 277 of 1914 and for the Respondent in Appeal No. 321 of 1914.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Narayanaswami Aiyar*, for the Respondents in Appeal No. 277 of 1914 and for the Appellants in Appeal No. 321 of 1914.

These appeals coming on for hearing on the 30th of September 1915 and the 1st October 1915, the Court delivered the following

JUDGMENT.

COUTTS TROTTER, J.—It will be convenient to dispose of these two appeals together, as they arise out of the same series of transactions between the same parties. The plaintiff is a widow who was the wife, during his life-time, of a younger son, the second son, of Krishna Pattar, the 1st defendant in the action; the other two defendants being Ananthanarayana Pattar and Vydianatha Pattar, his other two sons, one older and the other younger than the plaintiff's deceased husband. She sues the family of her husband for maintenance, alleging that there are family properties, moveable and immoveable, out of which she is entitled to be maintained, her husband having been during his life-time a co-parcener in that family property. The answer made by the defendants is that these are not, and never were, family properties and that they were in their origin the self-acquisitions of the 1st defendant, that they have always remained so and that nothing has taken place which, either in fact or by construction of law, has divested them of their character as self-acquisitions and converted them into family properties. Now

before dealing with the considerations of law applicable, it is as well to see exactly what the facts proved are.

The 1st defendant Krishna Pattar began, so far as we know, to engage in business somewhere about the year 1870, because the earliest document exhibited in the case which relates to his transactions in business is Exhibit V, which shews that in that year, 1870, he had started a *kuri* or chit fund. The amount was not large; the total amount was Rs. 350. Other similar transactions follow into which it is unnecessary to go. But it may be presumed that by the year 1882 he had made some profits out of these transactions, and by means of them had acquired some property. In the year 1882 a suit was brought for partition against Krishna Pattar by his elder brother, Sami Sastri, and after that litigation had been pending for some time, it was settled; and the settlement which is dated the 21st August 1883 resulted in this: that Krishna Pattar was to pay a sum of Rs. 1,125 to his brother and receive from him certain interests which the elder brother had in various *kuris*; and there was a division of certain properties whereby one brother got the ancestral house and the other got another house belonging to the family. The learned Judge observes, possibly with justice, that the only nucleus of property which can be supposed to have passed to the 1st defendant on that occasion was the house, and that cannot be a source of future accretions, because it was needed for his residence. In the course of that litigation the 1st defendant put in a written statement in which he asserted that the allegation in the plaint that he and his brother were undivided was untrue; that they had been separated for years, and speaking of the properties which he alleged to have been in his exclusive possession he said this: "I hold those properties under my control and *my family and myself* enjoy them by virtue of the right thus derived." That document was dated the 6th February 1883, and it is said that there is nothing to show that at that time he had a son at all. But we find that his eldest son was obviously of age by the year 1900, so that it seems clear that he was born by the date of this written statement. Besides this sentence which I have already read, there occurs the following statement: "I also hold in my possession and control 'certain property' which *my family and myself* are enjoying by virtue of the purchase I made." Now it is urged upon us that that document in itself points to this: that the purchases which were being made by the 1st defendant, even if they came out of his self-acquired funds, were regarded and spoken of by him as being property in which his family had a vested interest.

The next document is a document dated the 15th December 1900 (Exhibit C) and which is a *kuri* agreement defining the contract between the persons who were to take shares in the *kuri* and the persons who were to receive the moneys and manage it, and those latter persons were the 1st defendant and his eldest son Ananthanarayana Pattar, the 2nd defendant in this case. The agreement recites that the *kuri* was started for "our family necessity by the father and son." It is suggested that the only meaning that can be attached to that is that the enterprise, and, therefore, consequently the whole profits of it, were treated as a joint affair between the father and the son.

The next document of importance is a mortgage-bond of the 3rd of October 1902 (Exhibit A) purporting to be executed in favour of the 1st defendant and his son Ananthanarayana Patter, the 2nd defendant, by two mortgagors. That document was executed in favour of both. Those mortgaged properties were eventually purchased by Mr. T. R. Rama Chandra Aiyar, a well-known practitioner in these Courts; and having purchased the equity of redemption, he wished to pay off the mortgage and get an unencumbered property. Accordingly he went down to Coimbatore in February 1907 for that purpose. When he got to Coimbatore, he had an interview with the 1st defendant. A very remarkable conversation took place between them there, and the conversation broadly was this: that the 1st defendant evinced a desire to sign the discharge, *i.e.*, the endorsement of payment on the mortgage-bond himself. Mr. Rama Chandra Aiyar pointed out that that would not do, that the document stood in

the names of both the 1st defendant and the 2nd and that he was not going to be satisfied with anything less than the signatures of both of them. Thereupon the 1st defendant said that that might be done, but that, at any rate, he would insist upon a statement being put on the document that the money that had been lent was his money and no body else's. Mr. Rama Chandra Aiyar asked why? He said 'Oh, I have an object in doing that'. Thereupon Mr. Rama Chandra Aiyar asked him 'Is your object to defeat the daughter-in-law's claim for maintenance?' and he admitted it was. At that time the only concern of Mr. Rama Chandra Aiyar was to get the two signatures on this document. So he permitted the 1st defendant to endorse upon this mortgage this statement: "out of the principal sum of this bond executed in favour of both of us upon the advance made of the money of Krishna Pattar, one of us, etc." Of course if the money which formed the advance was advanced by Krishna Pattar solely, and if he advanced it with a view solely to increase his own property and had no idea of its being family property, the fact that he made that endorsement carries the case no further. But I cannot follow the learned Subordinate Judge at all in excluding the possibility, as he does, that this was done for the deliberate purpose of creating evidence in his favour to defeat the claim for maintenance, if such a claim be made; and I certainly, speaking for myself, can never find a man manufacturing evidence in support of a claim without having a very lively suspicion roused in my mind that that claim is not an honest one. It is not an infallible test, but it goes a good way to show that the claim was not an honest claim. After that matters went on and we observe that a considerable time after the date of this endorsement nearly three years later another *kuri* agreement was executed on the 10th February 1910 (Exhibit D) in which, as before, the persons who contracted as stakeholders were Krishna Pattar and his son Ananthanarayana Patter. It is said by Mr. Anantha Krishna Aiyar 'well, there you see in spite of his trying to defeat his daughter-in-law's claim by making this endorsement on the mortgage, why here you have him three years later openly and quite ingenuously writing the *kuri* deed just as he did before.' I do not think that is a conclusive argument. His daughter-in-law was very very slow in making her claim, and I think that his suspicions and anxieties on that subject had been lulled to sleep by the delay and that he reverted to the former practice of carrying out these transactions in the joint names of himself and his son.

Now the question arises, what in those circumstances is the legal position? As I understand it—I have some diffidence on matters of Hindu Law—as I understand it, the way in which the case for the respondent is put is this. It is said, you cannot divest an interest which lies in one person in favour of that person together with others without effecting what in fact is a transfer of property. Property is transferred from a single owner to a number of owners, and it is said the first principle to start with since the Transfer of Property Act is that a transfer of immoveable property by one person to others cannot be effected except by a registered deed. On the other hand, it is said this is a matter to which the Transfer of Property Act does not apply and the Hindu Law is saved from its operation in matters of this kind. Now, therefore, the question is, does the Hindu Law contemplate and provide for a case of property which was originally the self-acquisition of one member passing into the category of family property? On a consideration of the authorities which have been cited to us, it seems to me clearly laid down by decided cases that the Hindu Law does contemplate such a condition. If a man has property which he has acquired by his own exertions, but shows conclusively by his subsequent conduct and subsequent dealings with that property that his intention was that it should be regarded, and he himself regards it, as being property in which his family has a share, then that becomes thenceforward family property under the Hindu Law. The first authority cited to us is *Ramp rshad Tewarry* v. *Sheochurn Doss* (1). The material passage is at page 505 where

(1) 10 M. I. A. 490; 2 Sar. P. C. J. 177; 19 E. R. 1058.

this is said: "Upon the facts it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family, and there was a nucleus of ancestral property." Their Lordships state that the nucleus was infinitesimal. "It may be further admitted that Deenanath laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate, property that which he acquired at Agra. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners, and that thenceforward they carried on business together, each contributing by his exertions to the increase of the common stock..... There is nothing *prima facie* improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions would, according to the general principle of Hindu Law, be the joint property of the family whilst undivided, and be partible as such on a partition. There is no proof of any special contract .....which impressed the character of partnership as distinguished from joint or separate property, in the Hindu sense of these terms, upon the property in question." And thereupon, their Lordships found that in the case of that property, although originally acquired by one of the brothers, starting with a nucleus of family property which was infinitesimal, yet they found that that self-acquired property of the one brother having been used as capital for the joint business of the whole family, the whole property became impressed with the characteristics of family property. The next case which I propose to refer to is *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2). It is a very elaborate and learned judgment of Bashyam Aiyangar, J. The material passage is at page 154: "The main family and its branches may possess joint property not only by operation of law but also by act of parties. Property acquired without the aid of joint family property, by one or more individual members thereof,—whether they belong to different branches or to one and the same branch of the family—may by act of parties be incorporated with the joint property of the main family or of one of its branches; and a stranger may also give property to the family as a whole, or to one of its branches, as a corporate body. Even if the undivided family is not possessed of any nucleus of property which has come to it as 'unobstructed heritage', it may be that, by act of parties, property acquired jointly by all the members, or separately by one or more members thereof, can be impressed with the character and incidents of unobstructed heritage or joint property belonging to the main family or to any of its branches. Property devolving by inheritance as 'obstructed heritage' on all the members of a joint family, or upon any one of them, may likewise be impressed with the character of joint family property." That is a clear statement that property, even where there is no starting nucleus of property inherited from ancestors, may become family property subject to the ordinary incidents of the Hindu Law. The next case is *Laldas Narandas* v. *Motibai* (3). It is a judgment of Chandavakar, J., and what he says is this: "If Narandas (the defendant in that case) and his sons acquired their property by their joint labours and were besides joint in food and worship, they must be regarded as having constituted a joint Hindu family, even though there may have been no nucleus of property which had come down to Narandas from his father or grandfather or great-grandfather. For the formation of a co-parcenary in Hindu Law such a nucleus is not absolutely necessary, provided the persons constituting it stand in the relation of father and son or other relation requisite for a co-parcenary system and these persons by living, messing and worshipping together and throwing all the property acquired jointly into one common stock manifest their intention to deal with one another and with outsiders as members of a co parcenary system under the Hindu Law." And he goes on to hold on the facts proved in that case that the property had acquired the character of joint family

(2) 25 M. 149; 11 M. L. J. 353.

(3) 10 Bom. L. R. 175.

property. That decision is followed in two decisions of the Bombay Court by Beaman, J. The first is *Hari Das Velji* v. *Velji Chaturbhuj* (4), where he expressly decides that the members of a joint Hindu family may by their intention expressed in their conduct impress upon any property, which did not possess it before, the character of joint family property, and he further goes on to lay down that not only may that be done, but that any member of a joint Hindu family who desires to retain his self-acquisitions for himself should do so in express terms and keep them apart carefully from the joint property of the family, or else he will fail to preserve to them their character of self-acquisitions. The second case decided by the same learned Judge was *Karsondas Dharamsey* v. *Gangabai* (5). In the case he re-affirmed and abided by his decision in the earlier case. Both of those decisions have been alluded to and have been followed by a learned Judge of this Court, Bakewell, J., in *Madharaiya Chetty* v. *Damodaram Chetty* (6). That is only a *nisi prius* decision, but at the same time it shows that the doctrine laid down by Beaman, J., cannot be considered to be peculiar to the Bombay Presidency. Such being the state of the authorities, I feel constrained to accept the view enunciated in those cases that it is possible in law for a member of a Hindu family who has got self-acquired properties to convert them, if he chooses, into family property in which the other members of his family will have a vested interest.

The only question that remains is this. Whether in my view of the law the facts in this case point to the conclusion that the 1st defendant did convert his property into family property or not. I think it quite impossible to distinguish one set of property from another and indeed the *a priori* improbability of a man, without any expressed disposition to separate, desiring to hold some of his properties as separate property and some as joint with his sons is very great. But suffice it to say that there is no evidence in this case of any intention on the part of the 1st defendant to draw any distinction in tenure between the different classes of property. Having regard to the documents, having regard to the association of his eldest son with him in two utterly different sets of transactions, the *kuri* business and the taking of a mortgage of land, I think that the inference must be drawn that he intended to make the property, and regarded it, as family property. If his son had been associated with him in the *kuri* transaction alone, the inference might be less strong; for he might very well have thought that for the purposes of that particular business a young man with possibly a commercial aptitude should be associated with him. No such consideration could possibly apply to the taking of the mortgage. A lame story is told by the 1st defendant that it was done at the instance of a mortgagor. That is not a very credible story. I think it was probably done at the instance of the 2nd defendant himself, who having been treated as a sharer in the previous transactions wished to assert his right. With regard to the other sons, it is very uncertain as to what the plaintiff's deceased husband's age was. It is, therefore, impossible to draw any inference from his name not appearing in any of the documents which record the transactions entered into by the father, as he may have been a minor at all the material dates. With regard to the 3rd son, the 3rd defendant, his name would not appear in any event because he was admittedly a minor throughout. In these circumstances I come to the conclusion that the 1st defendant has ever since the year 1882 elected and wished to treat this property as family property, and that the documentary evidence in the case, coupled with the extremely unsatisfactory nature of the oral evidence on his behalf, is sufficient proof of that to enable me to act upon it. I, therefore, hold that these suit properties are properties out of which this lady has a right to be maintained.

The only question is as to what that maintenance shall be. The learned Judge has awarded her Rs. 100 per annum in cash and further 200 *paras* of paddy, which is said to work out at the rate of another Rs. 100 per annum, on the supposition that

(4) 20 Ind. Cas 476; 15 Bom L. R. 584.
(5) 32 B. 479; 10 Bom. L. R. 84.
(6) 17 Ind. Cas. 347; 12 M. L. T. 240; (1912) M. W. N. 972.

this Court might hold that she was in law entitled to maintenance. We think Rs. 100 in cash was a quite proper sum; but we think 200 *paras* of paddy excessive and we reduce that by one half. The order will be that the plaintiff is to be given maintenance at the rate of Rs. 00 in cash and 100 *paras* of paddy per annum. The maintenance will be payable once in six months, on the 5th January and the 5th July each year. The arrears of maintenance will be at the rate of Rs. 100 a year. The plaintiff will also be entitled to Rs. 3 per mensem for house rent. This appeal will be allowed with costs throughout proportionate to the amount recovered.

With regard to the other appeal, Appeal No. 321 of 1914, that is an appeal by the defendants against a judgment ordering them to return to the plaintiff certain moveable properties or in the alternative their value. Those properties are claimed by the plaintiff as the heir of her husband as to some items; as to others she claims to be the owner on the ground that the things were given to her for her own use at the time of her marriage. It is suggested that these articles are what may popularly be called wedding presents. It was at one time suggested by Mr. Ananta Krishna Aiyar that where presents are given in these circumstances the presumption would be that they became part of the joint family property of the husband. That seemed to me—I speak with all diffidence on account of my small knowledge of these affairs—it seemed to me an extravagant hypothesis, and as my learned brother very emphatically resisted that opinion, I feel on safe ground in rejecting it. With regard to the presents given to the wife such as clothes and jewels, they were intended to be enjoyed by herself. But we think certain items have been allowed which we think should not be allowed. There are certain sums of cash, items 23, 42 and 43 of the plaint schedule, which Mr. Rangachariar very properly and wisely abandoned. It is impossible to identify these sums of cash and follow the particular coins in the hands of the defendants. There are other items such as vessels, clothes and so forth, items 41, 44, 45, 46, 49 and 50, which are of so perishable and transient a nature that we think it would be quite ridiculous to make an order upon the defendants in respect of these after the lapse of more than ten years. This appeal is, therefore, allowed as to a sum of Rs. 924. Deducting that from the amount allowed by the learned Judge there will be an order directing the defendants to pay the plaintiff Rs. 1,930 4-0. Each side will bear its own costs.

SRINIVASA AIYANGAR, J.—I agree to the order proposed by my learned brother. Whether a member of a joint Hindu family who owns immoveable property as his self-acquisition can convert it into joint family property without an instrument in writing registered in the provinces where the Transfer of Property Act is in force, I think, admits of doubt. Section 2 of the Transfer of Property Act to which Mr. Rangachariar referred has no application whatsoever to this case. Any rule of Hindu Law would not be affected by the provisions contained in Chapter II of that Act. I find some difficulty in understanding the conversion of individual property into joint family property except by way of a transfer. That transfer may be by way of a gift, or it may be by way of an exchange; and it is also possible that it may be by way of a sale. It is no doubt true that the Transfer of Property Act does not provide for all kinds of transfers; but on analysis it will be found that such a conversion would partake of a character of one or the other of these transactions. It may be possible for one member of a family to acquire property on behalf of the family, although it may be by his own exertions. But I do not think it necessary to come to a final determination on either of these two questions; for, as has been pointed out in the judgment of my learned brother, so early as 1883 1st defendant said that from 1869, long prior to the coming into force of the Transfer of Property Act, he was in possession of properties belonging to the family and which were enjoyed by the family. Whether there was an original nucleus or not, prior to 1882, so early as 1866, and later, the family was possessed of properties according to the admission made by the 1st defendant himself. There is nothing to show that the later acquisitions were not made out of funds which then were family funds, and

the evidence in the case clearly leads to the conclusion that the 1st defendant treated the whole property as family property.

It is unnecessary for me to go in detail over the facts dealt with in the judgment just now delivered by my learned brother. I, therefore, agree to the order proposed.

This case having been set down for being spoken to this day, the Court delivered the following

JUDGMENT.—Parties be at liberty to apply to the lower Court to vary the security or substitute other security.

*Appeal allowed.*

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PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1893 OF 1912.

December 23, 1915.

*Present:*—Mr. Justice Shadi Lal and Mr. Justice Leslie Jones.

ABDUL AZIZ KHAN AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

KALA SHAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Sale—Payment of consideration, whether necessary to pass title—Registration of sale-deed, effect of—Intention of parties—Suit for redemption—Mortgagee, possession of.*

Ordinarily upon the due execution and registration of a sale-deed the title in the property sold passes from the vendor to the vendee, unless it is proved that both the parties intended that the payment of price should be a condition precedent to the transfer of ownership. [p. 962, col 1.]

*Bhagan* v. *Allah Ditta*, 9 Ind. Cas. 547; 55 P. R. 1911; 27 P. L. R. 1911; 41 P. W. R. 1911, referred to.

Where, therefore, a sale-deed was properly executed and registered and the vendor recited in the deed and admitted before the Sub-Registrar that he had received the entire consideration but no part of the price was ever paid to him:

*Held*, that, despite the non-payment of consideration, the terms of the deed coupled with the acknowledgment before the Sub-Registrar showed that the vendor intended to divest and did indeed divest himself of the ownership which immediately vested in the vendee. [p 962, col. 1.]

*Abbas Ali Shah* v. *Pir Bakhsh*, 132 P. R. 1879, followed.

In order to prove to have acquired title by adverse possession a mortgagee cannot rely on 12 years' rule unless he proves a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. [p. 963, col. 1.]

*Khiarajmal* v. *Daim*, 32 C. 296 (P. C.); 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N 201; 7 Bom. L. R. 1; 32 I. A. 23; *Pandu Lakshman Masurekar* v. *Anpurna*, 21 B. 793; *Byari* v *Puttanna*, 14 M. 38; *Jiwa Khan* v. *Lakhmi Chand*, 11 Ind. Cas. 429; 146 P. W. R. 1911; 232 P. L. R. 1911, referred to.

Second appeal from the decree of the Divisional Judge, Multan, dated the 19th August 1912, modifying that of the District Judge, Multan, dated the 8th August 1911, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Mr. *Broadway* and Mr. *Siva Ram Singh*, for the Respondents.

JUDGMENT.—On the 9th of April 1873, the plaintiff, Pir Shah, and his brother Kalandar Shah, since deceased, mortgaged with possession for Rs. 3,500 certain plots of land, of which the defendants, the successors-in-interest of the mortgagees, are now in possession. Pir Shah brought the present suit for redemption of the entire estate and the claim was resisted on the grounds (1) that Pir Shah had sold the equity of redemption in the moiety of the estate to one Jam Jahania, who had transferred his rights to the defendants; and (2) that Kalandar Shah's heir was one Jindwadda Shah, who had sold the equity of redemption in the remaining moiety to the defendants. The Court of first instance decided in favour of the plaintiff on both these points; but upon appeal, the learned Divisional Judge accepted the first contention of the defendants and negatived the second. He, accordingly, granted the plaintiff a decree for redemption of one-half of the land; and both the parties have preferred appeals against that decree. These appeals shall be disposed of by this judgment.

As regards the sale by Pir Shah to Jam Jahania, it is undeniable that on the 19th of December 1881 he executed and registered a sale-deed in favour of the latter for Rs. 3,000 and recited in the deed and admitted before the Sub-Registrar that he had received the entire consideration. It is, however, clear that no part of the price was ever paid to him and that consequently mutation in favour of the vendee in pursuance of the sale was refused by the Revenue Officer. The question arises whether the non-payment of the price had the effect of avoiding the sale transaction. Now, the law on the subject, as enunciated in

ABDUL AZIZ KHAN v. KALA SHAH.

*Bhagan* v. *Allah Ditta*(1) and other judgments, is to the effect that to make a sale complete it is not necessary that the price should be paid, but that ownership does not pass, if there is proof of intention on the part of both parties that ownership should not pass till payment of consideration. Ordinarily, upon the due execution and registration of the sale-deed the title in the property passes from the vendor to the vendee, unless it is proved that both the parties intended that the payment of price should be a condition precedent to the transfer of ownership. In the case before us, it is plain that the vendee, at any rate, intended the immediate transfer of ownership and his intention is placed beyond a shadow of doubt by the elaborate and underhand method adopted by him, in the absence of Pir Shah, to have the mutations effected in his and defendants' favour in 1887 and 1888. And as regards vendor's intention there can be little doubt that despite the non-payment of consideration, the terms of the deed coupled with the acknowledgment before the Sub-Registrar show that in December 1881 he divested himself of the ownership which vested immediately in the vendee.

*Ex facie*, the instrument is a conveyance of title and there is no indication therein or in the statement of the vendor before the Sub-Registrar that the parties intended that the *dominium* should not pass until the consideration was paid. Indeed, as observed already, the vendor actually acknowledged the receipt of consideration, and, the property being in the physical possession of the mortgagees, he had done everything to complete the transaction. The object of mutation in revenue papers is to bring the revenue records up to date and an entry in favour of the vendee is obviously not essential to the perfection of his title. Now, if the ownership had once passed, any unilateral act on the part of the vendor could not had the effect of depriving the vendee of the rights which had already vested in him. It may be that Pir Shah repented of the transaction and consequently objected to mutation, but it is clear that he was too late and his repentance was of no consequence.

The facts of the case are practically on all fours with those in *Abbas Ali Shah* v. *Fir Bakhsh* (2) and on the authority of that judgment we hold that Pir Shah by virtue of the sale effected by him ceased to be the owner of one-half of the property.

Coming now to the other one-half belonging to Kalandar Shah, we find that in their written statement the defendants, though alleging that Jindwadda Shah was the son of Kalandar Shah, did not urge that he was the adopted son. Consequently, no issue was framed on the question of adoption and the plaintiff did not get an opportunity of producing his evidence on that point. The defendants simply rely on the recital in a mutation order of an allegation by Kalandar Shah that he had adopted Jindwadda. Now, it must be remembered that Jindwadda was the *pichhlag* of Kalandar Shah; and the fact that in his life-time the latter succeeded, in spite of opposition by his brother, in having a gift of a portion of his estate mutated in favour of the former does not show that the alleged adoption did, as a matter of fact, take place. The mutation with respect to the land in suit on the death of Kalandar Shah was carried out evidently in the absence of Pir Shah and there is nothing to show that he ever came to know of it. The Courts below have concurred in holding that the said adoption never took place and we see no adequate reason to dissent from that finding.

Further, we doubt whether the adoption, if any, was valid under the custom by which the Sayyads of Shujabad Tahsil of the Multan District are governed. The *riwaj-i-am*, (*vide* answer to question 50 at page 68 of the Customary Law of the Multan District) requires a writing for the validity of an adoption and prescribes the entertainment of the brotherhood as the requisite ceremony. In the case before us there is no written adoption, nor do we find any proof of the said ceremony. But it is unnecessary to consider this matter any further, because we have already found against the defendants on the *factum* of adoption.

The limitation for a suit for redemption is 60 years, and the omission of the plaintiff to institute a suit within the period pre-

(1) 9 Ind. Cas. 547; 55 P. R. 1911: 27 P. L. R. 1911; 41 P. W. R. 1911.

(2) 132 P. R. 1879.

scribed by Article 118 for a declaration that the alleged adoption never took place does not, in view of the recent authorities, have the effect of curtailing the limitation for redemption to six years. Nor does the fact that Jindwadda Shah, before getting mutation in his favour with respect to the land in suit, executed two sale-deeds transferring the equity of redemption therein to the defendants, convert their position as mortgagees into that of trespassers, so as to invoke the rule by which adverse possession ripens into ownership after the expiry of 12 years. Jindwadda was, in our opinion, a perfect stranger to the property, and any assertion of title by the mortgagees on the strength of sale from him cannot change the nature of the original possession and make it adverse to the real owner. If any authority is needed on the subject, we would refer to *Khiarajmal* v. *Daim* (3); *Pandu Lakshman Masurekar* v. *Anpurna* (4); *Byari* v. *Puttanna* (5) and *Jiwa Khan* v. *Lakhmi Chand* (6). As observed in *Byari* v. *Pittanna* (5), a mortgagee cannot rely on 12 years' rule, unless he proves a subsequent valid sale, in the absence of which, his possession must be taken to retain its original character.

The result of the above discussion is that the plaintiff is entitled to redeem one-half of the mortgaged property and that the decree of the learned Divisional Judge must be confirmed. We, accordingly, dismiss both the appeals and direct the parties to bear their own costs in this Court.

*Appeal dismissed.*

(3) 32 C. 296 (P. C.); 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23.
(4) 21 B. 793.
(5) 14 M. 38.
(6) 11 Ind. Cas. 429; 146 P. W. R. 1911; 232 P. L. R. 1911.

## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2371 OF 1913.

February 11, 1916.

*Present*:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

*Sheikh* JOHAN BUKSH—PLAINTIFF—APPELLANT

*versus*

*Sheikh* MOHAMMAD TASLIM AND OTHERS—DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act XIV of 1882), s. 317—Civil Procedure Code (Act V of 1908), s. 66—Suit against private transferee of certified purchaser for confirmation of possession, maintainability of.*

Section 317 of the Civil Procedure Code, 1882, cannot be a bar to the maintainability of a suit for confirmation of possession of an immoveable property against a private transferee of the certified purchaser on the allegation that the certified purchaser as *benamidar* of the plaintiff purchased that property of the plaintiff in execution of a decree against him. [p. 965, col. 1.]

Section 66 of the new Code of Civil Procedure is more comprehensive than section 317 of the Civil Procedure Code of 1882. [p. 964, col. 2.]

*Dukhada Sundari Dasi* v. *Srimonto Joardar*, 26 C. 950; 3 C. W. N. 657; *Nisakar Das* v. *Bairagi Samal*, 19 Ind. Cas. 909; 19 C. L. J. 330; *Sasti Churn Nundi* v. *Aunopurna*, 23 C. 699, followed.

Appeal against the decree of the Subordinate Judge, 2nd Court, Muzafferpore, dated the 26th April 1913, affirming that of the Munsif, 1st Court, at that place, dated the 29th August 1912.

FACTS.—The facts material to the report are as follows:—

The plaintiff instituted a suit for a declaration of his title and for confirmation of possession, on the allegation that the defendant second party who purchased the property in suit in execution of a mortgage-decree was the *benamidar* of the plaintiff. The mortgage-decree was obtained against the plaintiff and others and the purchase was made on the 3rd June 1893 by the plaintiff in the *benami* of the defendant second party. This defendant second party sold the property in suit to the defendant 1st party on the 17th August 1904. The plaintiff's allegation was that he was all along in possession of the property in question and the defendant second party never claimed any right to the property. The Munsif without trying the suit on the merits dismissed it on the preliminary ground that the suit was barred under

section 66, Civil Procedure Code, 1908. On appeal the Subordinate Judge held that the Code of Civil Procedure applicable to the suit was the Code of 1882, but he held that the suit was barred by section 317 of the Code of 1882 and, therefore, the suit of the plaintiff was not maintainable. The present second appeal was preferred against the decision of the Subordinate Judge.

Babu *Rajendra Prasad*, for the Appellant.—The suit being one for confirmation of possession could not be barred under section 317 of the Code of 1882, *vide Sasti Churn Nundi* v. *Aunopurna* (1). Also the suit was not against the certified purchaser but against an assignee of the certified purchaser, therefore, section 317 has no application. This section ought to be strictly construed, as it bars the real right of a party who has actually purchased the property in execution sale and paid the consideration money but has taken the sale certificate in the name of his *benamidar*. This section is penal in its nature and must be confined within its strict term. If a case does not fall within its letter, the section cannot be applied to it, *vide Dukhada Sundari Dasi* v. *Srimonto Joardar* (2); *Nasakar Das* v. *Bairagi Samal* (3); *Theyyavelan* v. *Kochan* (4); *Sibta Kunwar* v. *Bhagoli* (5).

The Code of 1882 ought to govern this suit, as section 66 of the new Code does not lay down a mere rule of procedure but affects a substantive right, and cannot have retrospective operation—*Vide Gopeshwar Pal* v. *Jiban Chandra* (6).

Moulvi *Muhammad Mostapha Khan*, for the Respondent.—The suit having been instituted in 1911 when the new Code was in force, section 66 of the new Code and not section 317 of the old Code will govern the case. It could not be said that section 66 of the new Code deals with substantive law and not with procedure, as its object is to lay down a rule as to how an auction-purchaser in execution should proceed to complete his title to the property purchased. Even if the Code of 1882 applied, the suit of the plaintiff was not maintainable, *vide Hari Govind Joshi* v. *Ramchandra Narayan Gole* (7). There is no reason why the representative of a certified purchaser should be in a worse position than the certified purchaser.

JUDGMENT.

SHARFUDDIN, J.—This appeal is on behalf of the plaintiff. The facts of the case are these. The plaintiff in the suit had a small share in a certain *mauza*, which was sold in execution of a decree against him and was purchased by defendant No. 2 on the 3rd June 1893. On the 17th August 1904 the defendant No. 2 sold the share to defendant No. 1. The present suit was instituted by the plaintiff for confirmation of his possession with regard to that share on the allegation that the defendant No. 2, although a certified purchaser, was merely a *benamidar* for him, the plaintiff, and that the transaction of sale between the defendant No. 2 and defendant No. 1 was a fraudulent and colourable transaction.

The first Court without going into evidence dismissed the suit on the ground that section 66 of the present Civil Procedure Code was a bar to the maintainability of the suit. The plaintiff appealed to the Subordinate Judge of Muzafferpore, who dismissed the appeal holding that section 317 of the old Code, and not section 66 of the present Code, applied to the incidents of the sale, the sale having taken place at a time when the old Procedure Code was in force, and that the suit was not maintainable even under section 317 of the old Code. Hence the present appeal.

The grounds taken are, *first*, that though the suit was instituted at a time when the present Code was in force, the right to sue vested in the plaintiff before the passing of the new Code and could not be interfered with by the new Code; and *secondly*, that although there was a sale of the share in question in execution of a decree, the plaintiff notwithstanding the sale remained all along in possession.

The first question really is whether section 317 of the old Code or section 66 of the new governs the present suit.

Section 66 of the new Code is more com-

(1) 23 C. 699.
(2) 26 C. 950; 3 C. W. N. 657.
(3) 19 Ind. Cas. 909; 19 C. L. J. 330.
(4) 21 M. 7; 7 M. L. J. 290.
(5) 21 A. 196; A. W. N. (1899) 30.
(6) 24 Ind. Cas. 37; 18 C. W. N. 804; 19 C. L. J. 549; 41 C. 1125.
(7) 31 B. 61; 8 Bom. L. R. 873.

prehensive. It says that a suit against a person claiming under a certified purchaser is not maintainable on the ground of the purchase being on behalf of plaintiff.

Under section 317 of the old Code, no suit could be maintained against a certified purchaser.

The present suit, however, is not against the certified purchaser but against a private transferee of the certified purchaser. That being so, section 317 cannot be a bar to the maintainability of the suit.

On behalf of the appellant, our attention has been invited to certain authorities of this Court, first to the case of *Dukhada Sundari Dasi* v. *Srimonto Joardar* (2) where it was distinctly held that section 317 of the old Civil Procedure Code is no bar to a suit against any person claiming through or under the certified purchaser. The next case referred to was the case of *Nisakar Das* v. *Bairagi Samal* (3), in which it was held that the expression "certified purchaser" in section 317, Civil Procedure Code, should be strictly construed and did not include his successor-in-title. The third case referred to is the case of *Sasti Churn Nundi* v. *Aunopurna* (1). In this reported case the plaintiff had purchased in the name of the defendant certain property at a sale in execution of a decree. The plaintiff continued in undisturbed possession for a number of years. He then brought a suit against the defendant as the latter wanted to disturb his possession. It was held that the suit was maintainable as it did not come within the scope of section 317 of the Code. Here the plaintiff claims to have been in possession from 1893. On a review of the above cases, we think that this case should be sent back to the lower Appellate Court with instructions to send it to the first Court for deciding the case on the merits after giving both sides an opportunity of entering into evidence and examining witnesses. We set aside the judgment of the lower Appellate Court and remand the case for that purpose.

Costs will abide the result.

TEUNON, J.—I agree in the order proposed.

*Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 737 OF 1913.

January 19, 1916.

*Present*:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

SUBRAMANIAN CHETTIAR—DEFENDANT No. 1—APPELLANT

*versus*

KADIRESAN CHETTIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO 6—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 60—"Money deposited," meaning of—Servant allowing his salary to accumulate along with sum paid by him prior to entering service -Total amount, nature of—Banker and customer—Debtor and creditor.*

The plaintiff, prior to entering the service of the defendant firm, gave a certain amount of money to the firm and then allowed his salary to accumulate and remain with the firm under an agreement that both sums should be credited with interest at the current rate and should be payable on demand. The plaintiff occasionally drew against it whenever he required money. On a suit for sums due:

*Held*, that both sums were "money deposited" within the meaning of Article 60 of the Limitation Act and not "money lent" under Article 59 and that the period of limitation commenced to run from the date of demand. [p. 967, cols. 1 & 2.]

Money in the hands of a trader who is not a banker will be "a deposit" in circumstances such as would make it money of a customer where the depositee was a banker. [p. 967, cols. 1 & 2.]

*Ichha Dhanji* v. *Natha*, 13 B. 338; *Dharam Das* v. *Ganga Devi*, 29 A. 773; A. W. N. (1907) 263; 4 A. L. J. 628, dissented from.

*Official Assignee of Madras* v. *Smith*, 32 M. 68; 5 M. L. T. 164; *Foley* v. *Hill*, (1848) 2 H. L. C. 28; 9 E R. 1002; 81 R. R. 14, affirming 1 Ph. 399; 8 Jur. 347; 13 L. J. Ch. 182; 41 E R. 683; *In re Hallett's Estate, Knatchbull* v. *Hallett*, 13 Ch D 696; 49 L. J. Ch. 415; 42 L. T 4 1; 28 W. R 732; *Sinclair* v. *Brougham*, (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 0 T. L R. 3 5 referred to.

*Ishur Chunder Bhaduri* v. *Jiban Kunari Bibi*, 16 C. 25; *Perundevithayar Ammal* v. *Nammalvar Chetti*, 18 M. 39 ; 5 M. L. J. 203, followed.

The true relation between a banker and his customer is that of debtor and creditor, but a customer who pays moneys to his banker under terms that he is not to use it or who authorises his banker to collect money due to him on the like terms constitutes a fiduciary relationship between himself and the banker and is entitled to recover the amount from the general assets of the banker if the banker has committed a breach of trust, on the principle that all other payments must be assumed to have been made out of the money in the banker's hands to which no fiduciary character attached. [p. 966, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge

of Ramnad at Madura, in Appeal Suit No. 234 of 1912, preferred against that of the Court of the District Munsif of Paramakudi, in Original Suit No. 826 of 1910.

Mr. *V. K. Srinivasa Aiyangar* for Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *K. V. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.

NAPIER, J.—The question raised in this second appeal and in the connected Second Appeal No. 738 of 1913 is, whether certain sums claimed by the plaintiff in each case from the defendant firm are "money deposited" within the meaning of Article 60 of the present Limitation Act. The lower Appellate Court has held that they are, but we are asked to hold that there is no evidence to support that finding. The Second Appeal No. 737 of 1913 is to recover Rs. 817-1-9 alleged to be due to the plaintiff as balance of principal and interest due in respect of two sums deposited by him. The first amount was Rs. 550 given to the defendants on October 17th, 1905, prior to his entering their service as an assistant which he did on March 3rd, 1906. The second sum was Rs. 526-12-0, which represents half the salary of the plaintiff for the whole three years of his service and credited by him to himself on joining the service. No cash was taken out or returned by the plaintiff but it is proved that according to the custom of these traders, the plaintiff was entitled to take that amount and deal with it as he wished. What he did was to leave it with the firm and draw against it as he required money. The lower Appellate Court has found further that the agreement between the parties was that the account of both sums should be credited with interest at the current rate and should be payable on demand. It is contended for the appellants that the money is "money lent" within Article 59 and the suit is barred by limitation. Reliance is placed on *Ichha Dhanji* v. *Natha* (1), *Dharam Das* v. *Ganga Devi* (2) and *Official Assignee of Madras* v. *Smith* (3). The Madras case is one of those arising out of the Arbuthnot insolvency in which a large number of claims were made for preferential payment in respect of money in the hands of the firm. The Court had to decide the real legal character of the transaction between the banker and his customer and for that purpose laid down the law with which I respectfully agree—the basis of which is to be found in the two leading cases *Foley* v. *Hill* (4) and *In re Hallett's Estate, Knatchbull* v. *Hallett* (5), lately re-affirmed by the House of Lords in the Birkbeck Bank case, *Sinclair* v. *Brougham* (6). The law is as follows:—The true relation between a banker and his customer is that of debtor and creditor [*Foley* v. *Hill* (4)], but a customer who pays money to his banker under terms that they (?) are not to use it or who authorises his banker to collect money due to him on the like terms constitutes a fiduciary relationship between himself and the banker and is entitled to recover the amount from the general assets of the banker if the banker has committed a breach of trust, on the principle that all other payments must be assumed to have been made out of money in the banker's hands to which no fiduciary character attached [*In re Hallett's Estate, Knatchbull* v. *Hallett* (5)]. It is contended for the appellants that on the admitted facts the present case is not within *In re Hallett's Estate, Knatchbull* v. *Hallett* (5), and further that these principles must be applied in the construction of the Articles of the Limitation Act and that what is in law and fact a loan could not be money deposited under Article 60. This is undoubtedly the view taken in *Dharam Das* v. *Ganga Devi* (2), where the Court holds on facts very similar to those here that Article 60 is not intended to apply to a transaction which is in law a loan, and in *Ichha Dhanji* v. *Natha* (1), where the same language is used with the same result.

With great deference to the learned Judges the reasoning ignores the fact that if the term 'deposit' is legally inapplicable to a loan it is also inapt for describing a trust of money and also that the word 'deposit' is familiar in banking parlance as describing money held by a banker for his

(1) 13 B. 338.

(2) 29 A. 773; A. W. N. (1907) 263; 4 A. L. J. 628.

(3) 32 M. 68; 5 M. L. T. 164.

(4) (1848) 2 H. L. C. 28; 9 E. R. 1002; 81 R. R. 14, affirming 1 Ph. 399; 8 Jur. 347; 13 L. J. Ch. 182; 41 E. R. 683.

(5) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

(6) (1914) A. C. 398; 83 L. J. Ch 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315,

customer on special terms as distinguished from current account in both which cases, however, the banker is intended to have the use of the money and no trust arises. The contrary view is expressed in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (7), where the Court held that Article 60 must be construed with reference to the ordinary idea of the public as to the dealing with banks and by the language used by the bankers themselves in describing their balances held on account of customers. In a judgment which will repay careful examination the learned Judges give good reasons for taking the view. The same view was taken by this Court in *Perudevitayar Ammal* v. *Nammalvar Chetti* (8), a case somewhat stronger than the Calcutta case in one respect in that the depositee was not a banker but an ordinary shopkeeper and thus the position was much more like the present case, the only difference being that in *Perundevitayar Ammal* v. *Nammalvar Chetti* (8) the depositor is not shown to have been entitled to draw against the deposit, whereas in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* (7) he did draw. All these cases, however, are decided on the words of the Article in the Limitation Act of 1877, but the present Act has added the words "including money of a customer in the hands of a banker so payable." It must be admitted that the Legislature has not yet made the matter perfectly clear but it has definitely and, I think, intentionally used language in a non-legal sense. The money of a customer can only mean money paid in *the ordinary customary way of business.* Now clearly when it passes into the banker's hands it is not the customer's money any longer. It becomes a debt due from the bank. I cannot but regard this language as throwing light on the meaning to be given to the word 'deposit', for it seems to me illogical to treat the word 'deposit' as inapplicable to what is in law a loan and yet be compelled to give a non-legal meaning to a phrase which is stated to be "included" in the word 'deposit.' We can, I think, only give full meaning to the language used in the present Article by holding that money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker. For these reasons I am of opinion that the judgment of the lower Appellate Court is right and the appeal must be dismissed with costs.

AYLING, J.—I agree.

*Appeal dismissed.*

(7) 16 C. 25.
(8) 18 M. 390; 5 M. L. J. 203.

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## COURT OF THE BOARD OF REVENUE, MADRAS.

REVENUE PETITION No. 51 OF 1915.

January 19, 1916.

*Present*:—Mr. Clegg, F. M.

VEDACHALLA DHIKAHIDAR—PETITIONER

*versus*

VANKATHU SUBBARAYA REDDIAR AND ANOTHER—COUNTER-PETITIONERS.

*Madras Estates Land (Act I of 1908), ss. 112, 117, 205—Notice of intention to sell smaller extent of land—Ambiguity in sale proclamation, effect of—Sale, legality of—Civil Procedure Code (Act V of 1908), s. 151.*

A sale proclamation issued under section 117 of the Madras Estates Land Act (I of 1908) must closely follow the notice of intention to sell served on the defaulter under section 112 of the Act. [p. 969, col. 1.]

Where the sale proclamation represents a certain piece of land as lying within certain boundaries which cover a larger extent of land than that specified in the notice of intention to sell given under section 112 of the Act, and where the sale is also of crops on the land not included either in the notice of intention to sell under section 112 or in the proclamation of sale under section 117 and the land is sold for a very inadequate price:

*Held*, that under section 205 of the Madras Estates Land Act the sale was liable to be set aside as illegal. [p. 969, col. 2.]

Petition for revision against the decree of the District Collector in Appeal Suit No. 175 of 1915, dated the 3rd September 1915.

FACTS appear clearly from the grounds of appeal, which run as follows:

(1) The first respondent is the purchaser of certain lands at the Court sale held, in accordance with the sections 111 and 123 of the Madras Estates Land Act, on 15th December 1914.

(2) A petition was filed, under section 151 of Civil Procedure Code and section 192 of Madras Estates Land Act, to prevent the purchaser from taking the crops along with the land, among others, in the Court of the

Sub-Collector at Chengliput on 10th February 1915.

(3) Though an order complying with the request was got on 27th February 1915, the respondent without obeying the order forcibly took away the crops on the 28th February 1915.

(4) The appellant then put in a sanction petition in the same Court under section 195 of the Criminal Procedure Code in March 1915 and requested the Court to set aside the sale, on the grounds that the Madras Estates Land Act was not applicable to the parties as they were not related as landlord and tenant but as lessor and lessee, as the *merais* were improperly included in the attachment amount and that the rent sale was *benami* for another person.

(5) The sale was accordingly set aside by the order of the Sub-Collector No. 92 of 1915 referred to above.

(6) The defendant appealed to the District Collector to have the order of the Sub-Collector set aside in Appeal Petition No. 175 of 1915 and the District Collector set aside the above order on 19th August 1915.

The present appellant who was the first respondent in the above suit begs to prefer this revision petition under section 25 of Madras Estates Land Act to the Hon'ble Court of the Board of Revenue on the following among other grounds:—

(1) The lower Appellate Court erred in reversing the order of the Sub-Collector and had no jurisdiction to entertain an appeal against the order.

(2) The Sub-Collector had power to rectify his own error under section 151 of the Code of Civil Procedure he having himself passed the decree.

(3) The extent of land sold was more than 35 *kanis more than those* indicated in the sale proclamation and the purchaser has no right to take the crop also, since it was not sold.

Mr. *T. M. Vedantachari*, for the Petitioner.—The Sub-Collector having set aside the sale, the Collector had no jurisdiction to reverse his order. Under section 151 of the Code of Civil Procedure the Sub Collector had that power.

Here the extent of land actually sold is far greater than that specified in the proclamation of sale or the notice of intention to sell, and the crops on the land were sold though not covered either by the notice of intention to sell or the sale proclamation.

Mr. *N. S. Rangasawmy Aiyangar*, for the Respondents.—The relationship between the parties is not that of landlord and tenant, but only of lessee and lessor not governed by the Madras Estates Land Act.

The land having been sold as being within certain boundaries the whole extent within those boundaries passed by the sale.

JUDGMENT.—This is styled both an appeal and revision petition against the decree of the District Collector in Appeal Suit No. 175 of 1915, dated 3rd September 1915, setting aside the order of Sub-Collector in Miscellaneous Petition No. 92 of 915, dated 28th June 1915. Both the so-called appeal to the District Collector and the present petition are admissible only as revision petitions under section 205 of the Estates Land Act and will be treated as such.

2. The District Collector has considered only the question of jurisdiction of the Sub-Collector to pass the order, and in so far as he has found it to be *ultra vires* I consider he is right.

The petitioner neglected all the opportunities under the Estates Land Act to have the sale set aside and delivery of possession of the land and crops has been effected. There is no provision under the Act giving the Sub-Collector power to cancel the sale of the order delivering possession of the land and crops. I do not consider the provisions of section 151 of the present Civil Code of Procedure, Act V of 1908, (which did not exist under the old Act) are applicable. Other legal remedies were available.

It is not necessary, therefore, to interfere with the order of the District Collector cancelling that of the Sub-Collector.

3. The petitioner has now come to this Court under section 205 of the Act for revision of the Sub Collector's proceedings on several other grounds.

4. He contends that the relation between the proprietor and himself is that of lessor and lessee, and not that of land-holder and *ryot* under the Act. The proprietor denies

that the documents executed by them transfer any of his *melwaram* rights to the petitioner. The petitioner is admittedly a *ryot* and reading the documents, I have no doubt that they constitute a *patta* and *muchilika* for a permanent money rent under section 51 of the Act. This contention fails.

5. It is further contended that all that was sold was 35 *kanis* of land in the holding, that this was all that was covered by the notice of intention to sell under section 112 and sale proclamation under section 117, and that the crops on the land were not included in the sale.

The proprietor (second counter-petitioner) supports the contention that 35 *kanis* only were sold out of the holding; on the other hand, the auction-purchaser (1st counter-petitioner) asserts that he is entitled into the land within the boundaries in the sale proclamation with the standing crops thereon, that these have been delivered into his possession by the Sub-Collector and that the petitioner's remedy is a suit in a Civil Court if too much has been taken from him.

As a matter of fact possession has been given of about 70 acres with the crops thereon. The petitioner values the crops at Rs. 2,000 alone and the price realized at the auction sale was only Rs. 735, which seems totally inadequate for what the successful purchaser claims to have purchased.

Under section 117 the part of the holding to be sold must be *specified* in the sale proclamation. The proclamation which exactly follows the notice under section 112 contains two plots for sale measuring 15 and 20 *kanis*, respectively, but the northern boundary of plot No. 1 and the southern boundary of plot No. 11 are indefinite. From the fact that one of the southern boundaries of plot No. 11 is not mentioned as plot No. 1, it would be supposed that a strip of land was omitted between the two plots, and that, therefore, the whole area was not proclaimed or sold. Besides it is very doubtful whether it was intended that the crops should go with the land at the sale. There were no crops at all when notice under section 112 was served, no mention was made of crops in the sale proclaimed and judging from the price realised it is hardly likely that the bidders understood that the crops also were to be sold.

The contravention of the provisions in section 117, which means that the part of the holding to be sold should be clearly identifiable, has resulted, I consider in a serious miscarriage of justice, and this Court has power to interfere under section 205.

The proceedings under the Act for the realization of the rent will accordingly be cancelled *in toto*. As the proprietor (second counter-petitioner) is responsible for not specifying distinctly what he intended to sell he will bear the petitioner's costs in this Court.

*Proceedings cancelled.*

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3262 OF 1912.

February 11, 1916.

*Present*:—Mr. Justice Chapman and Mr. Justice Mullick.

HARI SINGH AND OTHERS—DEFENDANTS Nos. 1 TO 5—APPELLANTS

*versus*

SANT PROSAD SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Hindu Law—Son's liability to pay father's debt—Debt incurred by appropriating money due to another, if immoral—Criminal misappropriation.*

*H* and *T* bought a property at a revenue sale but the sale having been reversed, *T* withdrew the whole of the purchase-money. In a suit by *H* to recover his share of the purchase-money a decree was made against *T* in execution of which ancestral property belonging to *T* was sold. The son of *T* brought a suit to recover his half share of the property, on the ground that the debt incurred by his father was an immoral debt which he was not bound to repay:

*Held*, that the debt was not an immoral one and it was incumbent upon the son to repay it and that, therefore, he was not entitled to recover his share of the ancestral property. [p. 971, col. 2.]

Appeal against the decree of the District Judge, Patna, dated the 22nd June 1912, affirming that of the Additional Subordinate Judge, at that place, dated the 29th of August 1911.

FACTS.—The material facts will appear from the judgment of the High Court.

HARI SINGH v. SANT PROSAD SINGH.

The lower Appellate Court in dismissing the appeal preferred by Hari Singh and others made the following observations:—

"The case of the plaintiff is that Tipan Pershad Singh having taken the money * * * * * * * * * * * * dishonestly and fraudulently and under circumstances rendering him liable for criminal prosecution, the ancestral property is not liable and the only part of it which can be brought to sale is Tipan Pershad's own interest therein. * * * * * We are not able to obtain from Tipan Pershad any statement in respect of the intention with which he took the money. * * * * * We have to rely upon the pleadings in the suit brought by the appellants in 1896 and upon the pleadings in the present suit". (After discussing the pleadings, the learned District Judge observed) "Tipan Pershad's act was fraudulent from the very beginning; he was, therefore, on the pleadings of the present appellants guilty of an offence under section 403 of the Indian Penal Code. This having been their case throughout, they cannot now say that Tipan Pershad came by the money honestly."

Babu *Umakali Mukerjee* (with Babu *Raghunath Singh*), for the Appellants.—The lower Court was wrong in dismissing the appeal; if the original intention was not criminal, subsequent change of intention could not make it so. Tipan Singh, by taking out the money, did not commit any criminal offence : *Chakouri Mahton* v. *Ganga Proshad* (1).

[MULLICK, J.—The Judge finds as a fact that the money was withdrawn with a criminal intent].

The Judge cannot find that there was criminal intent if the facts in connection with the withdrawal of the money did not constitute a criminal offence. The question whether criminal intention existed or not is not a pure question of fact, as the intention has to be inferred from certain facts. The Collector would not pay the money to any person other than the recorded purchaser at the revenue sale; hence it was that Tipan who was the recorded purchaser withdrew the money. Could it be said that by withdrawing the money, he committed the offence of criminal misappropriation? True, he did not pay to the other recorded purchaser his share of the money who had consequently to bring a suit; but that does not show that Tipan committed any offence under the Penal Code, *vide Medai Dolavay Tirumalaiyappa Mudeliar* v. *Veerabudra* (2), *Kanemar Venkappayya* v. *Krishna Chariya* (3) and *Erasala Gurunatham Chetty* v. *Addepally Raghavalu Chetty* (4).

[MULLICK, J.—Is not existence or non-existence of an intention a question of fact?]

No. The intention must be inferred from conduct or words. If the acts or words did not warrant a criminal intention, the finding of the Judge that there was criminal intention cannot be binding on the High Court in second appeal. The act of Tipan Pershad could never amount to criminal offence, *vide Queen* v. *Parbutty Churn Chuckerbutty* (5).

Besides, the respondents have no equity on their side. We were deprived of our share in the purchase-money withdrawn by Tipan Pershad, and when we got a decree for the money and wanted to realise it in execution, the heirs of Tipan Pershad come forward and say that they are not liable for this debt of their ancestor on the ground that it was an immoral debt.

Babu *Mahendra Nath Roy*, for the Respondents.—This appeal is concluded by findings of fact. The question of criminal intention is a question of fact and not of law, *vide Pareman Dass* v. *Bhattu Mahton* (6).

[MULLICK, J.—It will be open to us to say that on the facts found, no criminal offence was made out].

Tipan with the help of and in collusion with the Muktear withdrew the whole amount without giving any notice to the respondents and converted it to his own use. Even a temporary conversion is sufficient to make a criminal offence.

[CHAPMAN, J.—Where is the proof of conversion? Taking by itself is not conversion.]

Taking under the circumstances stated in the judgments of the lower Courts amounted to conversion. Even if he thought of

(1) 12 Ind. Cas. 609; 15 C. L. J. 228 at p. 233; 16 C. W. N. 519; 39 C. 862.

(2) 4 Ind. Cas. 1090; 19 M. L. J. 759.

(3) 31 M. 161; 2 M. L. T. 529; 17 M. L. J. 613; 3 M L. T. 353.

(4) 31 M. 472; 3 M. L. T. 394; 8 Cr. L. J. 147.

(5) 14 W. R. 13 Cr.

(6) 24 C. 672.

repaying the money, that would not prevent it from being a conversion. I quite see that the case is a hard one for the appellants and your Lordships might be inclined to stretch the law a little in their favour. But I submit that hard cases should not induce your Lordships to make bad law.

JUDGMENT.

MULLICK, J.—Hari Singh and Tipan Singh bought an estate at a revenue auction sale in 1895 for Rs. 19,100. That sale was set aside and Tipan Singh became entitled after the reversal of the sale to 13/16ths of the auction purchase-money and Hari Singh to the balance. Tipan Singh eventually drew out the whole of the purchase-money and it was necessary for Hari Singh to sue Tipan Singh. He accordingly instituted a suit and obtained a decree against Tipan Singh for his share of the purchase money. In execution of that decree certain ancestral property belonging to Tipan was sold and purchased by Hari Singh. The suit out of which the present appeal arises was brought by Sant Prosad Singh, son of Tipan Singh, for possession of a half share of the ancestral property which has been purchased by Hari Singh in execution of his decree. The claim is based on the ground that the debt incurred by Tipan Singh was an immoral debt and that, therefore, there was no pious duty on the part of Sant Prosad, his son, to pay that debt and that, the property sold being the joint ancestral property of himself and his father, his half share was not affected by the sale. Both the lower Courts have found in favour of the plaintiff and have decreed the suit. The defendants have appealed to this Court.

In the present second appeal, it has been urged that the debt was not an immoral debt and that the plaintiff is not entitled to succeed. It is not necessary to discuss the various decisions which have been placed before us for the purpose of showing that there is a distinction between a taking which is not criminal and a taking which merely imposes a civil liability. It is sufficient for the purposes of this case to say that, upon the facts found by the learned District Judge, the offence of criminal misappropriation within the meaning of the Indian Penal Code has not been made out, and that Tipan Singh did not commit an immoral act in drawing out the money from the Collectorate. If his act was not an immoral one, it was incumbent upon the plaintiff to repay the debt. The plaintiff must, therefore, fail in the present suit. The result is that the appeal is decreed and the plaintiff's suit is dismissed with costs in all Courts.

*Appeal decreed.*

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MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 198 OF 1913.

December 15, 1915.

*Present:*—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

SUBBARAYA GOUNDAN—DEFENDANT No. 8—APPELLANT

*versus*

S. RANGANADHA MUDALIAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 7—RESPONDENTS.

*Madras Revenue Recovery Act (II of 1864), s. 42—Assignment of Government revenue—Assignee, whether has first charge on land—Suit to recover* jodi, *nature of—Small Cause Court, jurisdiction of.*

Per *Wallis, C. J.*—Where Government transfers the right to collect the *jodi* to a *zemindar* or *mittahdar* in consideration of his undertaking to pay a fixed *peshkush* and includes it in the assets of the *mittah* when calculating the *peshkush* payable thereon, the *zemindar* or *mittahdar* has no charge upon them and a suit by him to recover *jodi* from the *inamdar* is a suit for rent and nothing more and so cognizable by a Court of Small Causes in the Madras Presidency. [p. 972, col. 2.]

*Subbaraya* v. *Sub-Collector of Chingleput*, 6 M. 303 at p. 310; *Secretary of State* v. *Ashtamurthi*, 13 M. 89 at p. 123; *Vizianagaram Maharajah* v. *Sitaramarazu*, 19 M. 100 at p. 103, followed.

*Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rao*, 19 M. 329; *Venkatagiri Rajah* v. *Venkat Rau*, 21 M. 243; *Gajapati Rajah* v. *Suryanarayana*, 22 M. 11; *Appa Rao* v. *Sobhanadri*, 24 M. 158; *Kasturi Gopala Ayyangar* v. *Anantaram Thivari*, 26 M. 730 at p. 733; 13 M. L. J. 248, followed.

*Suryanna* v. *Durgi*, 7 M. 258; *Alubi* v. *Kunhi Bi*, 10 M. 115; *Krishnasami* v. *Venkatarama*, 13 M. 319; *Ramachandra* v. *Joganmohana*, 15 M. 161, referred to.

Per *Seshagiri Aiyar, J.*—It cannot be said that under no circumstances will an assignee of Government revenue possess the same remedies which the Government have for the realization of their revenue, but it is essential for the right to arise in favour of the assignee that the assigned revenue should retain its

distinctive character of Government assessment, and where such *jodi* is included in the assets of the *mittah* when fixing the *peshkush* thereon, it is merely income due to the *mittahdar* and not Government assessment. [p. 974, cols 1 & 2.]

*In re Churchill, Manisty* v. *Churchill*, 59 L. T. 597; 36 W. R. 805; 39 Ch. D. 174; 58 L. J. Ch. 136, referred to.

The priority given to Crown debts may also arise in favour of a mere assignee of Government revenue. [p. 973, col. 2 ]

*Secretary of State for India* v. *Bombay Landing and Shipping Co.*, 5 B. H. C. R. 23; *Judah* v. *Secretary of State for India*, 12 C. 445 at p. 452, referred to.

Appeal against the decree of the District Court of Salem, in Original Suit No. 20 of 1911.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswamy Aiyar* and *N. A. Krishna Aiyar*, for the Appellant.

Messrs. *S. Srinivasa Aiyangar*, *K. V. Krishnasamy Aiyar*, *A Srinivasa Aiyangar*, *N. C. Vijayaraghavachariar* and *C.S. Venkatachariar*, for the Respondents.

This appeal and the memorandum of cross-objections by the 8th Respondent coming on for hearing on the 10th and 14th September 1915, and having stood over for consideration till the 2 st September 19.5, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—The question involved in this appeal is whether a *zemindar* or *mittahdar* who under his *sannad* has a right to collect the *jodi* payable by an *inamdar*; has a charge for arrears of such *jodi* on the interest of the *inamdar*. Before considering this question it may be well to refer to the right of Government to a charge for arrears of revenue, and to the rights of the *inamdar* for arrears against the *ryots* themselves.

It was held by Innes, J., in *Subbaraya* v. *Sub-Collector of Chingleput* (1) that "the right of Government is only a right to a charge on the land, and a right to forfeit by due course of law, the title of the person holding the land who does not pay the charge;" and this was cited with approval by Shephard, J., in *Secretary of State* v. *Ashtamurthi* (2). In the present case the Government assigned its right to revenue to the *inamdar* subject to the payment of a *jodi*, and it is well settled that by virtue of such assignment the *inamdar* did not acquire a charge upon the land, but was left to recover rent from the occupiers under the provisions of the Madras Rent Recovery Act of 1865; and it was not until the passing of the Act of 1908 that landholders including certain *inamdars* acquired a statutory charge for rent. As regards the *jodi* payable by the *inamdar* to Government it is, where it has not been assigned, recoverable by Government, like *zemindars' peshkush*, by sale of the *inamdar's* interest under the law in force for the time being, now the Revenue Recovery Act, 1864. Under section 2 of that Act the land, the buildings upon it, and its products are to be regarded as the security for the public revenue; but provided they have paid the rent to the land-holder the *ryots* are not affected by the land-holder's default to pay the revenue due by him (section 33), and all that Government can do is to sell the interest of the defaulter free of all incumbrances. The right to sell free of incumbrances in such a case is conferred by section 42 of the Act.

Coming now to cases where the right to collect the *jodi* has been transferred to the *zemindar* or *mittahdar* under his *sannad*, there is a long series of decisions in this Court that, when Government transfers the right to collect the *jodi* to a *zemindar* or *mittahdar* in consideration of his undertaking to pay a fixed *peshkush*, the *zemindar* or *mittahdar* has no charge upon them and that a suit by him to recover *jodi* is a suit for rent and nothing more and so cognizable in this Presidency by the Court of Small Causes.

It was apparently so held in Second Appeal No. 692 of 1893 and though a different view was taken in Second Appeal No. 822 of 1894, [*vide* foot-note in *Vizianagaram Maharajah* v. *Sitaramarazu* (3)] it was again so ruled by Shephard and Subramania Aiyar, JJ., in *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rao* (4) and *Venkatagiri Rajah* v. *Venkat Rau* (5). *Gajapati Rajah* v. *Suryanarayana* (6) and *Appa Rao* v. *Sobhanadri Rao* (7)

(1) 6 M. 303 at p. 310.
(2) 13 M. 89 at 123.
(3) 19 M. 100 at p. 103.
(4) 19 M. 329.
(5) 21 M. 243.
(6) 22 M. 11.
(7) 24 M. 158.

are to the same effect; and in *Kasturi Gopala Ayyangar* v. *Anantaram Thivari* (8) it was again laid down broadly that assignees of revenue cannot proceed under section 42 of the Revenue Recovery Act and have only a personal claim. On the principle of *stare decisis* I feel bound to adhere to these decisions. The fact that *jodi* was held to be rent payable to a landholder by a tenant within the meaning of the Rent Recovery Act, 1865, having regard to the definition of landholder [see *Lakshminarayana Pantulu* v. *Venkatarayanam* (9) and the cases there cited], and that similar provisions were to be found in the Madras Estates Land Act, 1908, until these provisions were themselves repealed by the amending Act of 1909, has no direct bearing on the question but makes it more than ever undesirable to question the authority of the decisions laying down the competency of the Small Cause Courts to try suits for *jodi* on which the Legislature may have acted in finally deciding to leave such suits to the Civil Courts. The earlier cases of *Suryanna* v. *Durgi* (10), *Alubi* v. *Kunhi Bi* (11) and *Krishnasami* v. *Venkatarama* (12) were not cases of *jodi*, but assignments of portions of the revenue payable directly by the *ryot* and in the last of these cases Shephard, J., who was a party to some of the later decisions doubted if a mere assignment of revenue would convey a charge. In *Ramachandra* v. *Jagammohana* (13) the point did not arise. These decisions, in my opinion, afford no sufficient ground for questioning the numerous subsequent decisions expressly in point. If the law there laid down is to be altered it should, I think, be by Legislature. We must reverse the decree in so far as it affects the 8th defendant and allow his appeal with costs throughout. The memorandum of objections by the 7th defendant is dismissed with costs. As regards the defendants Nos. 2 to 6 the decree is varied so as to make it a decree against the joint family property in their hands under Order XLI, rule 33, of the Code of Civil Procedure.

(8) 26 M. 730 at p. 733; 13 M. L. J. 248.
(9) 21 M. 116 at p. 119; 8 M. L. J. 43.
(10) 7 M. 258.
(11) 10 M. 115.
(12) 13 M. 319.
(13) 15 M. 161.

SESHAGIRI AIYAR, J.—It is not without hesitation that I have come to the conclusion that the appeal should be allowed.

The *first* question is whether the *jodigai* due from the *inamdar* is a charge upon the land. I understood Mr. Ramachandra Aiyar to concede that if it is directly payable to Government, it would be a first charge. Apart from this admission, I am of opinion that there is a first charge for the *jodigai*. It was pointed out in *Secretary of State for India* v. *Bombay Landing and Shipping Co.* (14) that by the Common Law of this country, the debt due to the King took priority over other debts, with the possible exception of those due to *Brahmins*. This view was accepted in some of the early Bengal Regulations. See *Judah* v. *Secretary of State for India* (15). At the time of the Permanent Settlement, it was recognised in Madras. *Vide* section 6 of Regulation XXVII of 1802. In the Revenue Recovery Act of 1864, there is an express provision to that effect. I am satisfied that the *jodi* payable by *inamdars* is within the purview of that Act

Mr. Ramachandra Aiyar strongly relied on some of the decisions of this Court which have held that a claim for *kattubadi* or *jodi* is cognizable by the Court of Small Causes. They are all cases in which the payments were due to the *zemindar* as part of his income. The term *jodi* or quit-rent is applied indiscriminately to what is recoverable by a proprietor from his under tenure-holders as well as to payments due to Government by way of assessment. None of the cases, so far as I have examined them, related to *jodi* payable to Government. Further these decisions proceed on the construction of the terms "landholder and tenant" in Act VIII of 1865. The Estates Land Act is different. Even under the old Act, the decisions were not uniform. See *Alubi* v. *Kunhi Bi* (11), *Vizianagaram Maharajah* v. *Sitaramarazu* (3) (the case in the foot-note). It is true that a larger number of cases have taken a different view: *Vizianagaram Maharajah* v. *Sitaramarazu* (3), *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rao* (4), *Gajapati Rajah* v. *Suryanarayana* (6), *Lingam Krishna Bhupati Deru* v.

(14) 5 B. H. C. R; 23.
(15) 12 C. 445 at p. 452.

*Vikrama Devu* (16); *Appa Rao* v. *Sobhanadri Rao* (7). Mr. Justice Subramania Aiyar has explained in *Lakshminarayana Pantulu* v. *Venkatarayanam* (9) the reason of this change. Although on the principle of *stare decisis* it is undesirable to upset this course of decisions, I am not prepared to extend them to cases in which the *jodi* is payable to Government.

The *next* point for consideration is whether the plaintiff can stand in the shoes of the Government and claim a first charge. If the right to collect the *jodigai* was assigned to him as such, I would be prepared to hold that he has a first charge. I accept Mr. Srinivasa Aiyangar's contention that an assignee of Government Revenue is entitled to the security which the Government had, although he may not have all the statutory remedies which the assignor had. The principle of section 141 of the Indian Contract Act is applicable to such assignment. North, J., in *In re Churchill, Manisty* v. *Churchill* (17) says that the priority which the Crown has enures for the benefit of the surety. This is the view taken in *Suryanna* v. *Durgi* (10), *Krishnasami* v. *Venkatarama* (12). In *Kasturi Gopala Ayyangar* v. *Anantaram Thivari* (8) the learned Judges say that if the tax-payer was in a position to be proceeded against by the Government, the assessment will be a charge. I understand the decision to lay down that so long as the distinctive character of Government assessment remains, whoever may be the person that collects it, he will have a first charge. If it lays down that under no circumstances can an assessment which is collected by an assignee create a charge, I respectfully dissent from that view.

The difficulty in this case arises in finding out whether the *jodigai* as such was assigned to the plaintiff's predecessor-in-title. The *sannad* is not produced. We are not in a position to say whether in the Permanent Settlement a distinction was made between the right to collect the *jodigai* and the right to collect rents from tenants. It cannot be said that the *jodigai* was not included in the assets on which the *peshkush* was fixed. One circumstance on which Mr. Ramachandra Aiyar laid stress has influenced my finding on the point. From Exhibits G and H, it appears that the Government decided to claim the entire *jodigai* as the *mittahdar* had been given waste lands in other villages to which he was not entitled. It was argued by the learned Vakil for the appellant that the income from these waste lands was taken into account in including the whole of the *jodigai* in the *peshkush*. I think there is force in the argument. If this is the correct view, the Government did not assign the *jodigai* as such; and, therefore, the *mittahdar* cannot claim a first charge. This state of affairs can only be rectified by Government.

I agree in the order proposed by my Lord.

The memorandum of cross-objections by the 1st respondent coming on for hearing on 10th and 14th September 1915, respectively, and having been set down to be spoken to on the 24th September 1915, and by order made on that day coming on for re-hearing this day, the Court delivered the following

JUDGMENT.—Without deciding the question of legal liability of the 8th respondent to pay the amount claimed, we pass a decree for the amount as Mr. Venkatachariar has no objection to it, provided the amount decreed is deducted from the amount payable by him in Appeal No. 133 of 1913. Each party will bear his own costs.

*Appeal allowed.*

(16) 10 M. L. J. 256.
(17) 39 Ch. D. 174; 59 L. T. 597; 36 W. R. 805; 58 L. J. Ch. 136.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 956 AND 957 OF 1914.

December 3, 1915.

*Present*:—Mr. Justice Coutts Trotter.

SENNIMALAI GOUNDAN—PLAINTIFF—PETITIONER IN BOTH

*versus*

IN C. R. P. No. 956 OF 1914

PALANI GOUNDAN AND ANOTHER—DEFENDANTS—RESPONDENTS

IN C. R. P. No. 957 OF 1914

PALANI GOUNDAN—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 122, O. IX, r. 13—Application to set aside* ex parte *decree, if covered by s. 5 of Limitation Act—Power of High Court to make rules extending time—Limitation Act (IX of 1908), s. 5.*

Section 5 of the Limitation Act, as it stands, does not extend the applications to set aside *ex parte* decrees, but it is within the powers of a High Court acting under section 122 of the Code of Civil Procedure to frame a rule making its provisions applicable to the periods of limitation prescribed in that Act for presenting applications of this nature.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the District Munsif of Tirupur in Interlocutory Applications Nos. 485 and 484 of 1914 in Original Suit No. 1152 of 1912.

Mr. *T. V. Muthukrishna Aiyar*, for the Petitioner.

Mr. *K. Ramanatha Shenai*, for the Respondents.

JUDGMENT.—This was a petition originally to set aside an *ex parte* decree. The learned District Munsif held that there was good cause for excusing the petitioner being out of time under the Limitation Act and set aside the *ex parte* decree. When this case was first argued, it was pointed out that Order IX, rule 13 of the Civil Procedure Code, did not provide that section 5 of the Limitation Act which gives discretion to extend time should apply. It is quite clear that section 5 of the Limitation Act as it stands does not, and cannot, possibly extend the applications to set aside *ex parte* decrees. But it has since been pointed out to me that the High Court has now added to Order IX, rule 13, a sub-rule (2) to this effect: "The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)." That *prima facie* is an



end of the case. But the argument for the petitioner is that section 122 of the Civil Procedure Code, which deals with the power of High Courts to make rules, cannot possibly enable them to make rules which have the effect of altering the Limitation Act, on the ground that their only power is to alter the procedure, their own procedure or the procedure of Subordinate Courts, and that to alter the period of limitation prescribed by another Statute is outside the scope of section 122, and, therefore, *ultra vires*. I am unable to accede to that argument. I have always thought it unfortunate that the Indian Limitation Act deals in one Statute, and apparently as matters entirely *pari passu*, with things so different as the limitation of the number of years within which a suit can be brought and the fixing of so many days or so many weeks as the limit within which interlocutory and other applications should be launched. But there it is certainly. Whatever may be the case of the Statute prescribing say three years for an action to be brought, I am quite clear that the Articles in the Act limiting applications of this nature which are almost entirely interlocutory deal clearly with matters of procedure; and, therefore, the High Court has jurisdiction under section 122 to make the addition to Order IX, rule 13. The petitions fail and must be dismissed, but in the circumstances each party will bear its own costs.

*Petitions dismissed.*

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MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2203 OF 1914.

December 14, 1915.

*Present*:—Mr. Justice Kumaraswami Sastri and Mr. Justice Phillips.

*Raja* RAJESWARI AMMAL—PLAINTIFF—APPELLANT

*versus*

SUBRAMANIA ARCHAKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Religious office—Succession—Females, whether disqualified—Performance of religious duties by proxy—Custom excluding females—Onus.*

A female is not under Hindu Law or custom disqualified from succeeding to a hereditary religious office and getting such duties, as she may be dis-

qualified by reason of her sex from performing, performed by proxy.[p. 977, col. 1.]

*Sundarambal Ammal* v. *Yogavanagurukkal*, 23 Ind. Cas 72; (1914) M. W. N. 286; 1 L. W. 276; 38 M. 850; 26 M. L. J. 315, dissented from.

*Ramasundaram Pillai* v. *Savundaratha Ammal*, 27 Ind. Cas 440; 1 L W. 900; (1914) M. W. N. 919; 16 M. L. T. 423; *Tangirala Chiranjivi* v. *Raja Manikya Rao*, 25 Ind. Cas. 283; 27 M.L. J. 179; *Mahamaya Debi* v. *Haridas Haldar*, 27 Ind. Cas. 400; 20 C. L. J. 183; 19 C. W. N. 208; 42 C. 455; *Subraya Kakramaya* v. *Subraya Padayya*,7 Ind Cas. 715; 8 M. L. T. 325; (1910) M. W. N. 445, followed.

No special custom has to be pleaded to enable a female heir to succeed to a religious office; the onus is on those who deny that right to prove a custom excluding females. [p. 976, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore, in Appeal Suit No. 90 of 1914, preferred against that of the District Munsif of Tiruvadi, in Original Suit No. 499 of 1912.

Messrs. *G. S. Venkatarama Aiyar* and *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *S. Subramania Aiyar*, for the Respondents.

JUDGMENT.–The only question raised in this second appeal is, whether a female heir is disqualified from succeeding to the office of *archaka* and receiving the emoluments attached to the office in cases where such office is hereditary in her family. The District Munsif passed a decree in plaintiff's favour but the Subordinate Judge, who agreed with the District Munsif in all his findings of fact, dismissed the plaintiff's suit on the ground that the decision in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) was authority for holding that females were disqualified from succeeding to the office.

The right of females to succeed to religious offices and perform the duties by proxy where such offices are hereditary has been recognized in numerous cases. As observed by Justices Ayling and Hunnay in *Ramasundaram Pillai* v *Savundaratha Ammal* (2) (where all the important cases are collected), the rule enunciated by Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) runs counter to ideas which have been commonly accepted by parties concerned and given effect to by Courts for many years, and we think that the present case is one where Courts should apply the doctrine of *stare decisis* and not declare to be illegal a practice which has been followed for many years with, so far as we are aware, no serious evil consequences and which has been the foundation of many titles.

The hereditary right to succeed to a religious office is itself the creature of custom and the fact that females have been allowed without question to enjoy the emoluments of the office and to get the duties performed by proxy and that Courts have for a series of years given effect to such right, justifies us in holding that female succession is not excluded. The right of females to perform religious duties by proxy is not unknown to Hindu Law usage, the commonest examples being the performance of *sradhas* and funeral obsequies by female heirs by proxy and cases where a widow makes an adoption.

In *Tangirala Chiranjivi* v. *Raja Manikya Rao* (3), Justices Benson and Sundara Aiyar held that there was no basis for the assumption that females are as such disqualified from succeeding to a religious office attached to a temple and that the onus would be on the *dhamakartas* to prove any such disqualification, as services in temples are often performed by proxies. They were dealing with a case where the service to be performed was the reciting of Vedas in a temple and we can see little difference between such a service and the service performed by *archakas*..

The Subordinate Judge was wrong in thinking that any special custom has to be pleaded to enable a female heir to succeed. The onus is on those who deny that right to prove a custom excluding females.

In *Mahamaya Debi* v. *Haridas Haldar* (4), which was a case relating to an office in the Kalighat temple similar to that of *archakas* in this Presidency, Justice Mookerjee, after an elaborate review of several authorities, was of opinion that the custom whereby females not only succeeded to the office but also alienated the same was not

(1) 23 Ind. Cas. 72; 26 M. L. J. 315; (1914) M. W. N. 286; 1 L. W. 276; 38 M. 850.
(2) 27 Ind. Cas. 440; 16 M. L. T. 423; 1 L. W. 900; (1914) M. W. N. 919.

(3) 25 Ind. Cas. 283; 27 M. L. J. 179.
(4) 27 Ind. Cas. 400; 42 C. 455; 20 C. L. J. 183; 19 C. W. N. 208.

invalid as opposed to public policy. An alienation was also upheld in *Subraya Kakramaya* v. *Subraya Padayya* (5). It is unnecessary for us in the present case to decide how far the right of alienation extends, though there is authority for holding that a female heir can alienate the office to one next in succession. So far as the authorities go, we do not think that there is any ground for refusing to recognise the custom of female succession to hereditary religious offices on the ground of such a custom being opposed either to the express text of Hindu Law or to public policy.

Following *Ramasundaram Pillai* v. *Savundaratha Ammal* (2) and *Tangirala Chiranjivi* v. *Raja Manikya Rao* (3), we are of opinion that a female is not, under Hindu law or custom, disqualified from succeeding to a hereditary religious office and getting such duties, as she may be disqualified by reason of her sex from performing, performed by proxy.

We reverse the decision of the Subordinate Judge and remand the case to him for disposal of the second question raised by him. The respondents will pay appellants costs in this Court and the costs will abide and follow the result.

*Appeal allowed; Case remanded.*

(5) 7 Ind. Cas. 715; 8 M. L. T. 325; (1910) M. W. N. 445.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 41 OF 1915.

December 20, 1915.

*Present*: Mr. Stanyon, A. J. C.

BATTOOLAL—APPELLANT

*versus*

MRS. EKSTRAND RESPONDENT.

*Guardians and Wards Act (VIII of 1890), s. 17 (3)—Minor, intelligent preference by, consideration of.*

A boy of 14 and a girl of 16 years of age are 'old enough to form an intelligent preference' within the meaning of section 17 (3) of the Guardians and Wards Act, and their wishes have a right to the consideration of a Court appointing or declaring a guardian. [p. 979, col. 2; p. 980, col. 1.]

*Reade* v. *Krishna*, 9 M. 391, dissented from.

*In the matter of Saithri*, 16 B. 307; *Sarat Chandra* v. *Forman*, 12 A. 213; A. W. N. (1890) 80; *Mokoond Lal Singh* v. *Nobodip Chunder Singha*, 2 C. W. N. 379; 25 C. 881; *In the matter of Joshy Assam*, 23 C. 290; *Albrecht* v. *Bathee Jellamma*, 13 Ind. Cas. 453; 11 M. L. T. 53; (1912) M. W. N. 53; 22 M. L. J. 247, referred to.

Miscellaneous appeal against the order of the District Judge, Saugor, dated the 21st October 1915.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *G. P. Dick*, for the Respondent.

JUDGMENT.—This is an appeal under section 47 (*c*) of the Guardians and Wards Act, 1890, against an order of the District Judge of Saugor refusing to make an order for the return of a ward to the custody of her husband and guardian. The applicant, Battoolal, is a Dangi—a caste allied to Rajputs—of the village of Baroda, a few miles from Saugor on the road to Rehli; and the non-applicant is a Dane by nationality and the head of a Swedish Mission which was established in Saugor some 40 years ago. The alleged ward is the lawful wife of the applicant and the District Judge has found her to have been born on the 14th May 1899, and, therefore, to be a minor till the 14th May 1916. This girl left her home clandestinely one night, during the temporary absence of her husband, and reached the Mission of the non-applicant on the following morning. She was taken in, and her presence there concealed from her relations. Her husband, however, discovered her, and all attempts to secure her return amicably having failed, an application was made to the District Judge for an order under section 25 of the above enactment, with the result already stated.

It was claimed on behalf of the non-applicant that the alleged ward had attained majority before she entered the Mission, and that she had gone there quite voluntarily, impelled by a desire to embrace Christianity. On the 21st August 1915, in the course of proceedings before the District Judge under the above application, the Pleader, for the non-applicant, stated as follows:—

"No order for temporary custody is needed in this case. Mrs. Ekstrand is willing to give an undertaking that she will produce the girl whenever called upon by the Court, and also that she would not be converted to Christianity during the pendency of these proceedings."

BATTOOLAL *v.* MRS. EKSTRAND.

The proceedings before the District Judge ended on the 21st October 1915. A copy of the order was obtained on the 1st November, and this appeal filed on the 4th November 1915, accompanied by an application asking that the religion of the girl be not interfered with pending the decision of the appeal. This was a reasonable prayer, and on the 5th November 1915, I made the following order:—

"Let an order issue to the respondent that, pending the disposal of this appeal, though her care and custody of the minor ordered by the lower Court are preserved, she shall do nothing towards conversion of the minor from the caste and religion to which she belongs by birth and marriage.

"This order will become inoperative on the minor attaining majority."

There was some delay in serving this order, and when it reached the non-applicant on the 20th November 1915 she made the following endorsement on it:—

"Received copy of order, dated 5th November 19.5, on the 20th November 1915, but sorry to submit to the Hon'ble Court that the woman Konsa was converted to Christianity on the 28th October 1915, and I am, therefore, unable to carry out the order of the Court." It will be seen that the conversion was made a week after the order made by the District Judge. This course of conduct was no doubt within the letter of the undertaking given on the 21st August 1915, but it was an ill-advised proceeding, and created in my mind a strong doubt of the good faith of the non-applicant, I therefore ordered the production of the minor at the hearing to-day, an order which was duly obeyed, Mrs. Ekstrand herself having produced Konsa before me. The learned District Judge had already examined this girl, but it seemed expedient to make a further examination of her in this Court, and this was done. Arguments were heard on both sides, and I have come to the conclusion that this appeal must fail.

The story told by the girl is that on two occasions a lady of the Mission, Miss Sandberg, a Swede by nationality, visited Baroda, once three years ago and again in the early part of this year, and that on each visit Miss Sandberg came to her house, and, in Hindi, sang hymns explanatory of the joys of Christianity: that these hymns on the last visit created an earnest desire in her mind to become a Christian: that in pursuance of that desire, which she communicated to no one, on a date (not ascertained by the Judge in the course of the evidence) some five or six days after her husband had beaten her, she left her home at midnight, taking her ornaments and Rs. 10 in cash, made her way to the main Saugor-Rehli road which passes near Baroda, and walked along it till she reached Saugor at 6 o'clock the following morning: that near the first bungalow to which she came she accidentally met *Musammat* Kaiser, an old woman of the Swedish Mission, from whom she inquired the way to the Railway Station, her intention then being to go to Jubbulpore where she had heard there was a Christian Mission: that, having ascertained that Kaiser belonged to the Mission close by, she followed her to her house, and was subsequently introduced to Mrs. Ekstrand and admitted to the Mission.

I find it impossible to give credit to this story as being the whole truth. Miss Sandberg went to Baroda, as she goes everywhere, in pursuit of the main purpose of the Mission, which is to obtain converts to Christianity, and it is preposterous to suppose that the conversion of this illiterate young girl was obtained without any inducement beyond the singing of a few hymns. Miss Sandberg, when examined as a witness, professed to be oblivious of everything connected with the girl. Her evidence in substance may be thus summarised:—

"I do not remember seeing the girl or singing to her, but as she says that I saw her and sang to her I must have done so."

Therefore I think that there has been a good deal of *suppressio veri* as to the circumstances under which the girl made her way to the Mission. When she arrived no attempt was made to communicate with her husband or her parents, and the whole attitude of the Mission shows that the desire to obtain a convert was placed before everything else, and that the posi-

tion sought to be set up, that the girl was a refugee from the violence of her husband and the harshness of her mother-in-law, is more or less a pretence to cover the proselytism responsible for this case. But it is just to the non-applicant to state that the girl represented herself, and was believed to be, of full age, and not a minor; and in that condition of things the procedure of the Mission in not communicating with the girl's father is less open to condemnation that it would be otherwise, and did not violate any law of the land. The girl was examined by the Civil Surgeon of Saugor, Colonel Buchanan, I. M. S., an officer of ability and long experience in this country, on the 23rd July 1915, and he gave his opinion that she was over 18 years of age. He has confirmed this opinion in the witness-box in these proceedings, and Dr. Kale, a *Brahmin* and Sub-Assistant Surgeon, also examined as a witness, has concurred with that opinion. As I shall hereafter show, this evidence goes largely to shatter the allegation that the girl is a minor.

After the applicant discovered the whereabouts of his fugitive wife, he and his father made repeated efforts to induce her to return. The applicant has falsely deposed that he was never allowed to see his wife. He had several interviews with her, but always in the presence of Mrs. Ekstrand, who undoubtedly feared that he might carry the girl away by force. The applicant has admitted that Mrs. Ekstrand told him that, if his wife was willing to go back with him, the Mission would not detain her, and she was at liberty to go, but that he must not use force. The girl steadily and consistently refused to go back to him, and, at one interview on the 8th July 1915, the husband and father-in-law took away from her the Rs. 10 and certain trinkets and personal effects which she had brought away from her husband's home. This is proved by the receipt, Exhibit N-AI. Konsa states that on this occasion her husband declared that he abandoned her as she was of no further use to him, but admits that he came again and appealed to her to return with him. Before the District Judge, and before me, the girl, after several months' experience of Mission life, has firmly adhered to her purpose, and declared her distaste for her husband and former mode of life, and her strong desire for Christianity and education. This desire may be a mere impulse of an emotional and temporary nature, or it may be due to earnest and lasting conviction; but, for the time being at least, it is strong and genuine, and constitutes such a preference as is contemplated by section 17 (3) of the Guardians and Wards Act, 1890; and as the present age of the girl is certainly not less than $17\frac{1}{2}$ years, assuming her to be a minor, I would feel bound to give consideration to it in deciding this appeal. The girl is high spirited and very intelligent, and I gave her husband an opportunity of speaking to her in Court, and of persuading her to return to him. She firmly refused, and though, while under examination by me, she certainly answered in words which led me to believe that she would welcome her husband as a Christian, she modified or retracted that statement when questioned by his legal adviser, stating that even then she would not live with him as his wife, as she preferred Mission work and education to married life. Section 17 (3) aforesaid has consistently been applied by the Indian Courts in the cases of minors of much lower age than the $17\frac{1}{2}$ years which the finding of the Court below would give to the girl in dispute in this case. It may now be taken as settled law in India that a boy of 14 and a girl of 16 years of age have a right to a consideration under the above section of their preference as to where they will live, and in this respect the civil law has adopted the age limits for kidnapping from lawful guardianship enacted by the Indian Penal Code. That this was not always accepted as the law by the Indian Courts is clear from the decision of *Reade* v. *Krishna* (1) and some of the Indian cases therein cited. But that was a decision prior to Act VIII of 1890. It has not been followed by any Court subsequent to the introduction of that enactment, and must be taken to have been impliedly dissented from by the Bombay High Court in *In*

(1) 9 M. 391.

*the matter of Saithri* (2), a case in which the English and Indian Law on the subject was fully discussed, and it was laid down that "a boy of fourteen and a girl of sixteen have a right to choose their own residence." I am not prepared to go as far as this, nor does Act VIII of 1890 support this extreme view. It merely makes the selection by a minor "old enough to form an intelligent preference" a matter for consideration by the Court, and not a matter of right in the minor. The decision in *Reade* v. *Krishna* (1) was also not followed by the Allahabad High Court in *Sarat Chandra* v. *Forman* (3). In *Mokoond Lal Singh* v. *Nobodip Chunder Singha* (4), a Hindu boy, 12 or 13 years old, preferred to remain with Hindu uncles to living with his father who had become converted to Christianity, and this preference, and the conflict between the religion of the boy and his father and lawful guardian, were held to justify the father being deprived of his parental right, and his claim to the custody of the boy was refused. A somewhat similar view was taken in *In the matter of Joshy Assam* (5). The Calcutta view was approved in *Albrecht* v. *Bathee Jellamma* (6).

In all these cases the Courts followed a course which they considered most conducive to the welfare of the minor, and that is the sound principle which underlies the able and impartial order of the learned District Judge in this case. I am convinced, from my own examination of the minor, that that order is just and correct, even if Konsa (her name with her parents) *alias* Indrani (her name in her husband's home) *alias* Sushobi (the name given to her in Christian baptism) is a minor. If she is not old enough to make an intelligent preference at the age of 17½ years no minor can be old enough to bring section 17 (3), Act VIII of 1890, into operation. I hold, without any hesitation, that to send her where she does not want to go would be an unwarrantable restraint on her personal liberty as a British subject, and one which no Court could rightly impose. She is intelligent and adult, and has repeatedly and unequivocally declared her wish to remain in the Mission as a Christian. That ends the matter.

I am further of opinion that, having regard to the appearance of the girl and the expert evidence as to her age, a heavy onus lay on the applicant to prove that she was still a minor on the date of the application, and that the evidence given by him is legally insufficient to discharge that onus. If the evidence of the girl herself is carefully compared with the books of the *Kotwar*, on which the finding of the District Judge rests, it will be seen that the book does not record the births of all the children of Mohansingh, the girl's father, but of only three out of four of his daughters. It is then a matter more or less of conjecture whether Konsa was born in 1895 or in 1898. Mohansingh's evidence is contradicted by the book entries, and is obviously partisan. I must and do hold that Konsa has not been proved a minor. The evidence given to show that she was born in 1900 is demonstrably false.

One noteworthy point is this, that the girl's parents have not taken any active steps to obtain the return of the girl to her husband or her caste. Mohansingh merely said, in answer to questions, that he would be willing to receive her though an outcaste, but he has never asked for her either in Court or at the Mission. This is certainly significant of parental sympathy with, or at any rate want of parental objection to, the career selected by the girl. In this case I am concerned only with the claims of Battoolal as a guardian, and not with his claims as a husband.

For these reasons I dismiss the appeal: but as the claim made was natural and proper, and required final adjudication by this Court, I make no order as to costs.

*Appeal dismissed.*

(2) 16 B. 307.
(3) 12 A. 213; A. W. N. (1890) 80.
(4) 25 C. 881; 2 C. W. N. 379.
(5) 23 C. 290.
(6) 13 Ind. Cas. 453; 22 M. L. J. 247; 11 M. L. T. 53; (1912) M. W. N. 53.

KANNIAH NAIDU *v.* CHENGAMA NAIDU.

## MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 131 OF 1914.

February 18, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

KANNIAH NAIDU—PETITIONER—APPELLANT

*versus*

CHENGAMA NAIDU AND ANOTHER—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XXI, r. 16, O. XXII, r. 10, O. XXXIV, r. 5—Preliminary mortgage-decree for sale—Transferee, whether can apply for execution—Procedure.*

Where the transferee of a mortgage-decree for sale applied under Order XXI, rule 16, Civil Procedure Code, for execution and also prayed for the passing of a final decree and for sale:

*Held*, (1) that inasmuch as only a preliminary decree under Order XXXIV, rule 4, had been passed, there was no executable decree and the application for execution was premature;

(2) that as there was a prayer for passing a decree for sale, the applicant must be directed to amend the petition as one falling under Order XXII, rule 10, clause (1), and Order XXXIV, rule 5, of the Civil Procedure Code.

Appeal against the order of the Court of the District Court of Chingleput, in Appeal Suit No. 47 of 1914, preferred against that of the Court of the District Munsif of Poonamallee, in Execution Petition No. 1032 of 1912 (Original Suit No. 537 of 1911).

Mr. *V. C. Seshachariar*, for the Appellant.

Mr. *A. K. Madhava Rao*, for the Respondents.

JUDGMENT.—The appellant obtained a transfer deed (Exhibit A) of the decree passed in Suit No. 537 of 1911 on the file of the Court of the District Munsif of Poonamallee from the son and heir of the decree-holder (by name Chinna Chengama Naidu) on the 23rd of August 1913 for Rs. 232-11-5. The decree was a mortgage-decree for sale.

The appellant applied for execution on the 30th November 1912 as transferee-decree-holder under Order XXI, rule 16, of the Code of Civil Procedure and prayed for the passing of a final decree and also for sale.

It has to be observed that the lower Courts have not scrutinised the prayer in the petition and did not have it properly amended as they ought to have done. The petition mentions in the beginning only Order XXI, rule 22, of the Code of Civil Procedure. In column 10, it mentions Order XXI, rule 16, and Order XXI, rule 66, of the Code of Civil Procedure. These rules relate to applications by the transferee of a decree for execution thereof, to the issuing of notice of such applications and to the issuing of proclamation of sale. But there is at present no executable decree, because only a preliminary decree under Order XXXIV, rule 4, has been passed in the suit. The present Petition No. 1032 of 1912 in column 10 admits that a final decree *has to be passed, as it prays for the making of the decree final.* Till a final decree is passed, the suit is pending. The date of preliminary decree is dated 24th November 1911. The date fixed for payment is 24th February 1912. Under Order XXXIV, rule 5, clause (2), when the payment is not made, the plaintiff has to make an application to pass the final decree for sale. The application for execution, therefore, was premature and as there is a prayer for passing a decree for sale, the appellant ought to have been asked to amend the petition as an application under Order XXXIV, rule 5, clause (2), of the Code of Civil Procedure. But as a preliminary even to that application, he ought to have asked for leave of the Court to continue the suit under Order XXII, rule 10, of the Code of Civil Procedure on the ground that the interest in the preliminary decree has, during the pendency of the suit, been assigned to and has devolved upon him.

As the whole proceedings have been very irregular, we set aside the orders of the District Munsif in order that the District Munsif may direct the appellant to amend the petition as one under Order XXII, rule 10, clause (1), and under Order XXXIV, rule 5, clause (2), of the Code of Civil Procedure and to pass fresh orders thereon according to law. As the appellant has been guilty of grossly irregular procedure in filing the petition under wrong sections and praying for unripe reliefs, he will himself bear the costs incurred by him hitherto.

*Order set aside.*

KRISHNA IYER *v.* MURINGA MALAYIL.

## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2451 OF 1914.

February 11, 1916.

*Present*:—Mr. Justice Bakewell and Mr. Justice Napier.

L. S. KRISHNA IYER—PLAINTIFF—APPELLANT

*versus*

MURINGA MALAYIL KUNNATH GOPALAN NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Malabar Law*—Anubhavam *grant*—*Grant in favour of children*—Anubhavam *right on specified rent*—*Construction.*

The term "*anubhavam*" when used with reference to a grant of land confers a permanent tenure.

*Theyyan Nair* v. *Zamorin of Calicut*, 27 M. 202, followed.

Where, therefore, a deed of grant in favour of the children of a certain man recited that "as before you shall, in future also, hold the properties" on *anubhavam* right on a specified rent:

*Held*, that the document, construed as a whole, showed that the parties intended the tenure to be permanent and that the subsequent reference to a portion of rent as *anubhavam* meant a fixed allowance to be taken by the grantee in perpetuity out of the rent notwithstanding that the gross rent might be varied from time to time upon a customary renewal of the demise.

*Vythilingam Pillai* v. *Kuthiravattah Nair*, 29 M. 501; 16 M. L. J. 358; 1 M. L. T. 290, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit No. 1041 of 1913, preferred against that of the District Munsif, Alatur, in Original Suit No. 318 of 1912.

Messrs. *T. R. Ramachandra Aiyar* and *A. Narayana Sarma*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The question in this case is whether the respondents hold certain land on a permanent tenure, and the case has been argued with reference to the terms of a particular document, Exhibit II. This document is a grant to the children of a certain man and contains the words "as before you shall, in future also, hold" the properties described in the schedule "on *anubhavam* right on a rent of 159 *paras* of paddy worth Rs. 56-12-7. After deducting therefrom the 9 *paras* of paddy fixed as the *anubhavam*, the *purappad* rent is 450 *paras* of paddy." The document then declares the manner in which this net rent of 150 *paras* is to be applied.

RAMPAT MOHATO *v.* RAM GOLAM SINGH.

The word *anubhavam* has been held to confer a permanent tenure when used with reference to a grant of land [*Theyyan Nair* v. *Zamorin of Calicut* (1)], and we think that that decision governs the present case. The subsequent reference to a portion of rent as *anubhavam* may be explained by construing that part of the document as referring to a fixed allowance to be taken by the grantee in perpetuity out of the rent, notwithstanding that the gross rent may be varied from time to time upon a customary renewal of the demise. The use of the words "as before you shall, in future also, hold" the properties supports the construction that the parties regarded the tenure as permanent. The case of *Vythilingam Pillai* v. *Kuthiravattah Nair* (2) on which the appellant relies turned on the construction of a *kanom* in which the word *anubhavam* was used in connection with an amount reserved for the *kanom* demisee. The Court drew a distinction between cases where the tenure was *anubhavam* and the case before them, and holding that it was necessary to give full effect to the fact that a *kanom* is redeemable, decided that only the amount reserved was *anubhavam*. In this case it is true that the amount reserved is also described as *anubhavam*, but we are nonetheless bound to give effect to the grant of the lands as *anubhavam* and must hold the tenure to be perpetual.

The second appeal is dismissed with costs.

*Appeal dismissed.*

(1) 27 M. 202.
(2) 29 M. 501; 16 M. L. J. 358; 1 M. L. T. 290.

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## CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1293 AND 1791 OF 1914.

January 3, 1916.

*Present*:—Mr. Justice Chapman and Mr. Justice Mullick.

IN No. 1293 OF 1914

RAMPAT MOHATO AND OTHERS—DEFENDANTS—APPELLANTS

IN No. 1791 OF 1914

GOLAP CHAND MOHATO AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

RAM GOLAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS IN BOTH.

*Bengal Tenancy Act (VIII of 1885), ss. 105, cl. (4),*

RAMPAT MOHATO *v.* RAM GOLAM SINGH.

109A—*Settling rent—Enhancement—Second appeal —Civil Procedure Code (Act V of 1908), s. 115—Limitation, erroneous decision on, whether ground for revision.*

The expression settling rent in sub-section 4 of section 105, Bengal Tenancy Act, includes enhancement.

The decision of a Settlement Officer settling rent under sub-section 4 of section 105, Bengal Tenancy Act, which results in enhancement of the existing rent is not subject to second appeal.

A High Court cannot interfere under section 115 of the Civil Procedure Code, 1908, on the ground that the question of limitation was wrongly decided by the lower Court.

Where the Settlement Officer in a proceeding under section 105 of the Bengal Tenancy Act settled rent at Rs. 5-4-0 per *bigha* and on the tenants' appeal, the Special Judge altered the rent to Rs. 8-8-0 per acre, though the cross-appeal of the landlord was withdrawn:

*Held*, that the decree of the Special Judge altering the rent in favour of the landlord was without jurisdiction and was liable to be set aside in revision under section 115 of the Civil Procedure Code, 1908.

Appeal against the decrees of the District Judge, Patna, dated the 19th of March and 2nd of April 1914, respectively, affirming those of the Assistant Settlement Officer, Patna, dated the 23rd December 1911 and 23rd December 1912.

Babu *Surendra Nath Ghosal*, for the Appellants.

Babus *Umakali Mookerjee* and *Har Narain Pershad*, for the Respondents.

JUDGMENT.—These two appeals arise out of proceedings under section 105 of the Bengal Tenancy Act. In the Record of Rights prepared under that Act the lands were entered as *kabil lagan*. The landlord made applications for settlement of fair rent under section 105 of the Act. The applications were opposed by the tenants, among other grounds, on the ground of limitation. The question of limitation was decided in favour of the landlord.

The Assistant Settlement Officer dismissed the application on the ground that there was already an existing rent of Rs. 2-4-0 per *bigha* in each case. There were appeals to the Special Judge resulting in orders remanding the cases to the Assistant Settlement Officer for disposal on the merits. On remand the Assistant Settlement Officer decided that a fair rental would be Rs. 5-4-0 per *bigha*. Against that decision the tenants appealed. The Special Judge finally disposed of the matter in appeal by settling rent at Rs. 8-8-0 an acre. The tenants now appeal to this Court.

The respondents, landlords, take a preliminary objection that no appeal lies inasmuch as under the provisions of section 109A of the Bengal Tenancy Act no appeal lies from a decision settling rent. The appellants contend that the decision having resulted in an enhancement of rent it was not a decision settling rent. It is, however, clear from the terms of sub-section 4 of section 105 that the expression "settling rent" includes enhancement. The appellants then contend that in the course of settling the rent the Special Judge decided the question whether the tenants were holding at fixed rates. It is unnecessary for us to determine whether the portion of the judgment is appealable or not because the decision depended entirely on facts.

It is not now suggested that there was a mistake in law in coming to the decision upon the question of status. The result is that the appeals are dismissed.

There is an application in revision. The first ground on which we are asked to interfere in revision is that the question of limitation was wrongly decided. This is not a ground upon which this Court can interfere in revision.

The only ground which can be seriously urged is the ground that the Special Judge had no jurisdiction to grant any relief in favour of the landlord. As we have said, the decision of the Assistant Settlement Officer after remand was that the rent should be Rs. 5-4-0 per *bigha*. This rental, the learned Special Judge on appeal by the tenants, altered to Rs. 8-8-0 an acre.

There was a cross-appeal by the landlords but this cross-appeal was withdrawn. The appellant contends that the alteration of the rental in appeal is in favour of the landlords. It is clear that the Special Judge had no jurisdiction to grant the landlords any relief inasmuch as the landlords' cross-appeal had been withdrawn and no prayer for relief in favour of the landlords was before the Special Judge.

In the circumstances, we set aside the judgment and decree of the Special Judge and restore those of the Assistant Settlement Officer.

VENKATASWAMI NAIDU *v.* SHANMUGAM PILLAI.

Each party will bear its own costs throughout.

*Petition allowed.*

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MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 115 OF 1915.

January 6, 1916.

*Present*:—Mr. Justice Seshagiri Aiyar.

VENKATASWAMI NAIDU PLAINTIFF—RESPONDENT—PETITIONER

*versus*

SHANMUGAM PILLAI—DEFENDANT—PETITIONER—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII, r. 1 (d)—Conditional order setting aside ex parte decree, whether appealable—Order not imposing any terms as to costs, whether* ultra vires.

An order which imposes a condition before setting aside an *ex parte* decree must be taken to be a conditional dismissal and as such covered by Order XLIII, rule (1), clause (*d*), of the Code of Civil Procedure and is appealable.

*Nand Lal* v. *Kishore*, 26 Ind. Cas. 895; 12 A. L. J. 1270, followed.

An order setting aside an *ex parte* decree under Order IX, rule 13, of the Civil Procedure Code, is not *ultra vires* if it does not impose any conditions as to costs.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Madura, in Civil Miscellaneous Appeal No. 38 of 1914, preferred against that of the Court of the Principal District Munsif of Madura, in I. A. No. 1078 of 1913, in Original Suit No. 588 of 1911.

Mr. *K. Raja Aiyar*, for the Petitioner.

Mr. *K. S. Jayarama Aiyar*, for the Respondent.

JUDGMENT.—Mr. Raja Aiyar contends that no appeal lies against the order of the District Munsif directing the respondent to furnish security and impose a condition that otherwise the petition will stand dismissed. I was somewhat impressed by his argument. On further consideration I think the conclusion come to by the learned Judges who decided the case of *Nand Lal* v. *Kishori* (1) is more in consonance with justice than the stricter interpretation which Mr. Raja Iyer wants me to adopt.

(1) 26 Ind. Cas. 895; 12 A. L. J. 1270.

VATAKA CHATHILINGATH *v.* RAMASWAMY PATTAR.

The learned Judges of the Allahabad High Court have held that such an order must be taken to be a conditional dismissal, and as such covered by Order XLIII, clause (*d*). It is true that, as contended by the learned Vakil for the petitioner, in case the condition is not complied with the original order decreeing the claim *ex parte* will stand good. But as the form of the order in the case is that the petition do stand dismissed it is covered by the language of clause (*d*) of Order XLIII. I am, therefore, of opinion that there was an appeal to the District Judge.

Mr. Raja Iyer has also argued that as Order IX, rule 13, says the Court should impose such terms as to costs and that as in this case no terms have been imposed at all the order of the Appellate Court is *ultra vires*. I am not prepared to agree with this contention. It does not follow that because the Court is asked to impose terms there must be some order as to costs. The term may be that there is no order as to costs. In these circumstances I do not think that the Appellate Court's decision offends against Order IX, rule 13. I dismiss the petition with costs.

*Petition dismissed.*

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MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 29 OF 1915.

January 5, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

VATAKA CHATHILINGATH THAVAZHI *Karnavan* AND MANAGER SANKARAN NAIR—PETITIONER—APPELLANT

*versus*

RAMASWAMY PATTAR AND OTHERS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55 (2)—Sale of interest not larger than actually possessed—Eviction of vendee by superior landlord—Vendor, whether liable for breach of covenant for title*

When the interest which a seller "*professed*" to transfer was not larger than what he actually possessed, he is not liable for any breach of covenant for title, if the vendee is evicted by the superior landlord. [p. 985, col. 1.]

SITABAI RAGHUNATH *v.* LAXMIBAI VYANKATESH.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling, in Civil Revision Petition No. 190 of 1914, reported as 27 Ind. Cas. 889, preferred against the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 963 of 1913.

Mr. *C. Madhavan Nair*, for the Appellant.

Mr. *P. S. Narayanaswamy Aiyar* for Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

SCOTT, C. J.—We take it that the conclusion of the learned Judge of this Court, from whose decision this Letters Patent Appeal has been filed, is that on the true construction of Exhibit I, what was professed to be conveyed was a title whose existence was contingent on the pleasure of the *jenmi*. If so, the interest which the seller "*professed*" to transfer was not larger than what he actually possessed and hence the covenant mentioned in clause (2) of section 55 of the Transfer of Property Act was not broken and the learned Judge rightly (if we may say so with respect) distinguished the cases *Subbaraya Reddiar* v. *Rajagopala Reddiar* (1) and *Arunachala Aiyar* v. *Ramasami Aiyar* (2).

We dismiss the appeal with costs.

*Appeal dismissed.*

(1) 23 Ind. Cas. 570; (1914) M W. N. 376; 15 M. L. T 240.

(2) 25 Ind. Cas 618; 27 M. L. J. 517; 1 L. W. 849; 16 M. L. T. 397; 38 M. 1171.

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BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 49 OF 1914.

November 30, 1915.

*Present*:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

SITABAI RAGHUNATH VAIDYA—

PLAINTIFF—APPELLANT

*versus*

LAXMIBAI VYANKATESH VAIDYA—

DEFENDANT NO. 1—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 16 (d)—Maintenance suit—Prayer for charge on land—Jurisdiction.*

In a suit for declaration that the plaintiff was entitled to a maintenance allowance against the defendant who was residing in a Native State, it was prayed that the liability to pay the sum claimed should be made a charge on the defendant's land in British territory:

*Held*, that the suit fell within the purview of section 16 (*d*) of the Code of Civil Procedure, and hence the Court within the local limits of which the land was situate had jurisdiction to try the suit.

Appeal against the order of the First Class Subordinate Judge of Poona, in Suit No. 89 of 1912.

Mr. *J. R. Gharpure*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—The question is whether this suit can rightly be held to fall within the scope of section 16 (*d*) of the Civil Procedure Code. The learned Judge has held that it does not. The suit is one by the mother of the deceased husband of the 1st defendant against that defendant and her father. Both the defendants live in a Native State, and, therefore, in respect of personal claims they will not be liable to the jurisdiction of the Court unless the suit falls within section 16. The suit is for a declaration that the plaintiff is entitled to a maintenance allowance of a certain amount for her life against the 1st defendant and for residence and pilgrimage expenses and other claims and also for *stridhan* property, and one of the objects of the suit, which is set out in the prayer, is that the liability to pay the sums claimed should be made a charge on the 1st defendant's land in the Inam village in the Bhimthadi *Taluka* of the Poona District and on her share also in the said village. The 1st defendant is sued as the person to whom the family estate has come upon death of her husband, whose mother is the plaintiff Sitabai. On the plaint as framed, the question which has to be decided before the Court will be enabled to pass a decree, is whether or not the plaintiff is entitled to a right to, or interest in, immoveable property in the Bhimthadi *Taluka* by way of charge as security for the maintenance which may be decreed. That being the question to be determined, it is a question directly within the terms of section 16 (*d*) of the Civil Procedure Code. We, therefore, think that the learned Judge was in error We must set aside his order and direct that the suit do proceed against the 1st defendant, but we think that the Court had no jurisdiction against the 2nd defendant. Costs costs in the cause.

*Order set aside.*

MEENAKSHI AMMAL *v.* MR. R. G. ORR.

## MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 98 OF 1915.

January 31, 1916.

*Present:*—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

MEENAKSHI AMMAL—PETITIONER—APPELLANT

*versus*

MR. R. G. ORR AND OTHERS—RESPONDENTS.

*Madras Estates Land Act (I of 1908), ss. 186, 204—Certificate, grant of—Deputy Collector, powers of—Jurisdiction—Madras Regulation VII of 1828—Madras Deputy Collectors Act (VII of 1914).*

A Deputy Collector has jurisdiction to make the grant of a certificate required by section 186 of the Madras Estates Land Act to support an application to the District Judge for compulsory sale of land by the *ryot* to the land-holder.

*Quære.*—Whether a Court is bound to receive evidence tendered on the question of reasonableness and sufficiency of the purpose of an acquisition?

*Goghun Mollah* v. *Rameshur Narain Mahta*, 18 C. 271, referred to.

Appeal, under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Napier, in Civil Revision Petition No. 843 of 1913, dated 8th April 1915, reported in 29 Ind. Cas. 457, preferred against that of the District Court of Ramnad, in Original Petition No. 144 of 1911.

Mr. *K. Jagannadha Aiyar*, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General) and Mr. *S. Gopalaswami Aiyangar*, for the Respondents.

FACTS of the case appear from the judgment appealed against reported in 29 Ind. Cas. 457.

JUDGMENT.—Reading section 204 of the Estates Land Act, section 3, sub-section (6), of the General Clauses Act, Regulation VII of 1828 and Madras Act VII of 1914 together, we have no doubt the Deputy Collector had jurisdiction in this case to make the grant of the certificate required by section 186 of the Estates Land Act to support an application to the District Judge for compulsory sale of land by the *ryot* to the landholder.

We agree with Napier, J., that the affidavit filed in support of the contention that the District Judge refused to receive evidence tendered on the question of the reasonableness and sufficiency of the purpose of the acquisition, cannot be accepted as a reliable one. It, therefore, becomes unnecessary for us to give a final opinion on the difficult question whether, if evidence had been so tendered, the Court was bound to have taken that evidence on the point. [See *Goghun Mollah* v. *Rameshur Narain Mahta* (1) where the learned Chief Justice differed from the two other learned Judges on the construction of the corresponding section of the Bengal Tenancy Act which is practically identical with section 186 of the Madras Estates Land Act.]

We dismiss the Letters Patent Appeal with costs.

*Appeal dismissed.*

(1) 18 C. 271.

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GANGABAI PIRAPPA *v.* BANDU PIRAPPA.

## BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 668 OF 1914.

December 10, 1915.

*Present:*—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Shah.

GANGABAI PIRAPPA—DEFENDANT—APPELLANT

*versus*

BANDU PIRAPPA—PLAINTIFF—RESPONDENT.

*Hindu Law*—Sudras—*Inheritance—Illegitimate son*—Dasi putra—*His share in competition with legitimate son or daughter.*

Among *Sudras* the illegitimate sons of a kept woman or concubine are on the same level as to inheritance as the *dasi putra* or the son of a female slave by a *Sudra*. [p. 987, col. 1.]

An illegitimate son's share must be determined by dividing the whole estate in such a way as to give each of the illegitimate sons exactly half of the share of each of the legitimate sons. [p. 988, col. 2.]

An illegitimate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son. [p. 988, col. 1.]

Second appeal from the decision of the District Judge of Sholapur, in Appeal No. 203 of 1912, confirming the decree passed by the Joint Subordinate Judge, Sholapur, in Civil Suit No. 146 of 1911.

Mr. *J. R. Gharpure*, for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.

SHAH, J.—One Pirappa, by caste a *Lingayat*, died in 1907 leaving him surviving a wife Limbabi, who had no issue, a *Mohatar* wife, who had two daughters, and the present plaintiff who claims to be his illegitimate son by a concubine Sitabai, who was

by caste a *Shimpi* woman. All these persons except the plaintiff and the defendant, who is one of the daughters by the *Mohatar* wife, are dead.

The plaintiff sued to recover possession of the property of Pirappa from the defendant. The defendant urged that the plaintiff had really no interest in the property as he could not claim the position and rights of a *dasi putra* according to Hindu Law, and it was also urged that the connection between Sitabai and Pirappa being adulterous and forbidden by law, the text applicable to a *dasi putra* would not apply to the plaintiff.

The plaintiff's claim for the whole property was not allowed; but it was found that he was a *dasi putra* and as such entitled to a moiety of the property in suit, and a decree was passed by the Trial Court on that footing. The lower Appellate Court has affirmed the decision of the Trial Court.

It is found by both the lower Courts that the plaintiff is the illegitimate son of Pirappa, who had kept Sitabai as his mistress. It is also found that Sitabai's husband died when she was very young, and that she was a widow living with Pirappa, when the present plaintiff was born.

It is common ground that the parties are governed by the law applicable to *Sudras*.

Mr. Gharpure's *first* contention is that the plaintiff is not a *dasi putra*, that he is born of an adulterous connection forbidden by law, and that the texts relating to an illegitimate son do not apply to him. It is clear, however, that the condition that the *Sudra* woman of whom the illegitimate son is born, should never have been married to any man has been discarded in the Presidency of Bombay, as pointed out by Sir Michael Westropp, C. J., in *Rahi* v. *Govinda* (1). It is also observed in the same case at page 115 of the report, and the observation is repeated in the later case of *Sadu* v. *Baiza* (2), that among *Sudras* the illegitimate sons of a kept woman or concubine are on the same level as to inheritance as the *dasi putra* or the son of a female slave by a *Sudra*. It is clear that Sitabai's connection with Pirappa as his mistress being established, the present plaintiff, who was born when that connection subsisted, must be treated as the illegitimate son of Pirappa and is entitled to all the rights which a *dasi putra* would be entitled to on the facts of this case.

The *second* question raised in the course of the argument is that in any case the lower Courts are wrong in allowing the plaintiff a moiety of the whole property, and that the plaintiff is entitled to a moiety of the defendant's share, *i. e.*, to one-third of the whole estate. This point was not raised in either of the Courts below and has not been taken in the memorandum of appeal here. We have allowed the point to be argued, though not without reluctance, as it was pressed upon our attention as a point of law not involving any fresh finding of fact. An examination of the texts and the decided cases bearing on the point shows that the point is by no means easy to decide. We feel certain, however, that whatever may be the proper share to be awarded to the plaintiff, it could not be more than one-third of the whole estate.

At the outset it may be mentioned that Pirappa had two daughters. But it is not suggested by Mr. Gharpure that on that ground, on the footing upon which he argues for the plaintiff's share being one-third, his share would be really one-fifth of the whole estate. This aspect of the question has not been put forward in the argument, and we mention it only for the purpose of making it clear that the extent of the plaintiff's share is determined on the footing that Pirappa had only one daughter.

The fact that Pirappa left two widows behind him, makes, in our opinion, no difference in the *extent* of the plaintiff's share. The point whether in case of daughters and an illegitimate son, the widow of the deceased has only a right of maintenance or takes the estate of the deceased to the exclusion of the daughters is a point upon which there has been some difference of opinion; but that question really does not arise in this case. It is enough to point out that it has nothing to do with the extent of the illegitimate son's share, which must be determined with reference to the number of legitimate sons or daughters or daughters' sons. The question of the

(1) 1 B. 97 at p. 113.
(2) 4 B. 37 at 54.

extent of the illegitimate son's share has not been considered and decided in any of the cases bearing on the widow's right, which only dealt with the point whether she had any right to the property either when there were illegitimate sons or when there were legitimate daughters and illegitimate sons.

The provision as to the extent of an illegitimate son's share is to be found in the Mitakshara, Chapter I, Section XII, placita 1 and 2 (see Stokes' Hindu Law Books, page 426). Yajnyavalkya's text (Vyavaharadhyaya, verse No. 134) contains the word *ardhabhagika* (* * *) which is translated by Colebrooke as partaker of the moiety of a share. It is explained in the commentary by Vijnaneswara that after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is, let them give him half (as much as is the amount of one brother's) allotment. It is further pointed out that if there be daughters of a wife, the son of the female slave participates for half a share only. Speaking with reference to the daughters, Vijnaneswara uses the word *ardhabhagika* (* * *) about the illegitimate son, which is the word used in Yajnyavalkya's text and which has been explained by him in the previous part of the commentary with reference to the sons of a wedded wife as meaning a sharer to the extent of one-half in a brother's allotment. Having regard to the context as well as the language used by Vijnaneswara, there can be no doubt that the illegitimate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son. It may be that in some decided cases this view may not be found to have been uniformly acted upon. But there is no discussion on this point and we feel quite clear that the illegitimate son's share in this case should be calculated on that footing.

The question, however, as to the extent of that share is not so free from difficulty. There are two methods of determining the extent of the share. One method is to divide the whole estate in such a way as to give to each of the illegitimate sons exactly half of the share of each of the legitimate sons. The other method is to divide the estate into as many shares as there may be sons, treating the illegitimate sons as legitimate sons, and then from one share to give half to each illegitimate son, and give the remainder to the legitimate sons. To take the simplest instance, if there be one legitimate son and one illegitimate son, according to the first method, the whole estate would be divided into three shares, two shares going to the legitimate son and one share to the illegitimate son. According to the other method the estate would be divided into two shares, and the illegitimate son will be given half of one share, that is, one-fourth of the whole estate, and the remaining portion, that is, three-fourths of the whole will go to the legitimate son. This second method has been adopted by Vijnaneswara himself in dealing with the share of a sister. It has been explained by him at length in Chapter I, Section VII, placita 6 to 10 (Stokes' Hindu Law Books, pages 398-400). If we had to make a choice between the two methods for the first time, as a matter of proper construction, we should have been inclined to adopt the second method. The expression explained in Section VII, placita 6 to 10, by Vijnaneswara is *nijadanshat* (* * *) which is used by Yajnyavalkya in verse No. 124, while the expression used by him in section XII, placitum 2, is *swabhagat* (* * *) which is synonymous with the former. It is, however, unnecessary to pursue this point any further, as we think that the second method of determining the extent of the illegitimate son's share cannot be accepted now, though, in our opinion, it has the merit of Vijnaneswara's approval. In the first place Mr. Gharpure has not argued that it is the proper method to be adopted now. The decided cases in this Presidency show that it is the former method that is adopted, and the second method, though not expressly considered, must be deemed to have been rejected by necessary implication. Lastly, the other High Courts also have adopted the first mentioned method. On a point of this kind it is important that a rule, once laid down, should be adhered to unless there are exceptionally strong and clear grounds to justify a departure therefrom.

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The case of *Dhodyela* v. *Malanaik* (3) decided by Melvill and Pinhey, JJ., shows that the shares of the illegitimate sons were calculated according to the first method. The same rule was adopted by Melvill, J., in *Sadu* v. *Baiza* (2). Though his judgment was upset in appeal on a different ground, the learned Judges in appeal expressed a clear opinion in favour of the view of Melvill, J., on the point now under consideration, though it was not necessary for the decision of the case. They observed (at page 52 of the report) that "if Mahadu had not survived his father Manaji, then, indeed, under Mitakshara, Chapter I, Section XII, placitum 2, Sadu would have been entitled to only half a share, *i. e.*, one-third of the property, and the remaining two-thirds would have vested in Darya as the legitimate daughter of Manaji".

The same view has been recently taken in *Chellammal* v. *Ranganatham Pillai* (4) and the Allahabad High Court took the same view long ago in *Kesaree* v. *Samardhan* (5).

Mr. Kelkar relied upon the case of *Shesgiri* v. *Girewa* (6) for the proposition that the illegitimate son would be entitled to a moiety of the estate. In that case, however, the plaintiff, who was one of the daughters, was awarded one-sixth share of the whole estate and the illegitimate sons, who were among the defendants, were allowed a moiety of the whole by the District Court. The illegitimate sons appealed against the decree and the plaintiff daughter had filed no cross-objections. The only point urged before, and decided by, the High Court was, whether the illegitimate sons excluded the widow and the daughters altogether. The true extent of the plaintiff daughter's share was not decided by the High Court. The remark of Sir Charles Sargent, C. J., that the illegitimate sons were entitled to a half share, apparently based upon the observation of Sir Michael Westropp, C. J., in *Rahi* v. *Govinda* (1), is apt to be misunderstood. No doubt, at page 115 of the report of *Rahi* v. *Govinda* (1) it is stated that the illegitimate son is entitled to a half share. But in order to understand whether it was half of the whole estate or half of a legitimate son's share it is necessary to bear in mind the observations at page 104 of the report, where Sir Michael Westropp, C. J., after referring to the Mitakshara, Chapter I, Section XII, observes: "If there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son; and such daughter or daughter's son would take the residue of the property". Even if there be any doubt as to what was meant by that passage, Sir Michael Westropp's dictum in the later case of *Sadu* v. *Baiza* (2), which is already quoted, makes the meaning abundantly clear. There is no reason to suppose that Sir Charles Sargent did not understand Sir Michael Westropp's observation in that sense, and though the decree of the District Court in *Shesgiri's* case (6) may not be consistent with the view, which we have already expressed as being the correct view to take of the extent of the illegitimate son's share, it is clear that there is nothing in the decision of the High Court which is inconsistent with that view. The point considered and decided in *Meenakshi Anni* v. *Appakutti* (7) was that the widow did not exclude the illegitimate sons altogether. The question as to the extent of the illegitimate son's share in competition with a legitimate daughter apparently did not arise in that case and was not decided.

For these reasons we are of opinion that the plaintiff is not entitled to more than a third of the property in suit. We accordingly modify the decree of the lower Appellate Court by directing that the plaintiff should be awarded on partition one-third of the property in suit. In other respects the decree should be confirmed. Under the circumstances the appellant must pay the respondent's costs of this appeal, as the grounds mentioned in the memorandum of appeal have failed.

*Decree modified.*

(3) (1874) P. J. 43.
(4) 12 Ind. Cas. 247; 34 M. 277.
(5) 5 N. W. P. H. C. R. 94.
(6) 14 B. 282.
(7) 4 Ind. Cas. 299; 7 M. L. T 26; 20 M. L. J. 359; 33 M. 226.

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 3 OF 1915.

January 4, 1914.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

SWAMINATHA AIYAR—DEFENDANT No. 6—PETITIONER—APPELLANT

*versus*

S. SIVAGURUNATHA CHETTIAR—PLAINTIFF—RESPONDENT.

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 67, 90—Sale in execution of a decree—Irregularity in proclamation, whether enough for setting aside sale—Applicant, what must prove.*

The mere fact that, in a proclamation of sale by public auction in execution of a decree, certain fields were by mistake included in the lands mentioned in the first of the four lots advertised for sale whereas they should have been entered in the second, is not of itself such an irregularity as to afford good ground for setting aside the sale.

A judgment-debtor who stands by when an irregularity is committed within his knowledge and in his presence, cannot afterwards take advantage of that irregularity in support of his application to set aside a Court auction sale.

*Arunachellam* v. *Arunachellam*, 12 M. 19 (P. C.); 15 I. A. 171; 5 Sar P. C. J. 265; 12 Ind. Jur. 371, followed.

A person seeking to set aside a Court auction sale on the ground of an irregularity in the conduct of the sale and of consequent loss to himself must adduce direct evidence to connect the irregularity with the loss.

*Tasadduk Rasul Khan* v. *Ahmad Husain*, 20 I. A. 176; 21 C. 66 at p. 70, followed.

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, in Execution Appeal No. 472 of 1914, in Original Suit No. 55 of 1911.

Mr. *N. C. Narasimhachariar* for Mr. *T. Narasimha Aiyangar*, for the Appellant.

Messrs. *T. Rangachariar*, *S. Muttiah Mudaliar* and *K. Ramachandrier*, for the Respondent.

JUDGMENT.—The only irregularity in publishing or conducting of the sale proved in this case was that in the sale proclamation fixing the sale for 16th April 1914, about 30 acres were by mistake included in the lands mentioned in the first of the four lots advertised for sale, whereas those 30 acres should have been entered in the second of the four lots. But the sale was conducted rightly of only the remaining 56 acres as exhausting the first lot. Strictly speaking, no doubt, there should have been a fresh proclamation in respect of the sale of the first lot. But the correction was made at the instance of the appellant himself and he did not insist on a fresh proclamation and did not ask for an adjournment of the sale of lands in the first lot as corrected at his instance. To allow a party who stands by when an irregularity is committed within his knowledge and in his presence to afterwards take advantage of that irregularity in support of his application to set aside a Court auction sale has been strongly animadverted upon by their Lordships of the Privy Council in *Arunachellam* v. *Arunachellam* (1). Further, the learned Subordinate Judge has, on a consideration of the affidavits on both sides, come to the conclusion that the appellant had failed to prove that the properties sold fetched a lower price than they would have fetched if the irregularity had not occurred. Though one of his reasons, namely, the probability of this Kannambadi dam having loomed large in the eyes of intending bidders seems a little fanciful, we think that he has given other good reasons for his conclusion that the lands fetched as fair a price as could be expected at a compulsory Court auction sale.

Further, assuming that injury is shown to have occurred, their Lordships of the Privy Council have held in *Tasadduk Rasul Khan* v. *Ahmad Husain* (2), that "direct evidence" to connect the irregularity with the alleged loss has to be adduced to satisfy the requirements of the section allowing Court auction sales to be set aside. There is no evidence so connecting the irregularity in this case and the alleged injury adduced on the appellant's side, except the statement in his own affidavit (paragraph 11) that "some" intending bidders went away thinking that a fresh proclamation would be issued, etc. This statement is hardly worth the name of evidence.

We, therefore, dismiss the appeal with costs.

*Appeal dismissed.*

(1) 12 M. 19 (P. C.); 15 I. A. 171; 5 Sar. P. C. J. 265; 12 Ind. Jur. 371.

(2) 21 C. 66 at p. 70; 20 I. A. 176.

SRINIVASA CHARIAR *v.* RANGANAYAKI AMMAL.

## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 87 OF 1915.

December 10, 1915.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

R. SRINIVASA CHARIAR—RESPONDENT No. 1—APPELLANT

*versus*

S. P. RANGANAYAKI AMMAL—PETITIONER—RESPONDENT.

*Succession Certificate Act (VII of 1889), s. 4 (1) (a)—Money due from Insurance Company after death of insured person—Succession certificate, whether necessary.*

Where the widow of an insured person applied for a succession certificate in order to recover money due from an Insurance Company:

*Held*, that the application was misconceived as the Company was not the debtor of the deceased in respect of the sum and the applicant was not entitled to this sum as part of the effects of the deceased within the meaning of section 4 (1) (*a*) of the Succession Certificate Act.

Appeal against the order of the District Court of Trichinopoly, in Original Petition No. 537 of 1914.

Messrs. *T. R. Rangachariar* and *K. Bashyam Aiyangar*, for the Appellant.

Mr. *V. Ramaswamy Aiyangar*, for the Respondent.

JUDGMENT.—The application for a succession certificate was misconceived, as the Insurance Company was not the debtor of the deceased Mr. S. P. Rangachary in respect of this sum of Rs. 5,000 and as the applicant (the widow) was not "entitled" to that sum as part "of the effects of the deceased person" [Succession Certificate Act, section 4 (1) (*a*)] the said sum did not "form part of the deceased's estate" (section 6 of Married Womens' Property Act). The applicant was the beneficiary who became entitled to the beneficial interest in this sum on her husband's death.

The appeal is, therefore, allowed and the application for a succession certificate will be dismissed. There will be no order as to costs under the circumstances.

*Appeal allowed;*
*Application for certificate dismissed.*

DINA *v.* PARASRAM.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 699 OF 1914.

October 25, 1915.

*Present*:—Sir Henry Drake-Brockman, KT., J. C.

DINA AND ANOTHER—PLAINTIFFS—APPELLANTS

*versus*

PARASRAM—DEFENDANT—RESPONDENT.

*Central Provinces Tenancy Act (XI of 1898), s. 41 (2)—'Give' notice, meaning of—Period of one month, starting point of.*

Under section 41 of the Central Provinces Tenancy Act, the period of one month within which a landlord is bound to intimate to the tenant his desire to purchase the absolute occupancy right, begins to run from the date of receipt of notice, and not from the date when such notice was posted to his address. The word 'give' in that section is equivalent to 'serve.' [p. 992, col. 2.]

*Bharat Singh* v. *Dhan Singh*, 14 C. P. L. R. 162 at p. 165, followed.

*Musammat Tulsa* v. *Musammat Dasoda*, 15 C. P. L. R. 173 at p. 174, referred to.

Appeal against the decree of the Additional District Judge, Balaghat, dated the 29th June 1914, confirming that of the Munsif, Balaghat, dated the 21st November 1913.

Mr. *S. Ramdas*, for the Appellants.

Mr. *M. Chuckerbutty*, for the Respondent.

JUDGMENT.—The appellants to this Court took on the 13th April 1904 a mortgage of absolute occupancy land in *Mauza* Narodi from the tenant. On the 29th May 1907 they took a second mortgage. Finally they foreclosed both mortgages and obtained possession of the land in April 1911. The suit out of which the present appeal arises was filed by the *malguzar* of the village to obtain possession. The plaint alleged that both mortgages were void against the plaintiff, inasmuch as they were effected without his consent. He offered to pay Rs. 100, mentioning that a Revenue Officer had fixed the value of the absolute occupancy right at that figure.

The tenants put into the post on the 4th March 1904 a notice of the kind contemplated by section 41 (2), Central Provinces Tenancy Act, intimating to the plaintiff their intention to mortgage the holding for an advance of Rs. 60. Delay occurred in delivery and the notice actually reached the plaintiff on the 1st or 2nd April. On the 27th April the plaintiff replied in Exhibit D-1 to the notice he had received,

intimating that he had learnt of the execution of the mortgage-deed a fortnight earlier and offering to take a mortgage himself for the same consideration. Both the Courts below have held that the mortgage executed in favour of the appellants on the 13th April 1904 is void against the plaintiff. The Trial Judge gave the plaintiff a decree for possession conditional on the payment of Rs. 100 to the appellants, and this was confirmed by the lower Appellate Court which dismissed the first appeal preferred by appellants. The plaintiff did not appeal from or object to the direction requiring him to pay Rs. 100, so the lower Appellate Court did not interfere with that direction, although it treated the plaintiff as entitled to possession because both mortgages were voidable by him.

It is admitted for the purposes of this appeal that no legal notice of intention to effect the later mortgage was given by the tenants to the plaintiff. The main contention on behalf of the appellants is that they should not be made to suffer for the delay in the post which prevented the notice of March 1904 reaching the plaintiff till the following month, and that the tenants sufficiently complied with the requirements of section 41, Tenancy Act, by waiting till the 13th April to execute the mortgage. It is urged that a week being enough to admit of a letter traversing the entire length or breadth of India, a tenant is entitled to treat a notice as "given" if he has allowed that time in addition to a calendar month from the date of putting his notice in train of transmission to the landlord.

The question what the word "given" in section 41 (2) of the Tenancy Act precisely means does not appear to have arisen in any reported case. In *Bharat Singh* v. *Dhansingh* (1) Ismay, J. C., said:— "Section 41 of the Tenancy Act is not very happily worded but it appears to contemplate that within the period of one month from the receipt of notice the landlord must intimate to the tenant his desire to purchase the absolute occupancy right." The history of this requirement is given in *Musammat Tulsa* v. *Musammat Dasoda* (2). I think there can be no doubt that the object of the Legislature in prescribing a notice to the landlord as a condition precedent to certain alienations was to place him in a position to keep out undesirable strangers. Incidentally the interests of tenants are also served, inasmuch as they have to think twice before determining to make an out and out transfer or to take a considerable loan on the security of their holdings. But the tenor of section 41 throughout its considerable length is to vest the landlord with a power of acquiring the land himself to the exclusion of tenant and transferee alike. Now to put a notice into the post is hardly to "give" it to the addressee. And it has to be remembered that in many tracts of these Provinces even the post may not be readily or promptly available, service of a notice necessitating, therefore, a long trudge or journey by cart to where the landlord is. A clear month is certainly not too long for considering the position and making the claim contemplated by sub-section 3 (*a*) of section 41, and I find great difficulty in supposing that the Legislature intended to cut out of this period the time taken for the notice to travel to its destination. Under section 4, Indian Contract Act, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made, the method of transmission adopted being a matter of indifference, and where the person addressed is one with special interests to be protected the rule should not be less favourable to him. That the word "give" in connection with notices is equivalent to "serve" appears from section 27, General Clauses Act, 1897, and from section 26, Central Provinces General Clauses Act, 1914, and also from the cases cited under "served" in Stroud's Judicial Dictionary (2nd edition, pages 1835 and 1836). I think then that the lower Appellate Court was clearly right in holding that the tenants could not legally mortgage their holding on the 13th April 1904, inasmuch as their notice had reached the landlord no earlier than the 1st idem.

(1) 14 C. P. L. R. 162 at p. 165.

(2) 15 C. P. L. R. 173 at p. 174.

RAMASWAMI AIYAR *v.* ABDUL AZIZ SAIB.

The only other point pressed for the appellants is that the suit is in form one for pre-emption, a relief barred by time, and that possession on the ground of the mortgages being void ought not, therefore, to have been decreed. I find, however, from the pleadings and issues that the parties went to trial on the clear understanding that the plaintiff might be entitled to possession as distinct from pre-emption. The appellants, no less than the plaintiff, were represented throughout by an experienced Pleader and must, in my opinion, be treated as having admitted that if the mortgages were prematurely effected the landlord would be entitled to possession. As already pointed out, both transactions were expressly alleged in the plaint to be void as against the plaintiff.

The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

*Appeal dismissed.*

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## MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 249 OF 1914.

January 25, 1916.

*Present*:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

RAMASWAMI AIYAR AND OTHERS—VENDEE FROM THE AUCTION-PURCHASER AND HIS REPRESENTATIVES—PETITIONERS—APPELLANTS

*versus*

ABDUL AZIZ SAIB AND OTHERS—DEFENDANTS NOS. 1, 3 AND 4 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 2—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 180, applicability of—Application for possession by decree-holder-purchaser—Limitation.*

An application for possession by a decree-holder-purchaser is not an application to execute the decree, and is governed by Article 180 of Schedule I of the Limitation Act, 1908.

*Sultan Sahib Marakayar* v. *Chidambaram Chettiar*, 1 Ind. Cas. 998; 19 M. L. J. 224; 4 M. L. T. 350; 32 M. 136, followed.

Appeal against the order of the Court of the Subordinate Judge of Madura, in Miscellaneous Petition No. 16 of 1913, in Original Suit No. 39 of 1902 (Execution Petition No. 35 of 1907).

MALLA SURIAH *v.* SURAN NAIDU.

Mr. *T. Natesa Aiyar*, for the Appellants.

Mr. *K. Bala Subramania Aiyar*, for the Hon'ble Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Respondents.

JUDGMENT.—We think that we ought to follow the considered decision in *Sultan Sahib Marakayar* v. *Chidambaram Chettiar* (1), which held that an application for possession by a decree-holder-purchaser is not an application to execute the decree. Article 182 of the Limitation Act, therefore, cannot apply and the question of the saving of limitation by steps taken in aid of execution does not arise in respect of such applications. Further, Article 180 of the new Limitation Act expressly applies to such an application and no other Article could, therefore, be applied.

Applying Article 180 the present application, made 6 years after the Court-auction-sale had become absolute, was rightly dismissed by the lower Court as barred.

The appeal is dismissed with costs.

*Appeal dismissed.*

(1) 1 Ind. Cas. 998; 32 M. 136; 19 M. L. J. 224; 4 M. L. T. 350.

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## MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 37 OF 1914.

February 3, 1916.

*Present*:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

MALLA SURIAH AND OTHERS—DEFENDANTS NOS. 1 TO 8 AND 15 TO 26—APPELLANTS

*versus*

*Choudhri* SURAN NAIDU AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 10 TO 12, 14 AND 27 TO 38—RESPONDENTS.

*Hindu Law—Partial alienation by widow—Consent of reversioners, value of—Alienation, whether binding upon estate—Surrender of life-estate, when operative.*

Where a Hindu widow alienates part only of the estate of her deceased husband, the consent of the next reversioner is never anything more than evidence that the alienation was justified by necessity and was a proper alienation in law, but the alienation is not conclusively validated and made binding upon the estate by reason only of such consent. [p. 995, col. 1; p. 996, col. 1.]

*Bajrangi Singh* v. *Mukhraraka Baksh Singh*, 3 I. A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605; *Muthuveera Mudaliar* v. *Pythilinga Mudaliar*, 3 Ind. Cas. 476; 5 M. L. T. 122; 19 M. L. J. 88; 32 M. 206; *Marudamuthu Nadan* v. *Srinivasa*

MALLA SURIAH v. SURAN NAIDU.

*Pillai*, 21 M. 128; 8 M. L. J. 69; *Nachiappa Gounden* v. *Rangasami Gounden*, 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N 53; 2 L. W. 69; 17 M. L. T. 87; *Rangappa Naik* v. *Kamti Naik*, 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355; *Kattamudy Raghupathy* v. *Kattamudy Kannamma*, 16 Ind. Cas. 710; 12 M. L. T. 325; 23 M. L. J. 363; (1912) M. W. N. 1223; *Hari Kishen Bhagat* v. *Kashi Pershad Singh*, 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 64; 42 C. 876, referred to.

Per *Seshagiri Aiyar*, J.—The theory of surrender is that the widow retires from the management of the property and lets in the persons who are entitled to succeed her after her death. This theory becomes inoperative if the transfer is made to only one of the persons who are entitled to enjoy the property. [p. 995, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore, in Appeal Suit No. 257 of 1912, preferred against that of the Court of the District Munsif, Chicacole, in Original Suit No. 1042 of 1910.

Mr. *A. Srirangachari*, for Mr. *T. Rangachari*, for the Appellants.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

COUTTS TROTTER, J.—In this case a certain Ammanna had a widow's estate in the properties of her deceased husband Sanyasi Naidu. After her husband's death the next reversioners were her two grandsons both in the same degree, one called Janakanna and the other Yerranna. The widow purported to adopt Yerranna, and the Courts below have found as a fact that the adoption was bad. She also by Exhibit VII during Yerranna's life-time purported to convey to him the whole of her deceased husband's property. Subsequently Yerranna died and thereupon Ammanna, the widow, alienated with the consent of Janakanna certain properties in favour of various persons. This time the alienations were not of the whole property but only of parts of it. The first point taken for the appellants was that as by Exhibit VII, there was an alienation of the whole estate by the widow, that would be binding if there was proved consent of the next reversioners. Yerranna, of course, consented, because the surrender was in favour of him. But there is no document in existence whereby any consent by Janakanna was obtained. It is argued that, because he did not object, his consent must be presumed. We cannot accept that argument. We think his consent is a question of fact which must be proved by evidence like any other fact, and the Subordinate Judge in this case weighed such evidence as there was to substantiate the contention that Janakanna consented to the alienation to Yerranna and decided against the contention. He says: "It is nowhere stated nor proved that Janakanna assented to that surrender and waived all his rights to the property. The fact that subsequent to Exhibit VII Janakanna chose to join Ammanna in dealing with those very properties after Yerranna's death lends support to the contention that Janakanna regarded Ammanna herself as the owner of the property and joined her in dealing with the property." That is the conclusion arrived at by him, after a consideration of the probabilities in the light of what happened later, that in fact Janakanna never consented to the alienation by Exhibit VII. That being so that alienation is clearly bad. But after Yerranna's death, alienations, as I have already stated, were made by the widow Ammanna at the time when Janakanna was undoubtedly the next reversioner, alienations of parts of the property, and we are asked to say that the consent of the nearest reversioner will conclusively validate the alienations by the widow not merely of the whole estate but of part of it. It is argued that the decision in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1) has upset the express decisions of this Court and other Courts to the effect that the doctrine that the consent of the nearest reversioner validates alienations is confined to cases where the alienation is of the whole estate. It is said that *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1), when properly examined, is a case of a partial alienation. That is true in one sense and not true in another. It is an aggregate of partial alienations which in their totality comprehended the whole estate and the effect of the transactions as a body was to divest the widow of any interest at all in the estate of her deceased husband. It is quite true that there are observations of the learned Judges in this Court which purport to speculate as to what the effect of the

(1) 30 A. 1; 3 M. L. T. 1 (P. C.); 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1; 17 M. L. J. 605.

decision of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1) may be upon other decisions of this Court rather than treat it as a definite expression of opinion one way or the other. But speaking for myself I do not think that anything in *Bajrangi Singh* v. *Manokarnika Rakhsh Singh* (1) has unsettled what I think is a clearly established doctrine of Hindu Law in this Presidency, that where a widow alienates part only of the estate of her deceased husband the consent of the next reversioner is not anything more than evidence—it may be in some cases evidence of great weight and great conclusiveness,—but is never more than evidence that the alienations were justified by necessity and were proper alienations in law. I think there is nothing either in the decision of the Privy Council or any of the observations of this Court to overrule or to make no longer good law the decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai* (2) and the exact decision on this point in *Muthuveera Mudaliar* v. *Vythilinga Mudaliar* (3). For my part I do not regard this question as open to this Court and I do consider it as settled law in this Court that a partial alienation by a widow is not conclusively validated by the consent of the nearest reversioner.

The appeal fails and is dismissed with costs.

SESHAGIRI AIYAR, J.—My learned colleague has stated the facts and it is not necessary for me to refer to them now. Mr. Srirangachari has argued three questions. His *first* proposition is this, that a transfer of the whole estate by a widow to one only of the immediate reversioners, provided the other reversioners do not dispute the transfer, is binding upon the reversioners who may live after the widow. The theory of *surrender* is that the widow retires from the management of the property and lets in the persons who are entitled to succeed her after her death. This theory becomes inoperative if the transfer is made to only one of the persons who are entitled to enjoy the property. Moreover, as pointed out by my learned brother, the finding of the Subordinate Judge is that the other reversioner is not shown to have consented to the surrender in favour of the other reversioner. Therefore that proposition fails.

The *second* proposition for which the learned Vakil contended is that a partial surrender is valid if it is made with the consent of the immediate reversioner. This would affect the alienations under Exhibits II, V and VI. It was held in this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai* (2) by a Full Bench of four Judges that *qua* surrender, it would not be valid unless the whole of the properties in the possession of the widow was surrendered. In *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1), which has been very much relied upon in the arguments before us, this case of *Marudamuthu Nadan* v. *Srinivasa Pillai* (2) is quoted with approval; and in other Courts also the position that a partial surrender in favour of the immediate reversioner will not be binding upon the estate has been regarded as good law. Therefore the second proposition also fails.

Mr. Srirangachariar fell back upon a proposition which has been debated too long in this Court without reaching a final decision. His proposition is this, that although the partial surrenders under Exhibits II, V and VI may not be valid, they should be regarded as valid, as partial alienations made with the consent of the immediate reversioner. The well-known case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (1) is relied upon in this connection. As pointed out by my learned colleague, in that case the entire property in the possession of the widow had been alienated, although the alienations were by a number of documents. This case was examined by Kumaraswami Sastri, J., and myself in the Full Bench case in *Nachiappa Gounden* v. *Rangasami Gounden* (4) and we came to the conclusion that the consent of the reversioner is only evidence of necessity and that it is not conclusive evidence; as such the alienation is not binding upon the estate by reason only of the consent. There are observations in *Rangappa Naik* v. *Kamti Naik* (5) and in *Kattamudy Raghupathy* v. *Kattamudy Kan-*

(2) 21 M. 128; 8 M. L. J. 69.

(3) 3 Ind. Cas. 476; 5 M. L. T. 122;32 M. 206; 19 M. L. J. 88.

(4) 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69; 17 M. L. T. 87.

(5) 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355.

*namma*(6), in the one case by the learned Chief Justice and in the other by Sadasiva Aiyar, J., throwing some doubt upon the correctness of the proposition laid down in *Marudamuthu Nadan* v. *Srinivasa Pillai* (2). With all deference I am unable to share these doubts, especially as the decision in *Muthuveera Mudaliar* v. *Vythilinga Mudaliar* (3), which is directly in point, has never been overruled. The decision in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (7), to which our attention was drawn and in which it is said that the consent of a reversioner is a very stringent equity, has also been considered in a number of cases in this Court and so far as I am concerned, I find no reason to depart from the position I took up in the Full Bench case. I do not consider that *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (7) in any way enunciates a different proposition; I am glad to find that my learned brother, sitting with Srinivasa Aiyangar, J., in Appeal No. 108 of 1914 was of opinion that in cases of partial alienation the consent of a reversioner was only evidence of the *bona fides* of the transaction. Therefore the preponderance of judicial opinion in this Court is that if there is a partial alienation made with the consent of a reversioner, the consent should be taken only as evidence of the necessity for the alienation, but it is not conclusive evidence of necessity. In this case the Judge has come to the conclusion that notwithstanding the consent given by the immediate reversioner the alienations were not made for justifiable purposes and are, therefore, not binding on the estate. In the view I have expressed the decision of the lower Court is correct. I, therefore, agree in the conclusion of my learned brother that the second appeal should be dismissed with costs.

*Appeal dismissed.*

(6) 16 Ind. Cas. 710; 12 M. L. T. 325; 23 M. L. J. 363; (1912) M. W. N. 1223.

(7) 27 Ind. Cas. 674; 17 M. L. T. 115; 19 C W. N. 370; 13 A. L. J. 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M. W. N. 511; 42 I. A. 64; 42 C. 876.

## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 734 OF 1913.

June 16, 1915.

*Present*:—Mr. Batten, A. J. C.

RAMESHWAR—DEFENDANT—APPELLANT

*versus*

BHANGILAL—PLAINTIFF—RESPONDENT.

*Hindu Law—Joint family—Father, suit by—Presumption—Oath, agreement to be bound by, if binding on sons.*

A Hindu father with one of his three adult sons sued to recover debts due to the joint family, and on trial agreed to be bound by the oath of the defendant. The son, however, did not and withdrew from the suit with permission to bring a fresh suit. The suit, as brought by the father, was dismissed. Subsequently the son with his other brothers sued for the three-fourths share of the debts:

*Held*, that as the suit by the father was not one as by the manager of the family the agreement by him did not bind the sons and that they were entitled, on proof, to a decree of their share of the family debt. [p. 997, col. 2.]

*Obiter dicta.*—Where a Hindu father, a member of a joint family, sues or is sued alone, the presumption is that he sues or is sued in his representative capacity. An agreement by him, therefore, to be bound by an oath of the opposite party is binding on his joint sons who are not parties to the suit even if they are adults, in the absence of fraud or collusion on the part of the father. [p. 997, col. 1.]

*Sheo Shankar Ram* v. *Jaddo Kanwar*, 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 36 A. 383; *Kishan Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395; *Moti* v. *Kanhya*, 4 Ind. Cas. 797; 5 N. L. R. 181; *Chengal Reddi* v. *Venkata Reddi*, 12 M. 483; *Sheo Nath Saran* v. *Sukh Lal Singh*, 27 C. 229; 9 C. W. N. 327, followed.

Appeal against the decree of the Divisional Judge, Chhattisgarh Division, dated the 20th October 1913, modifying that of the Subordinate Judge, Raipur, dated the 15th August 1913.

Dr. *H. S. Gour*, for the Appellant.

Mr. *S. K. Bose*, for the Respondent.

JUDGMENT.—I have not the slightest doubt that if the former suit had been brought by the father Chudaman alone, his sons, the present plaintiffs, would have been bound by his having allowed judgment to be given against him on the taking of an oath by the defendant. Such a method of deciding a suit is allowed by law, and it cannot be said that the father, in stating the willingness to be

bound by the oath of the defendant, was not acting *bona fide*, or that, if he had been suing alone as representative of the family, his method of conducting the suit was not in the interests of the family and not within the scope of his authority. The result of a current of decisions is that when a Hindu father, a member of a joint family, sues or is sued, it is to be presumed that he sued or was sued in his representative capacity. It is sufficient to refer to the remarks of their Lordships of the Privy Council in *Sheo Shankar Ram* v. *Jaldo Kunwar* (1) and in *Kishan Parshad* v. *Har Narain Singh* (2) and of Bose, A. J. C., in *Moti* v. *Kanhya*(3). In *Chengal Reddi* v. *Venkata Reddi* (4) and *Sheo Nath Saran* v. *Sukh Lal Singh* (5), it was held that a minor party to a suit is bound by the consent of his guardian and father to be bound by the oath of the opposite party. I would hold that such consent by a Hindu father would, for the reasons stated above, be binding on his joint sons who were not parties to the suit, even if they were adult, and the sons would be precluded from further litigation on the same cause of action, unless they proved fraud or collusion on the part of their father.

But in the present case the father was not the sole plaintiff, and there is not, in the circumstances of the case, any presumption that he was suing as manager on behalf of the family. The joint family consisted of the father and three adult sons, but the first suit was brought by the father and one son only, namely, Bhangi. It was clearly proper that the suit should be brought either by the manager representing the joint family, or by all the members of the joint family. When the suit came for trial, the father was willing to be bound by the oath of the defendant but the son Bhangi was not. Bhangi applied for permission to withdraw the suit with permission to bring a fresh suit, on the ground that all the proper parties had not been joined, and as the defendant offered no objection, the permission was granted under Order XXIII, rule 1 (2), of the 1st Schedule of the Civil Procedure Code. The suit as brought by the father was dismissed. Bhangi has now brought a fresh suit on the same cause of action, and his two brothers have joined with him as plaintiffs. It appears to me that the parties are in exactly the same position as if all the four members of the family had brought one suit together and the father consented to be bound by the oath of the defendant, while the sons did not. The suit to the extent of the father's claim has been dismissed, but as regards the claim of the three sons, it has been decided on the merits, and they have been given a decree for their three-quarters share in the total claim. Under the Mitakshara Law as interpreted in these provinces, a member of a joint family can alienate his share without the consent of the other members. Here the four members have sued, and one of them has given up his claim to a decree. I fail to see how this action on his part can adversely affect his co-plaintiffs. Though the father may be the manager, yet in this suit he was not suing as such for all the adult members of the family were suing jointly. I am of opinion that the decree of the learned Divisional Judge is correct, and I dismiss the appeal with costs.

*Appeal dismissed.*

(1) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810.

(2) 9 Ind. Cas. 739; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L R. 359; 38 I. A. 45; (1911) 2 M. W. N. 395.

(3) 4 Ind. Cas 797; 5 N. L. R. 181.

(4) 12 M. 483.

(5) 27 C. 229; 4 C. W. N. 327.

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## MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 10 OF 1915.
CIVIL MISCELLANEOUS PETITION No. 1932 OF 1915.

December 10, 1915.

*Present*:—Mr. Justice Srinivasa Aiyangar.

C. R. P. No. 10 OF 1915.

KODANDARAMA AIYAR—PLAINTIFF—PETITIONER

*versus*

ARUNACHALA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Promissory note executed by managing member—Renewal after executant ceases to be manager—Acknowledgment by such executant, whether binds others—Hindu Law—Joint family—Manager.*

DHANYA *v.* TANYA.

A managing member of a joint Hindu family who executed a promissory note on behalf of himself and his brothers has no authority to renew it after he ceases to be the manager of the family and an acknowledgment by him will not bind the other members of the family so as to save limitation against them.

*Bhasker Tatya Shet* v. *Vijalal Nathu*, 17 B. 512, distinguished.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Negapatam, in Small Cause Suit No. 1256 of 1914.

Petition praying that in the circumstances stated in the accompanying affidavit the High Court will be pleased to set aside the *ex parte* decree passed against him in Small Cause Suit No. 1256 of 1914 on the file of the Court of the Subordinate Judge of Negapatam and to remand the suit for re-trial on the merits.

IN C. R. P. No. 10 OF 1915.

Mr. *T. V. Gopalaswami Mudaliar*, for the Petitioner.

Messrs. *G. S. Venkatarama Aiyar* and *K. Krishnaswami Aiyangar*, for the Respondents.

IN C. M. P. No. 1932 OF 1915.

Mr. *K. Krishnaswami Aiyangar*, for the Petitioner.

Mr. *T. V. Gopalaswami Mudaliar*, for the Respondent.

JUDGMENT.

IN C. R. P. No. 10 OF 1915.

The suit is on the pro-note executed by the 1st defendant while he was the managing member of the family consisting of himself and his brothers. The Subordinate Judge finds that the family became divided and that all the co-parceners except the 2nd defendant had sold their share of the family lands. It appears that the 2nd defendant requested his elder brother to manage his lands. At the time when the original pro-note was about to become barred, the 1st defendant renewed the pro-note. The suit is now instituted against the 1st defendant and his brothers also. The lower Court gave a decree against the 1st defendant who executed the promissory note and dismissed it as against the other defendants, on the ground that the 1st defendant had no authority to renew the original promissory note after he ceased to be the manager of his family. I think he is right. Reliance was placed by the petitioner's Pleader in support of his contention on *Bhasker Tatya Shet* v. *Vijalal Nathu* (1). All that that case decided was that the managing member who incurred a liability had a right to acknowledge that liability if he was at the time of acknowledgment the managing member. I, therefore, dismiss the petition with costs.

IN C. M. P. No. 1932 of 1915.

Civil Miscellaneous Petition No. 1932 of 1915 is a petition to set aside the *ex parte* decree passed against the 1st defendant in the above suit. The 1st defendant contends that he was not properly served with summons. His Pleader here admits that the 1st defendant executed the pro-note and that the money claimed under it is due but he says that if he had been present at the time the decree was passed, he would have asked the Court to pass a decree against the defendants Nos. 2 and 3 also, in order to lessen his own liability. But I have now decided that there is no cause of action against the defendants Nos. 2 and 3 on the suit note. In these circumstances even if there was no proper service of summons and the decree was set aside on that ground, the 1st defendant could not get a fresh decree making the 2nd and 3rd defendants also liable.

I dismiss this petition also with costs. The memorandum of objections filed by the 1st respondent in Civil Revision Petition No. 10 of 1915 is also dismissed.

*Decree upheld; Petitions dismissed.*

(1) 17 B. 512.

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## NAGPUR JUDICIAL COMMISSIONER'S COURT.

APPEAL FROM APPELLATE DECREE No. 177 OF 1914.

December 14, 1914.

*Present*:—Sir Henry Drake-Brockman, KT., J. C.

DHANYA AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

TANYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), s. 102—Suit,*

DHANYA *v.* TANYA.

*nature of, determination of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13, scope of—Suit for dues against trespasser—Appeal, second, maintainability of.*

For the purposes of section 102 of the Code of Civil Procedure, the nature of the suit must be determined from the claim as laid, without regard to the nature of the defence. [p. 999, col. 2.]

*Bapuji* v. *Kuvarji*, 15 B. 409; *Harischandra Deo* v. *Narayana*, 24 M. 508; *Lakshmandas* v. *Anna*, 32 B. 356; 6 Bom. L. R. 731, followed.

Article 13 of the second Schedule to the Provincial Small Cause Courts Act relates primarily to dues claimed from the person liable to pay them as such and not to dues improperly collected by him. [p. 999, col. 2.]

*Mahadeo* v. *Budhai Ram*, 26 A. 358; A. W. N. (1904) 50; *Bhavadasan* v. *Narayana Somayajipad*, 28 M. 202, followed.

Certain *kotwars* of a village sued to recover Rs 36-14-3 from fellow *Mahars* of that village on the ground that the sum claimed was made up of certain items of different kinds which by custom were the *kotwars'* exclusive perquisites and had been wrongfully taken by the defendants:

*Held*, that the suit was not one to enforce payment of a due from a trespasser but was akin to one for damages against a trespasser and that, therefore, a second appeal in the suit was barred by section 102 of the Civil Procedure Code, 1908. [p. 999, col. 2; p. 1000, col. 1.]

Appeal against the decree of the District Judge, Wardha, dated the 27th November 1913, modifying that of the Junior Munsif, Arvi, dated the 7th July 1913.

Rao Bahadur *D. N. Khare*, for the Appellants.

Mr. *K. N. Deshmukh*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the three *kotwars* of *Mauza* Antora to recover Rs. 36-14-3 from fellow *Mahars* of that village. According to the plaint the sum mentioned is made up of five items of different kinds which by custom are the *kotwars'* exclusive perquisites and had been wrongfully taken by the defendants. The principal item is hides of cattle. Of this the Court of first instance held the plaintiffs to be entitled to one-half the hide in each case, while the lower Appellate Court, relying on the *wajb-ul-araiz* of 1892-93 and 1910 11, decided their title to be exclusive.

A preliminary objection is taken to the appeal on the ground that the suit is of the nature cognizable by Courts of Small Causes, so that no second appeal lies. For the appellants it is urged that the suit is one to enforce payment of a *hakk* or due payable to a person by reason of his interest in an hereditary office.

In my opinion the respondents' contention is sound. Article 13 of the Second Schedule to the Provincial Small Cause Courts Act, 1887, seems to me to relate primarily to dues claimed from the person liable to pay them as such. This is the view taken by a Division Bench of the Allahabad High Court in *Mahadeo* v. *Budhai Ram* (1). In *Bhavadasan* v. *Narayana Somayajipad* (2) it was remarked by a similar Bench that such a construction involves importing into the Article material words which the Legislature would not have omitted to insert had its intention been to so restrict the character of the provision. In the latter case the claim was by a person claiming to be a member of an association for his share of certain presents made to that association, and their Lordships laid down that as between persons entitled to participate in voluntary payments to a religious institution the share to which each such person is entitled, is properly a "due" to him by reason of his interest in the institution. Without dissenting from the view of the learned Judges in the Madras case so far as the facts thereof are concerned, I think that a suit of the present kind is akin to one for damages against a trespasser who has removed fruit or grass from the plaintiff's land, and I feel great difficulty in regarding such a suit as one to enforce payment of a due from the trespasser. On the case set up in the plaint the persons who paid the defendants would or at least might remain liable to the plaintiffs. Moreover, it seems to me that Article 13 would have been differently worded, had the intention been to cover not only a suit against a person primarily bound to pay but also against a person who has improperly collected.

The appellants' learned Pleader urges that the suit is really one to establish title to the *hakk*, inasmuch as the respondents claim half or all of each perquisite in dispute. It is, however, well settled that for the purposes of section 102, Civil Procedure Code, the nature of the suit must be determined from

(1) 26 A. 358; A. W. N. (1904) 50.
(2) 28 M. 202.

the claim as laid without regard to the nature of the defence: see *Bapuji* v. *Kuvarji* (3), *Harischandra Deo* v. *Narayana* (4) and *Lakshmandas* v. *Anna* (5).

I hold that a second appeal is barred by section 102, Civil Procedure Code.

I am asked to interfere at any rate by way of revision, on the ground that the oral evidence shows the custom to be other than that entered in the *wajib-ul-arz*. In this connection I am unable to see that the District Judge acted illegally or with material irregularity in basing his decision on the *wajib-ul-araiz* of two successive Settlements: see *Babu* v. *Musammat Parwati* (6). The later one is quite recent, and in discussing the oral evidence the learned Judge came to the conclusion that for the convenience of all concerned the *kotwars*' rights under the *wajib-ul-arz* were not enforced in consideration of the defendants or other representatives of non-*kotwar* families assisting the *kotwars* in the performance of their official duties. There is a presumption in favour of the correctness of the *wajib-ul-arz* under section 82, Land Revenue Act, and the District Judge has also found that since the final visit of the Settlement Officer to the village in 1910 the working arrangement by which non-*kotwars* helped *kotwars* and all remuneration was, therefore, shared, has ceased.

The appeal is dismissed with costs. In the Courts below costs will be borne as already ordered.

*Appeal dismissed.*

(3) 15 B. 460.
(4) 24 M. 508.
(5) 32 B. 356; 6 Bom. L. R. 731.
(6) 6 Ind. Cas. 429; 6 N. L. R. 49.

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## MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 661 TO 682, 1447, 1785 AND 2834 OF 1915.

January 25, 1916.

*Present*:—Mr. Justice Abdur Rahim.

KASARAVENI RAMASWAMI AND OTHERS —APPELLANTS—PETITIONERS

*versus*

*Sri Raja* BOMMADEVARA VENKATA NARASIMHA NAIDU BAHADUR ZAMINDAR VARU—RESPONDENT.

*Review—Delay in filing petition—Duty of applicant to account for delay—Limitation.*

Where an application for review of a judgment delivered on the 26th July 1911 was presented on the 23rd January 1915 and the review was asked for on the ground that a subsequent Privy Council decision passed on the 19th June 1914 showed that the judgment sought to be reviewed was wrong:

*Held*, that even supposing that the fact that the Privy Council decision laid down the law differently was a good ground for review, the enormous delay in filing the application had to be accounted for, and the applicant not having done so, his application was time-barred. [p. 1000, col. 2; p. 1001, col. 1.]

Petitions, under section 114 of the Civil Procedure Code, for review of the judgment of the High Court, dated 26th July 1915, in Second Appeals Nos. 68, 70, 77, 79, 83, 85, 86, 89, 91, 98, 102, 103, 105, 109, 110, 114, 117 to 120, 124, 129, 148, 107 and 96 of 1910, presented against the decrees of the District Court of Kistna, in Appeal Suits Nos. 794, 796, 807, 809, 813, 816, 817, 820, 824, 831, 835, 837, 839, 843, 844, 848, 852 to 854, 858, 912, 933 of 1907, 6 of 1908, 841, 829 of 1907 (Summary Suits Nos. 59, 61, 72, 74, 78, 81, 82, 85, 89, 96, 100, 102, 104, 108, 109, 113, 117, 118, 119, 123, 183, 204, 180, 106 and 94 of 1907, on the file of the Court of the Head Assistant Collector of Bezwada).

Messrs. *T. Prakasam* and *P. Chenchiah*, for the Appellants.

Messrs. *T. Rangachariar* and *P. Nagabhushanam*, for the Respondents.

JUDGMENT.—The judgment of this Court of which a review is sought was passed on the 26th July 1911, and the ground on which the review is asked for is that there has been a subsequent decision of the Privy Council which shows that the judgment of this Court is wrong. The decision of the Privy Council referred to was passed on the 19th June 1914 in another analogous case. A preliminary objection is taken by Mr. Rangachariar, who appears to oppose the application for review, that the application is out of time and must be dismissed on that ground. The application for review was filed on the 23rd January 1915. Now supposing that the subsequent decision of the Privy Council laying down the law differently is a good ground for review, even then the enormous delay in this case has to be duly accounted for. The Legislature allows ninety days from the date of the decree or order. Even after the judgment of the Privy Council was delivered on the 19th June 1914, the applicant did not file his application for

review for more than six months. According to the ruling of this Court he has to account for every day's delay. In the affidavit no attempt whatever has been made to account for the delay. The applicant had ample time to explain the delay in a proper way and he has not chosen to do so. He now seeks the indulgence of being allowed to file another affidavit at this stage which is objected to by Mr. Rangachariar, and I think very rightly. The application for review is, therefore, dismissed with costs. Civil Miscellaneous Petitions Nos. 662 to 682, 1447, 1785 and 2834 of 1915 are also dismissed with costs.

*Petition dismissed.*

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## COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 13 OF 1913-14 OF ETAWAH DISTRICT.

February 15, 1915.

*Present*:—Mr. Holms, S. M., and Mr. Campbell, J. M.

HIRA SINGH AND OTHERS—DEFENDANTS—APPLICANTS

*versus*

*Rao* JODHA SINGH—PLAINTIFF—RESPONDENT.

*U. P. Land Revenue Act (III of 1901), ss. 219, 87—Rent, determination of—Settlement Officer, duty of—Substantial irregularity—Revision—Agra Tenancy Act (II of 1901), s. 10.*

In fixing rent of an ex-proprietary tenant under section 87 of the U. P. Land Revenue Act a Settlement Officer commits substantial irregularity justifying interference in revision if he disregards the provisions of section 10 of the Agra Tenancy Act.

Application for revision of the order of the Commissioner of Allahabad Division, confirming that of the Record Officer of Etawah, dated the 25th March 1914, in a case of assessment of rent.

JUDGMENT.

HOLMS, S. M.—(*February 10th*, 1915.)—The present application has been very carelessly drawn up. It purports to be an application for revision under section 185 of the Tenancy Act, the order in question being one under the Resumption Chapter, section 150 of that Act. As a matter of fact, the Settlement Officer's order of the 1st May 1913 was one passed under section 87 of the Land Revenue Act determining rent to be paid by an ex-proprietary tenant. I have heard what both sides have to say and there is little doubt that the present applicants were negligent in not putting their case forward on the sole date of hearing which they had ample opportunity of doing. It has, however, come to my notice that the order of the 1st May 1913 is such that interference on revision under section 219 of the Land Revenue Act seems called for. The application by Rao Jodha Singh under section 87 was for fixation of rent on *sir* in respect of 2 *biswas* out of 4 *biswas* of proprietary rights, which were alleged to have been sold, and the whole number of plots in the *sir* were specified. The Settlement Officer's duty was to take action in accordance with section 10 of the Tenancy Act and specify the plots which appertain to half of the proprietary rights which had been parted with. This he did not do and fixed rent without specifying any numbers at all. Respondent at first told me that he had specified numbers out of half the *sir* and that the Settlement Officer had accepted his specification, but afterwards, admitting that the statement was incorrect, he urges that it should be deemed that half of each plot has had rent fixed on it. I cannot accept this view. It is clear that the Settlement Officer acted with substantial irregularity in not deciding what the plots were with regard to which he fixed rent and prejudiced the present applicant. I would, therefore, set aside the order of the Settlement Officer of the 1st May 1913 and direct that he re-hear the application under section 87 of the Land Revenue Act. As the present applicant has been so negligent in the matter he should pay the costs of the entire proceedings in all Courts up to the present time.

CAMPBELL, J. M.—I agree.

*Application allowed.*

MOHIDEEN BEE *v.* MEER SAHEB.

MADRAS HIGH COURT.

CIVIL SUIT No. 23 OF 1915.

October 7, 1915.

*Present*:—Mr. Justice Bakewell.

MOHIDEEN BEE AND OTHERS—PLAINTIFFS

*versus*

*Syed* MEER SAHEB AND OTHERS—DEFENDANTS.

*Muhammadan Law—Suit for a share in property left by a deceased Muhammadan—Limitation, when inheritance becomes divisible—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 123.

Under the Muhammadan Law there is no such thing as joint family property. [p. 1003, col. 1.]

If the members of a Muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property; and the Article of the Limitation Act which would apply to a suit for a share would be Article 123, which deals with a suit for a distributive share of an intestate. In the case where one of the heirs has retained part of the inheritance in his possession, the suit must be brought within twelve years at the latest, after the debts of the intestate have been paid and the inheritance has become divisible among the heirs. [p. 1003, col. 1.]

Messrs. *S. Guruswami Chetti* and *A. Hameed Hasan*, for the Plaintiffs.

Messrs. *C. P. Ramaswami Aiyar* and *C. Padmanabha Aiyangar*, for Defendant No. 1.

Mr. *C. Krishna Achariyar*, for Defendants Nos. 2 and 3.

JUDGMENT.—The plaintiffs in this case are the heirs of one *Syed* Oomer Sahib who died about nineteen years ago, leaving three sons and three daughters all of whom attained their majority considerably more than three years before this suit. *Syed* Oomer had a brother *Syed* Meer who survived him and is the first defendant in the case. The plaint itself is very difficult to understand as it appears to intermingle Muhammadan and Hindu Law in a very confused manner; but paragraph 7 sets out that *Syed* Oomer carried on business jointly with his brother, the first defendant, and that the properties set out in Schedule A "were purchased out of the moneys acquired in the said joint business and the sale-deeds thereof were clandestinely secured by the first defendant in his own name." Clearly the allegation is that the two brothers carried on a partnership business which was dissolved by the death of *Syed* Oomer and that the properties set out in Schedule A are part of the assets. It is perfectly clear that the proper suit against the first defendant on those allegations would be a suit for an account of the partnership as from the date of the death of Oomer, and the property that would be divisible would be the assets which remained after the realization of the partnership property and the payment of the partnership debts. Such a suit would have become barred more than fifteen years ago, under Article 106 of the Limitation Act. Paragraph 8 sets out that after the death of *Syed* Oomer his two sons, second and third plaintiffs, one Khader Saheb and the first defendant carried on various businesses and the immoveable properties set out in Schedule B to the plaint were purchased out of the earnings of the joint business. Here again the alleged partnership was dissolved on the death of Khader Saheb who admittedly died four years ago, and a suit on account of these transactions is likewise barred. Paragraph 14 sets out that the first defendant with the assistance of the funds of the family carried on a business in partnership with one Patel Hussain. This is apparently part of one of the firms mentioned in paragraph 7 or 8. In that case this claim is also barred. It was admitted that this business was carried on in the years 1903-04 and a suit for an account is, therefore, barred. Paragraph 15 alleges that some fuel depôt business was carried on under the management of *Syed* Khader Saheb. Any suit with regard to this should have been brought within three years from the dissolution of partnership and the claim to this item is likewise barred. Paragraph 16 alleges that the first defendant received the sale-proceeds of a house which was sold by the first plaintiff and another person (now deceased). The moneys were received by him so long ago as 1895 and any claim against him is barred under Article 62 of the Limitation Act. Paragraph 17 alleges that about 1897 the first defendant realised some moneys which had been invested on a mortgage. This claim is barred for the same reason.

I think that the suit is due to some confusion in the minds of the plaintiffs as to the applicability of the Hindu Law of joint family property to Muhammadans. There is no allegation in the plaint that the parties agreed to retain the property, which they inherited from *Syed* Oomer on his death, undivided and to hold it as tenants-in-common such as appeared in the case of *Abdul Kader* v *Aishamma* (1). It has been argued that Article 127 of

(1) 16 M. 61; 2 M. L. J. 200.

the Limitation Act will apply, under which the plaintiff has twelve years from his exclusion from joint family property. I think it is perfectly clear that in Muhammadan Law there is no such thing as joint family property. If the members of a Muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property; and the Article of the Limitation Act which would apply to a suit for a share would be Article 123 which deals with a suit for a distributive share of the property of an intestate. In the case where one of the heirs has retained part of the inheritance in his possession, the suit must be brought within twelve years at the latest, after the debts of the intestate have been paid and the inheritance has become divisible among the heirs. In my opinion the suit is barred and must be dismissed with costs.

*Suit dismissed.*

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CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1967 OF 1914.

February 23, 1916.

*Present*:- Mr. Justice Sharfuddin and Mr. Justice Teunon.

*Lala* DEO SARAN LAL AND OTHERS—DEFENDANTS—APPELLANTS

*versus*

BALESWAR MANDAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

*Occupancy-holding, non-transferable, transfer of, if operative against a co-sharer landlord purchasing it subsequently in execution of a money-decree.*

The transfer of a non-transferable occupancy-holding made by a *raiyat* is operative against a subsequent purchaser of the same in execution of a money-decree against the *raiyat* and even when such purchaser happens to be a co-sharer landlord.

*Dayamoyi* v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), applied.

Appeal against the decree of the District Judge of Purnea, dated the 28th of April 1914, reversing that of the Munsif of that place, dated the 5th of July 1913.

Babu *Rajendra Prosad*, for the Appellants.

Babu *Panchanon Ghose*, for Babu *Harihar Prashad Sinha*, for the Respondents.



JUDGMENT.—This is an appeal by the defendants first party in a suit brought by the plaintiff for confirmation of his possession in an occupancy-holding on declaration of his title thereto.

It appears that he purchased it from the original tenants by a deed, dated 11th September 1907. The defendants, first party, purchased it in 1911 in execution of their own money-decree against the same tenants. The District Judge has held that the plaintiff's purchase was a genuine purchase and he has also found that the plaintiff's possession from and since the date of his purchase has been proved.

From the decision of the Full Bench of this Court in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury* (1), it is clear that the voluntary transfer by the original *raiyat* made on the 11th September 1907 is operative against the *raiyat* and also operative against all persons other than the landlord including obviously a subsequent purchaser from the same *raiyat*. It has been suggested that the fact that the purchasers are co-sharer landlords puts them in a better position than a stranger purchaser would be. No authority for this proposition has been submitted to us and we cannot see why on principle the fact that the subsequent purchaser is a co-sharer landlord should affect the question.

For these reasons we dismiss this appeal with costs.

*Appeal dismissed.*

(1) 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.).

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MADRAS HIGH COURT.

CIVIL SUIT No. 203 OF 1899.

November 9, 1915.

*Present*:—Mr. Justice Bakewell.

JAMES RUSSEL MCLAREN AND OTHERS—PLAINTIFFS

*versus*

V. VEERIAH NAIDU AND OTHERS—DEFENDANTS.

*Limitation Act (IX of 1908), Sch. I, Art. 183—Revivor without notice to some judgment-debtors, effect of.*

For the purposes of Article 183 of the Limitation Act, 1908, where an order of revivor is made without

notice to one of the judgment-debtors the order has no effect as against him or his property and, therefore, an application for execution against such a judgment-debtor brought 12 years after the date of the decree is barred by limitation. [p. 1005, col. 1.]

Messrs. *Venkatasubba Rao* and *Radhakrishnayya*, for the Plaintiffs.

Mr. *K. Ramachandra Aiyar*, for the 1st Defendant.

JUDGMENT.—By a decree of this suit, dated 20th of February 1900, the two defendants in the suit were ordered to pay to the plaintiffs the sum of Rs. 10,938-11-0 and interest thereon and costs. On the 24th February 1903, one of the plaintiffs in the suit presented an application for execution of this decree, which prayed that notice under section 248 of the Code of Civil Procedure might issue to the first defendant to appear and show cause why execution of the decree should not issue and for attachment of a decree in another suit awarding costs to the first defendant. Notice was issued accordingly to the first defendant and on 3rd March 1903 an order was made granting leave to execute as prayed.

On the 25th February 1914 the transferee from the same plaintiff presented this application for execution of the decree, which states that the last order in execution is that of 3rd March 1903 and prays that the name of the transferee may be brought on record and leave to execute the decree against the second defendant be granted to him, and that notice may issue to the defendants. The second defendant appears upon notice issued on this application and objects that the application is barred by limitation by virtue of Article 183 of the Limitation Act, 1908. This Article prescribes a period of twelve years for an application to enforce a decree of a High Court in the exercise of its ordinary original civil jurisdiction, and provides that, when the decree has been revived, the twelve years shall be computed from the date of such revivor.

The English law is stated by Blackstone in the following passage:—"Writs of execution must be sued out within a year and a day after the judgment is entered; otherwise the Court concludes *prima facie* that the judgment is satisfied and extinct; yet, however, it will grant a writ of *scire facias* in pursuance of Statute Westen 2-13, Edw.1, c. 45, for the defendant to show cause why the judgment should not be revived and execution had against him; to which the defendant may plead such matter as he has to allege in order to show why process of execution should not be issued or the plaintiff may still bring an action of debt founded on this dominant judgment, which was the only method of revival allowed by the common law" (Commentaries, 15th Edition, Vol. 3, page 421). The writ recited the judgment and any change in the parties, and commanded the Sheriff to make known to the defendant or other person named in the writ that he should appear before the Court on a specified date to show cause why the plaintiff should not have execution of the judgment (Freeman on Execution, Vol. 1, pages 323 and 324). The form of notice under Order XXI, rule 22 of the Code, which corresponds with section 248 of the Code of 1882, contains substantially the same particulars (Appendix E, Form No. 7), and it has been held that the procedure under this section has taken the place of the former procedure by writ of *scire facias* in the Supreme Court, and that an order for execution after notice effects a revivor of a decree within the meaning of Article 189 [see *Desoo Venkatesa Perumall Chetty* v. *Srinivasa Ranga Row* (1)]. Where there had been a change of parties subsequent to judgment, as in the case of the death of the judgment-creditor, a writ of *scire facias* was necessary even within a year of the judgment, and it was held that a judgment in *scire facias* conferred a new right upon the executors [*Farran* v. *Beresford* (2) and *Farrell* v. *Gleeson* (3)]. Whether the judgment in *scire facias* conferred a new right when there had been no change of parties seems doubtful [*Farran* v. *Beresford* (2)] but the writ should conform to the original judgment and should, therefore, be joint when the judgment is joint, and the latter should be revived against all the original defendants (Freeman on Execution, Vol. 1, page 313). The procedure upon the writ, therefore, followed that in the action of debt against joint debtors in which all should be joined and judgment against

(1) 4 Ind. Cas. 306; 7 M. L. T. 32; 33 M. 187.
(2) (1843) 10 Cl. & F. 319 at p. 334; 8 E. R. 764.
(3) (1844) 10 Cl. & F. 702; 8 E. R. 1269.

one extinguished the claim against another joint-debtor [*King* v. *Hoare* (4)].

From the passage from Blackstone cited above it appears that a judgment-creditor had concurrent remedies by the writ of *scire facias* and the action of debt, and it is improbable that the judgments would have different effects.

The order of revivor in the present case was made without notice to one defendant and he had, therefore, no opportunity of appearing and objecting thereto, and it had no effect as against him or his property, except that, if it were carried out, his co-debtor might obtain a right of contribution as against him. It seems to me that an *ex parte* order of this kind should not be held to affect the position of the second defendant in the absence of any direct authority.

In other Courts, where the prescribed period of limitation is very much less than in this Court, an application for execution made against one of several joint-debtors takes effect against them all (Article 180); but there is no such provision for cases in which notice of the application is required. The fact that the Legislature has expressly provided for one case of joint-debtors and has omitted to make the same provision for another case appears to me to show an intention to place the two cases on a different footing.

For these reasons I hold that the previous order in execution against the first defendant did not revive the decree as against the second defendant, and I dismiss this application with taxed costs.

*Application dismissed.*

(4) (1844) 13 M. & W. 494; 2 D. & L. 382; 14 L. J. Ex. 29; 8 Jur. 1127; 153 E. R. 206; 67 R. R. 694.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 215 OF 1915.

February 7, 1915.

*Present*:—Mr. Justice Piggott and Mr. Justice Walsh.

*Pandit* SANT LAL—JUDGMENT-DEBTOR—APPELLANT

*versus*

*Lala* SRI NEWAS DAS—DECREE-HOLDER—RESPONDENT.

*Execution of decree—Limitation Act (IX of 1908), Sch. I, Art. 181—Fresh application—Question of substance and not of form—Simple question of fact.*

The question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a simple question of fact and is also a question of substance and not of form. [p. 1006, col. 2; p. 1008, col. 1.]

*Shcoraj Singh* v. *Kameshar Nath*, 24 A. 282; A. W. N. (1902) 63 and *Rahim Ali Khan* v. *Phul Chand*, 18 A. 482; A. W. N. (1896) 142, referred to.

Execution first appeal from the decision of the Subordinate Judge, Muttra, dated the 12th of April 1915.

FACTS are briefly these:—The date of the decree sought to be executed was 11th July 1902. The present application for execution was made on the 13th November 1914, more than twelve years after the passing of the decree. Several applications for execution of the decree were made but they were either withdrawn or dismissed for default. On the 12th June 1912, an application was made for sale of certain property. This was held up by reason of a suit instituted by the judgment-debtor's son asking for a declaration that the property attached was not liable to sale in execution of this decree. The suit was decreed by the Court of first instance, but the present respondent successfully appealed and the order of the Appellate Court was passed on the 28th August 1914. The execution of the present decree had been suspended under an injunction granted on the 23rd January 1914. When the present decree-holder had finally succeeded in getting the suit brought by the judgment-debtor's son dismissed, he came into Court with his application on the 13th November 1914. The judgment-debtor contended that the application was barred by the twelve years' rule of limitation. The lower Court held that the application of 13th November 1914 was

not a fresh application but a continuation of the application of 12th June 1912.

The judgment-debtor appealed to the High Court.

Mr. *Baleshwari Prasad* (for Mr. *Narain Prasad*), for the Appellant.—The present application is barred by the 12 years' rule of limitation under section 48, Civil Procedure Code. The application was made according to the form prescribed in Order XXI, rule 11, Civil Procedure Code, and was registered and numbered as a separate application. Consequently it is a fresh application within the meaning of section 48, Civil Procedure Code.

He relied on *Rahim Ali Khan* v. *Phul Chand* (1); *Ram Sarup* v. *Dashrath Tewari* (2).

Mr. *Mohan Lal Sandal*, for the Respondent. —In order to find out whether the application is a fresh application or a continuation or revival of the former application, one must look to its substance and not the form. The prayer in both the applications is for sale of the same property. The proceedings relating to sale of the property remained in abeyance so long as the injunction remained in force. The present application was made soon after to revive the former proceedings.

He relied on *Anwur Ali Khan* v. *Phul Chand* (3).

He submitted that the ruling of the Full Bench reported as *Rahim Ali Khan* v. *Phul Chand* (1) was in his favour.

Mr. *Baleshwari Prasad* was heard in reply.

JUDGMENT.

PIGGOTT, J.—This is a judgment-debtor's appeal in an execution case; the decree is an old one, dated July 11th, 1902, and the present application for execution was made on the 13th of November 1914. The *first* point taken on behalf of the appellant is that execution is barred by the twelve years' rule of limitation, The Court below has found that the present application is not a fresh application, but is a petition to the Court made in continuation of a previous application of the 20th of June 1912. The matter has been discussed before us as a point of law, but it is really a question of fact. If the application of the 13th of November 1914 was a fresh application it was barred by the twelve years' rule, on the other hand, if it was in substance and in fact a petition to the Court to take up the previous application of the 20th June 1912 and to proceed with the same according to law, then it was within time. As a matter of fact the application of June the 12th, 1912, was for sale of certain property. This was held up by reason of a suit instituted by the judgment-debtor's son, asking for a declaration that the property attached was not liable to sale in execution of this decree. That suit was actually decreed by the Court of first instance on May the 7th, 1914; but the present respondent successfully appealed, and the order of the Appellate Court was passed on the 28th of August 1914. The execution of the present decree had been suspended under an injunction granted on the 23rd of January 1914. When the present decree-holder had finally succeeded in getting the suit brought by the judgment-debtor's son dismissed, he came into Court with his application on the 13th November 1914. I agree with the Court below that this application was, in substance and effect, merely an application to the Court to take up and continue the proceedings instituted on June the 20th, 1912, and interrupted by the suit which was finally dismissed on the 28th of August 1914. There is no force in the suggestion put forward on behalf of the appellant that only the period from January 23rd, 1914, to the 7th of May 1914, the date of the decree of the first Court, should be taken into account in the extension of the statutory period of twelve years. When the Court of first instance decreed the suit brought by the judgment-debtor's son, it is true in a sense that the injunction

(1) 18 A. 482 (F. B.); A. W. N. (1896) 142.
(2) 9 Ind. Cas. 817; 8 A. L. J. 412 (F. B.); 33 A. 517.
(3) A. W. N. (1898) 137.

issued on January 23rd, 1914, ceased to have any effect, but the place of that injunction was taken by the decree of a competent Court debarring the present respondent from proceeding with his execution in accordance with his application of June the 20th, 1912. That bar was only removed when the Appellate Court dismissed the suit brought by the judgment-debtor's son on the 28th of August 1914, that is to say, the judgment-debtor's son succeeded in holding up execution of the present decree in accordance with the application of June the 20th, 1912, from the 23rd January 1914 to the 28th of August 1914, and if this period be allowed, as it must be, the present application is saved from the twelve years' rule.

*Another* point argued before us is that the present application is barred under the three years' rule, in accordance with the provisions of Article 182 of the first Schedule to the Indian Limitation Act (Act IX of 1908). According to the respondent the decree has been kept alive by a continuous series of applications, each within the three years period, and each giving rise to a fresh period of limitation under paragraph 5 of the Article above referred to. The dates given by the decree-holder are July the 12th, 1902, October the 1st, 1904, September the 26th 1907, February the 11th, 1909, January the 16th, 1912, and June the 20th, 1912. What the judgment-debtor contends is that there was no application of October 1st, 1904, in consequence of which the application of September 26th, 1907, and all subsequent applications were legally barred by limitation. In substance this also comes before us as a question of fact and not of law. The record shows that there was an application by the decree-holder, dated October the 1st, 1904. That application has now been weeded out and it is somewhat difficult to ascertain with certainty what was its purport. I agree, however, with the learned Subordinate Judge that the materials on the record fully justify the presumption that this application was in fact what the decree-holder says it was, namely, an application for transfer of his decree for execution to another Court. If so, it was an application to the proper Court in accordance with law to take a step-in-aid of execution of the decree, and does operate to save limitation. I may notice that there was an application of the 13th of June 1913 by the present decree-holder on which stress has been laid by both sides. It will be seen that this application was brought while the application of June the 20th, 1912, was pending The decree-holder, having found his former application held up by the manœuvres of the judgment-debtor's son, was making another effort to realize his money, or some part of it. He found that there was a decree of another Court, apparently that of the Subordinate Judge of Agra, in favour of his judgment-debtor, and he asked the Court to attach that decree and to permit him to proceed with the execution of the same for his own benefit. In this application of June 13th, 1913, the decree-holder recited the previous steps taken by him in execution and referred to the alleged application of October the 1st, 1904, as an application for transfer of his decree. No objection was taken by the judgment-debtor on this point and execution was ordered to issue. I might refer to the case of *Sheoraj Singh* v. *Kameshar Nath* (4) as an authority for the proposition that this proceeding is conclusive against the judgment-debtor; but I prefer to regard the question of the existence and of the contents of this application of October the 1st, 1904, as one of fact, to be determined in the manner already stated. A suggestion was, however, put forward on behalf of the appellant that, by reason of this intermediate application of 13th June of 1913, the application of November 13th, 1914, which is now before us could not be regarded as in continuation of the previous application of June the 20th, 1912. There is no force in this plea. The fact that execution against certain property of the judgment-debtor was being obstructed at the instance of the judgment debtor's son was no reason why the decree-holder should not attempt to get what he could out of other property of the judgment-debtor in the meantime, and should not ask to be allowed to proceed with

(4) 24 A. 282; A. W. N. (1902) 63.

his application of June the 20th, 1912, as soon as the obstacle to his doing so had been removed.

*Finally* there remains a question of fact. It is alleged before us that this application of June 13th, 1913, actually resulted in the realization of some money for the benefit of the decree-holder, which has not been allowed for in the present application. This point was taken in the memorandum of objections filed by the present appellant in the Court below. There is no allusion to it in the judgment of that Court, and it would appear that it was not pressed. It is certain that the materials on the record now before us do not enable us to arrive at a decision in favour of the judgment-debtor; that is to say, the judgment-debtor, who was pleading part payment and on whom the burden of proof lay, has failed to lay before the Court any materials from which it could arrive at a determination of the amount alleged by him to have been realized. We might overrule the objection at once on this ground, but it has been conceded before us on behalf of the respondent that some small amount was, in fact, realized under the execution started by the application of June the 13th, 1913. Under these circumstances I think it sufficient to direct that this question may be raised again in the Court below, and the judgment-debtor given credit for any amount which he satisfies that Court to have been, in fact, realized by the decree-holder in the proceedings initiated by the application of June 13th, 1913. Apart from this direction the present appeal fails and I would dismiss it with costs.

WALSH, J.—I only want to add a few words. I take a very strong view that in a case of this kind the question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a simple question of fact. It is also a question of substance and not of form. In my view a disposition on the part of the Appellate Court to be led by Counsel into academic discussions upon supposed questions of law in matters of this kind only results in confusion, multiplication of authorities and difference of opinion. A careful study of the Full Bench case of this Court in *Rahim Ali Khan* v. *Phul Chand* (1), where there was a very full judgment of Mr. Justice Knox, shows that what they were laying down was that it was a question of fact in every case and that in the particular case all that they were deciding was that there was evidence sufficient to justify the finding which had been arrived at by the Court below. The case is an example of the objection to dealing with this question as a question of law to which I have already referred, inasmuch as in that very case one learned Judge was compelled to hold that a decision of his own on precisely similar facts was wrong. It is impossible to imagine a better illustration of the evil, to my mind, of this class of argument which has been ably presented than we have before us. No question of principle is involved at all. The object of the limitation, which is after all only a question of procedure, in an execution of a decree, is to prevent parties sleeping on their rights. In this particular case the unfortunate decree-holder has made no less than eight applications in twelve years and yet it is contended that in some way or other he should be held to be time-barred. Such holding, if a Court were driven to it, would be most unfortunate, because to my mind it would be to turn what is intended as an instrument of justice into an instrument of injustice. I agree in the order proposed by my learned brother.

BY THE COURT.—Except for the direction to the Court below that it should go into the question as to whether or not any amount was realized under the execution started with the application of the 13th June 1913 and that, in the event of an affirmative finding, the judgment-debtor should be given credit for the amount so realized, the appeal is dismissed with costs including fees on the higher scale.

*Appeal dismissed.*

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*Held*, that the whole period should be considered to be the time for which the land was sub-let in contravention of the provisions of the Tenancy Act and, therefore, should be excluded from the period of twelve years necessary for rights of occupancy. U. P. B. R. HARGOBIND *v.* TULSI **399**

— S. 13—*Occupancy holding, acquisition of—Ejectment—Tenant's son let into possession—Entry of* zemindar's *servant as tenant-in-chief, effect of—Tenancy, break in.*

A *zemindar* ejected a tenant in 1306 *Fasli*, and in 1307 *Fasli* the land remained in possession of the ejected tenant's son at the same rent though the name of the *zemindar's* servant was shown as the tenant-in-chief in the *patwari's* papers:

*Held*, that there was no break in the tenancy. U. P. B. R. BIDHU CHAND *v.* DURGA PRASAD **595**

SS. 18, 28—*Ex-proprietary tenant, permanent sub-lease granted by—Ex-proprietary right extinguished—Sub-lease, if binding on landholder*

*Quære.*—Whether any sub-lease given by a female ex-proprietary tenant should be binding in perpetuity against the landholder under section 28 of the Agra Tenancy Act for a period after her interest as ex-proprietary tenant is extinguished? U. P. B. R. KHUSHAL SINGH *v.* BHAGWAN DAS **857**

——— S. 20 **913**

———S. 21—*Mortgage of occupancy holding before operation of Act—Possession and dispossession after operation of Act - Suit for possession by mortgagee, if maintainable—Party in possession, position of.*

A usufructuary mortgage of an occupancy holding was executed before the coming into force of the Agra Tenancy Act, 1907, but the mortgagee obtained possession after the Act came into force. He was subsequently dispossessed and sued for possession:

*Held*, that the mortgagee could not recover possession, inasmuch as the mortgage was governed by the provisions of the Agra Tenancy Act, 1901.

Where both litigants are parties to an invalid transaction, the position of one in possession is stronger and must prevail. A. NAJAF KHAN *v.* GIRDHARIA **593**

AGRA TENANCY ACT—contd.

— S. 22—*Minor's tenancy—Guardian—Co-sharer in cultivation.*

A guardian of a minor tenant, who looks after the minor's cultivation, can be deemed to be sharing in the cultivation of the holding within the meaning of section 22 of the Tenancy Act. U. P. B. R. RAHMAT *v.* SIDH NARAIN SINGH **916**

— S. 22—*N. W. P. Rent Act (XII of 1881), s. 8—Occupancy holding—Succession opening before operation of Agra Tenancy Act—Daughters, succession by—Female estate—Death of daughter after operation of Act—Daughter's son, right of - Hindu Law.*

*K*, a Hindu occupancy tenant, died while the Rent Act of 1881 was in force leaving behind two daughters *D* and *S*. *D* died 14 years before the suit was instituted leaving plaintiff as her son; *S* died in 1913 leaving defendant as her son:

*Held*, that the succession was governed by the ordinary Hindu Law and that on the death of *S* both her son and that of her predeceased sister *D* were entitled to equally succeed to the occupancy holding of *K*.

There is nothing beyond the ordinary estate of a Hindu female in the Agra Tenancy Act, which enlarges the estate in an occupancy holding of a Hindu female in possession at the time the Act was passed. A. BISHESHAR AHIR *v.* DUKHRAN AHIR, 14 A. L. J. 127 **771**

———S. 22—*Succession—Last male occupancy tenant dying before* 1901—*Daughter, succession by—Adoption by daughter—Adopted son, right of—N.-W. P. Rent Act (XII of* 1881).

The last male owner of an occupancy holding died while Act XII of 1881 was in force and was succeeded by his daughter who adopted a son while Act XII of 1881 was still in force. This adopted son, however, did not share in cultivation with his maternal grandfather:

*Held*, that the adopted son having acquired a right of succession under Act XII of 1881 could not lose that right by the passing of the Tenancy Act of 1901 inasmuch as section 2 of the latter Act preserved such a right. U. P. B. R. CHURA MAL *v.* JIT SINGH **767**

———S. 22—*Widow—Re-marriage—Right in holding, if subsists—Hindu Widows' Remarriage Act (XV of 1856), s. 2, applicability of.*

A widow succeeding her husband under section 22 of the Agra Tenancy Act, 1901, has only an interest in the occupancy holding till her re-marriage and section 2 of Act XV of 1856 does not apply to the interpretation of this section. U. P. B. R. BHAIRON RAM *v.* SIDHANNA **801**

———S. 28 **857**

———S. 28—*Lease for definite period—Female tenant in her own right—Death of tenant—Lease, effect on.*

If a female ex-proprietary or occupancy tenant, having full rights in her own right and not having merely a life-interest in the tenancy, grants a *bona fide* lease for a definite period and if her interest comes to an end before the expiry of the lease, the lease is binding upon the landholder under section 28 of the Tenancy Act. U. P. B. R. MOTI CHAND *v.* SULTAN BEGAM **713**

——— S. 34 **395**

AGRA TENANCY ACT—contd.

——— S. 43—*Enhancement of rent of occupancy holding—Rent for three holdings paid in lump sum—Enhancement of rent of one holding, suit for, maintainability of.*

Where a *zemindar* sued for the enhancement of rent of an occupancy holding, the rent for which together with the rent for two fixed-rate holdings was paid in a lump sum:

*Held*, that the suit was not maintainable as it was the duty of the *zemindar* to have first the rent really due upon this holding only determined according to law. U. P. B. R. CHAKAURI *v.* NAKCHEDI SINGH **734**

——— S. 58 **765**

——— SS. 58, 34—*Ejectment, suit for—Grove—Land.*

A suit for ejectment under section 58 of the Tenancy Act does not lie against a grove-holder who pays no rent for the grove nor does section 34 apply to such a suit, as it applies only to *land* and a grove is not *land* within the meaning of the Act. U. P. B. R. IBAD-UN-NISSA BIBI *v.* DALGANJAN SINGH **395**

——— S. 58—*Land let for agricultural purposes converted into other uses - Ejectment, suit for—Remedy.*

A sub-tenant of an occupancy holding erected a "*chardiwari*" and an enclosure for feeding cattle on the holding:

*Held*, that the fact that the land was not *now* held for agricultural purposes was no bar to ejectment under section 58 of the Tenancy Act U. P. B. R. BABBAN MISIR *v.* RAM LOCHAN **576**

——— SS. 59, 60—*Non-deposit of decretal amount—Sufficient cause—Service of notice by affixation—Service, when insufficient.*

A plea by a tenant that he could not deposit the amount of a decree within the time fixed by the notice issued under section 60 of the Agra Tenancy Act on account of illness is not an unreasonable plea.

In the service of notices under section 60 the utmost care should be exercised.

Where a notice was served by affixation and the process-server reported that the whereabouts of the judgment-debtor were not known:

*Held*, that there was no due and reasonable diligence in effecting a personal service and that, therefore, there was no service at all of the notice. U. P. B. R. ZALIM *v.* SRI RAM **17**

——— S. 60 **17**

——— SS. 60, 61—*Decree for arrears of rent—Ejectment—Fifteen days' notice not given—Gross and palpable error of law—Revision.*

Where an Assistant Collector did not comply with the provisions of sections 60 and 61 of the Tenancy Act and ordered ejectment before the expiry of the required 15 days:

*Held*, that the Assistant Collector committed a gross and palpable error of law resulting in an injustice to the ejected tenant and the order was liable to be revised. U. P. B. R. JAISI RAM *v.* NATHU LAL **755**

——— S. 61 **755**

AGRA TENANCY ACT—contd.

——— S. 87—*Death of tenant—Heirs not traceable—Ejectment suit against sub-tenant, if maintainable.*

A landlord, before he can eject a sub-tenant, must prove that the tenant-in-chief has died without leaving any heirs. The mere fact that no trace is to be found of his heirs does not entitle him to a decree, as there is no abandonment when the holding is cultivated by the sub-tenant. Section 87 applies only when a tenant has ceased to cultivate his holding either by himself or by some other person. U. P. B. R. RAJA SINGH *v.* PARGAN SINGH **586**

——— SS. 150, 153, 154, 158—*Sale of proprietary rights—Reservation of certain area free from all payments—Rent-free grant—Right to hold free of revenue.*

Where a person sold his proprietary rights in a village reserving a certain area for himself free of any payment whatsoever:

*Held*, that the agreement constituted the area a rent-free grant acquired in consideration of a right previously vested in him, but that the vendor could not claim to hold it free of revenue, the agreement in this respect being contrary to law. U. P. B. R. KALKA SINGH *v.* DWARKA PRASAD **4**

——— SS 153, 154 **4**

——— SS. 157, (*b*), 158—*Sale of* zemindari *Reservation by vendor of certain area as rent free—Vendee, right of, to get revenue assessed.*

A person sold his share in a certain village but reserved to himself, rent-free in perpetuity, an area of some 17 *bighas*. In a suit by the vendee to have the area assessed to revenue and to have the vendor declared liable to pay the revenue so assessed:

*Held*, that the land had been acquired as a rent-free holding, within the meaning of section 151 (*b*) of the Tenancy Act, for a valuable consideration. U. P. B. R. DWARKA PRASAD *v.* PHUL KUNWAR **10**

——— S. 158 **4, 10**

——— S. 158—*Mortgagee of rent-free holding—Absolute transferee.*

A mortgagee of a rent-free holding is not an absolute transferee and he cannot, therefore, be considered to be a 'successor' to the grantee within the meaning of section 158 of the Tenancy Act. U. P. B. R. GHULAM ABBAS *v.* FIDA HUSSAIN **766**

——— S. 164—*Suit for profits—Defendant not realizing in excess of his share, liability of.*

The different co-sharers in a village were in possession of separate specific plots of *sir* and *khudkasht* land under certain private arrangement. One of the co-sharers sold his share to the plaintiff. The plaintiff failed to recover possession of certain plots from his vendor or to get rent assessed on the same. He sued to make good his loss out of the profits raised by the other co-sharers in the village:

*Held*, that the plaintiff was not entitled to succeed as he had not proved that the defendants had realized anything in excess of their share of profits. A. BHAGWANT *v.* ARJUN, 4 A. L. J. 209 **617**

——— S. 194 (1)—*Ejectment, suit for, by four out of five brothers—One brother absent abroad—Agent—Power of*

AGRA TENANCY ACT—concld.

Where four out of five brothers brought a suit for ejectment, the fifth one being absent in Burma:

*Held*, that the suit was maintainable, inasmuch as it must be assumed that the four brothers had been appointed by the absent brother as agents to act on his behalf under section 194 (1) of the Tenancy Act. U. P. B. R. GIRMAR *v.* GULAB **781**

AGREEMENT to pay off advance of money by delivering ballast—Promisor, whether an artificer **678**

ALIENATION. *See* CUSTOM.

ALIYASANTANA LAW—*Inheritance—Self-acquired property—Members of deceased's own branch, right of.*

The self-acquisition of a member of a family governed by the Aliyasantana Law devolves upon his death, not upon all the members of the larger family to which he belonged, but upon the members of his own branch in the larger family. Among the members of his own branch themselves, no distinction is made between persons nearer in blood to or remoter in blood from the deceased acquirer. All the members of the nearest non-extinct branch are the heirs of the self-acquirer. M. MANJAPPA AJRI *v.* MARUDEVI HENGSU, 30 M. L. J. 204: 39 M. 12 **165**

ALLAHABAD HIGH COURT RULES, CH. VII, R. 5 **335**

—— CH. XVI, R. 22—*Payment of fee—Affidavit—Payment by cheque of third person, if sufficient—Civil Procedure Code (Act V of 1908), ss. 151, 152—Appeal to Privy Council—Decree, if amended.*

An affidavit to authenticate the payment of fees to a Pleader under rule 22, Chapter XVI, of the High Court's Rules was filed by an agent of the party and it was stated that the payment was made by means of a cheque of a third person:

*Held*, that this was a sufficient compliance with the rules, inasmuch as the natural inference to be drawn from the words of the affidavit was that the agent who made the affidavit got the cheque and brought it to the Pleader,

A High Court cannot amend a decree which is the subject-matter of an appeal to the Privy Council. A *In re* RISAL SINGH *v.* BALWANT SINGH (F. B.) **194**

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—— Suit for redemption—Mortgage sued on found to be invalid—Plaintiff, whether can fall back on earlier mortgage—Amendment of plaint, when can be allowed **624**

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——, abatement of—Death of one respondent—Failure to bring his representative on record within time—Limitation Act (IX of 1908), s. 5—Sufficient cause—Ignorance of law—Appeal, whether abates as a whole **829**

—— Appellate Court, when can admit fresh evidence—"Substantial cause," interpretation of—Necessity, proof of—Recitals in documents, whether enough **908**

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—— Appellate Court, power of—Suit against two defendants—Decree prayed for against both or either of them—Decree against one—Appeal—No appeal by plaintiff—Appellate Court, power of to decree against other defendant **491**

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—— Arrest in execution, order deciding legality of—Application to set asside *ex parte* decree—Order giving time for payment, whether operates as stay of execution **731**

Continuance of suit by plaintiff after devolution of interest—No application—Appeal, maintainability of **858**

—— Contract to sell lands—Specific performance—Decree fixing time for payment of purchase-money—Confirmation of decree by Appellate Court—Appellate Court, whether can extend time **401**

—— Court of second appeal, issues remanded by, for recording evidence and findings—Lower Appellate Court, power of, to delegate the function to Original Court **634**

—— Date of hearing postponed—Date not communicated—Default Dismissal of appeal—Restoration of appeal—Sufficient cause **936**

—— Decree, purchase of, question of—Decision **524**

—— dismissed as time-barred—Respondent, whether entitled to be heard on cross-objections **579**

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—— *Letters Patent, cl. 15—"Judgment", meaning of—Concurrent findings of fact, effect of Hindu Law—Alienation—Limited owner—Widow—Family settlement, validity of—Consent of expectant reversioners, effect of Mere attestation of deed, effect of—Compromise—Deed, construction of—Decree, admissibility of.*

The word "judgment" is used in clause 15 of the Letters Patent in the sense of "a sentence of the law pronounced by Court" and not of the reasons which have led to that pronouncement.

An appeal under clause 15 of the Letters Patent must be deemed to have been preferred against a decree, and all the points necessary to be in-

APPEAL—(CIVIL)—contd.

vestigated for the determination of the correctness of t at decree are open for consideration, although the Court as a Court of Appeal would be slow to take, upon a question of fact, a view contrary to the concurrent opinion of two Courts.

Where a deed by a limited owner with qualified powers of alienation is called in question, the test is, whether the purpose for which the alienation is made is proper in the circumstances of the case. The doctrine of legal necessity is but a particular phase of the law

The sanction by expectant reversioners of an alienation of property by a Hindu woman affords evidence that the alienation was made under circumstances which rendered it lawful and valid.

A mere attestation of a deed does not necessarily import consent to an alienation effected thereby, nor even a knowledge of the contents thereof

The validity of a family settlement is not affected by the circumstance that the grantor of a lease of some of the family property was a limited owner in possession with qualified powers of alienation.

Per *Mookerjee, J.*—A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore, or resile from.

Deeds and contracts of the people of this country must be liberally construed; the form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses.

A compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such a case, the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim

Per *Jenkins, C. J.* A decree dismissing a suit based on a compromise filed on the petitions of both the parties is admissible in evidence without registration. C. UPENDRA NATH BOSE v. BINDESHRI PROSAD, 22 C. L. J. 452; 20 C. W. N. 210 **468**

——— Order granting application for review for "other sufficient reason", whether appealable —Revision **860**

——— Order refusing leave to amend plaint by High Court Judge on original side, if appealable **423**

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——— *Pauper, leave to appeal as, granted—Limitation Act (IX of 1908), s. 5—Stamping before inquiry as to pauperism is finished—Appeal, if within time—Co-owner's right for damages for use and occupation—"Tax, rate or assessment," meaning of—Lower Burma Town and Village Lands Act (IV of 1898), ss. 24, 25, 26—Burma Land and Revenue Act (II of 1876).*

Where an application for leave to appeal as pauper, presented beyond the proper time, is admitted under section 5 of the Limitation Act, 1908, and further inquiry as to pauperism is directed but proper Court-fees for an ordinary memorandum of appeal are paid before the inquiry is concluded, the appeal must be deemed to have been presented on the date of presenting the application for leave to appeal.

A suit for use and occupation by a co-owner against another co-owner will not lie.

APPEAL—(CIVIL)—concld.

Ground rent, under English Law, does not come within any of the terms "taxes, rates and assessments" but under sections 24, 25 and 26 of the Lower Burma Town and Village Lands Act ground rent due to Government is in a different position from ground or other rent due to an ordinary landlord. They virtually make ground rents, payable to Government, a tax or assessment L. B. SWAN TEE v. MA NGWE **630**

——— Plaint, amendment of, in appeal—Remand —Appellate Court, power of **906**

——— by plaintiff against partial decree -No appeal or cross-objection by defendant Appellate Court, whether can dismiss suit entirely **494**

——— Practice—Order directing plaint to be presented to Revenue Court set aside—Remand—Jurisdiction **759**

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— Proof of mortgage-bond—Finding by first Court—Document "legally proved"—Appellate Court, whether should interfere **760**

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——— Secondary evidence of document given at trial—Appellate Court, whether can admit document itself. **711**

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——— Sale in execution of Small Cause Court decree—Suit to set aside sale dismissed by ordinary Court—Second appeal, whether lies **711**

— Settling rent—Enhancement **982**

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——— Thak *map, preference given to, whether a question of law—Finding of fact or law—Weight given to a document which is not one of title, whether a question of law*—Halabadi chittas—*Execution proceeding, question to be left to be decided in.*

The question that a lower Appellate Court gave undue preference to a *thak* map involves a pure question of fact and as such cannot be raised in second appeal.

*Halabadi chittas* cannot be called documents of title and, therefore, what effect is to be given to them in evidence is not a question of law which can be raised in second appeal.

A question, which it was not essential to decide in a suit, may be left to be decided in execution proceedings.

Where a lower Court without re-laying the *thak* map and ascertaining the boundaries decreed a suit for declaration of title to and possession of a share in the residuary *chak* of a *thak* number of a certain *mauza* and directed that the *thak* map should be re-laid in the locality by a Commissioner in execution of the decree:

*Held*, that there was no error in leaving the ascertainment of boundaries by re-laying the *thak* map to be decided in the execution proceeding. C. BHARAT CHANDRA DAS *v* RAMANANDA DEB **862**

APPEAL TO PRIVY COUNCIL—Decree, if can be amended **194**

APPROVER—*Corroboration, nature of—Preparation to commit dacoity—Evidence of preaching sedition, relevancy of—Penal Code (Act XLV of 1860), ss. 399, 402—Evidence Act (I of 1872), s. 114 (b).*

There should be direct and material corroboration of the statement of an approver who is of very bad character.

Where the charge is that the approver and his companions made preparations to commit dacoity and actually assembled together at various places for that purpose, the evidence that they preached sedition and excited the populace to mutiny does in no way corroborate his statement, though their doing so was also illegal.

The evidence tending to show that the co-accused or some of them were seen in the company of the approver at or in the vicinity of the places at which, he says, dacoities were to be committed, is not sufficient corroboration of his statement. P. WARYAM SINGH *v.* EMPEROR, 2 P. W. R. 19.6 CR.; 17 CR. L. J. 107 **843**

——, testimony of, value of **833**

ARBITRATION.—Agreement—Guardian *ad litem*—Signature on application for reference, absence of, effect of—Arbitration—Umpire—Award **161**

——— Agreement to refer to arbitration on behalf of minor, when valid—Decree passed in accordance with award, scope of **881**

——— *Award—Award not filed in Court, effect of- Deed of conveyance not executed to give effect to terms of award, effect of—Title of persons under such award, if can be impugned.*

The title of persons entitled to a property under an award of arbitrators cannot be impugned because the award has not been filed in Court or because no

ARBITRATION—concld.

deed of conveyance has been executed to give effect to its terms O. MOHAMMAD HADI *v.* MOHAMMAD IAKI, 18 O. C. 282 **465**

——— Award—Decree based on award—Appeal—Revision—Grounds—Jurisdiction **250**

——— Award, setting aside of Date for making of award not fixed by order of reference, effect of—Notice of filing of award not given, effect of Material irregularity—Opinion, mere, unsupported by reasons—Decision, insufficient **345**

——— Award, suit on, limitation for—Award not signed by parties, if binding **88**

——— Award—Withdrawal of suit Jurisdiction **347**

——— Mutation—Award—Subsequent suit in Civil Court, maintainability of *Res judicata* **761**

——— Mutation case, contested—Jurisdiction of Tahsildar to enquire—Tahsildar, power of, to refer to arbitration—Award, effect of—N. W. P. Rent Act (XII of 1881), s. 203 **573**

ARMS ACT (XI OF 1878), S. 20—*Heavy sentence, propriety of.*

Where an accused was convicted of an offence under section 20 of the Arms Act and sentenced to three years' rigorous imprisonment and no special grounds were mentioned in the judgment for imposing such a heavy sentence:

*Held*, that having regard to the circumstances of the case the sentence was very heavy and ought to be reduced. M. *In re* BLAMBOYIL KUTTASHERI AHAMAD, 17 CR. L. J. 80 **672**

ASSAM LAND AND REVENUE REGULATION (I of 1886), S. 28, proviso, cl. (4) **774**

ATTACHMENT. *See* DECREE.

———, application for, before judgment—Suit for damages, maintainability of **448**

——— before judgment. *See* CIVIL PROCEDURE CODE, O. XXXVIII, R. 5 (1) (*b*).

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BAIL—Accused, rights of—Jurisdiction **669**

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BENAMI TRANSACTION—Motive and subsequen conduct of parties **267**

—— —— *Presumption, legal—Civil Procedure Code (Act V of 1908), s. 66—Declaration, suit for, maintainability of—Relief, vague, based on allegations outside pleadings—Court, power of.*

In a case for a declaration that the plaintiff wa the real, and the defendant was the *benami*, purchaser of the property in suit, the plaintiff did not give any credible explanation why the *benami* transaction had been entered into but proved satisfactorily that the money advanced on the deeds was his own money, that the defendant at the time had no means of her own and that the plaintiff remained in possession of the property transferred from the time of the purchase:

BENAMI TRANSACTION—concld.

*Held*, that in the absence of any rebutting evidence produced by the defendant, the transaction must, on the above evidence, be legally presumed to have been *benami*.

The words "no suit" used in section 66, Civil Procedure Code, 1908, not only include a suit for possession but also a suit for a declaration.

A relief, which is not based on the pleadings as they stand but on certain allegations which ought to have been definitely set up, but are not so set up in the pleadings and are such as, if allowed to be set up, turn the suit as brought into another and a different sort of suit, cannot be granted on the mere ground that the plaint contains a vague prayer to the effect that the Court may grant any other relief which it may deem proper. O. SITARA BEGAM *v.* MUHAMMAD ISHAQ KHAN, 2 O. L. J. 584 **365**

BENCH AND BAR, amity between, necessity of **657**

BENGAL COURT OF WARDS ACT (B. C. IX of 1879), S. 51—*Disqualified proprietor, suit against, when maintainable.*

A suit for recovery of money, alleged to be due from a deceased debtor, against his heiress who has been declared a disqualified proprietor under section 6 (*a*) of Act IX of 1879 (B. C.), where the inherited estate is in the hands of the Court of Wards and where in the suit she is not described as a Ward of Court or represented by the manager of the Court of Wards as her guardian and where the suit does not relate to the property not taken charge of by the Court of Wards, is in contravention of section 51 of the Act and not maintainable. C. ANANDA KUMARI DEBI *v.* DURGA MOHAN, 20 C. W. N. 31; 22 C. L. J. 522 **1**

BENGAL ESTATES PARTITION ACT (V OF 1897), SS. 88, 119—*Partition proceedings—Suit to set aside partition in Civil Court, maintainability of.*

Where in a partition proceeding in a Revenue Court no dispute or doubt was found to exist as to whether any land formed a portion of the parent estate and no order was made by the Collector directing the partition to proceed under section 88 (*b*) of the Estates Partition Act, a party suing in a Civil Court for declaration of title to and possession of land, alleging that by reason of fraud practised by one of the defendants land belonging exclusively to him had been partitioned as joint land, is not a person aggrieved by an order made under section 88 and is not entitled to maintain the suit.

Per *Fletcher, J.*—A party to a partition proceeding in a Revenue Court, having known about his rights from the time the partition papers were submitted to the Collector under section 58 and notices inviting objections issued and never having put them forward in the partition proceedings, ought not to be subsequently permitted to raise them so as to upset the partition proceedings to which he was a party.

Whatever rights a party may have, he is not entitled to keep the lands allotted to him on the footing that the lands sued for formed a portion of the estate under partition and bring an action to recover possession of the lands or a portion thereof awarded to the other party. C. GURBUKSH PROSHAD TEWARI *v.* KALI PROSAD NARAIN SINGH, 19 C. W. N. 1322 **167**

——— S. 119 **167**

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819), S. 21 **774**

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BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (III OF 1828), S. 10 **774**

BENGAL LAND REVENUE SALES ACT (XI OF 1859)—Sale—*Noabad taluk*, purchaser of—Amendment of plaint, objection to, waiver of—Bengal Land Revenue Sales Act (VII of 1868, B. C.), S. 12 **752**

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869 B. C.), S. 27 **757**

BENGAL LAND REVENUE SALES ACT (VII OF 1868 B. C.), S. 12 **752**

——— S. 27, *applicability of—Tenant dispossessed by a co-sharer landlord—Suit for recovery—Limitation.*

When a tenant is ousted by a co-sharer landlord, the special limitation provided in section 27 of Act VIII of 1869 B C. has no application to the tenant's suit for recovery of possession. C. GANDO PATUNI *v.* SARAT PATUNI **510**

BENGAL RENT ACT (X OF 1859), S. 21 **185**

BENGAL TENANCY ACT VIII OF 1885), S 3—*Tenant's status, tests for determining—Construction of document.*

In determining the status of a tenant under the Bengal Tenancy Act, if the inception of the tenancy is clear and the document creating the tenancy shows what it is, subsequent conduct or dealings of the tenant need not be considered. It is only when no clear conclusion can be arrived at from the document that subsequent conduct or dealings are necessary to consider.

An entire village comprising about 500 *bighas*, where persons were residing, was let out to a tenant and the document creating the tenancy did not clearly show whether the tenancy was a *raiyati* holding or a tenure:

*Held*, that under the circumstances the tenancy was an under-tenure. C. PROTAB CHANDRA *v.* MOHENDRA LAL **717**

——— S. 5—*Non-transferable occupancy holding, transferee of—Co-sharer landlord, recognition by, effect of.*

A settlement by a co-sharer landlord does confer a right with regard to the share of that landlord. Therefore, a transferee of a non-transferable occupancy holding, who afterwards obtains a recognition from some of the co-sharer landlords, acquires a good title with regard to the shares of those landlords and as such has the right to joint possession of the holding C. UMAR ALI *v.* JADU RAM KAPALI **855**

——— SS. 11, 18, 85, 170 (3)—*Lease, permanent and at fixed rate*—Raiyat, *rights of—Sub-lease, if permitted—Sub-lessee, right of, to apply under s* 170 (3).

A lease was granted upon a rent of Rs. 5 a year and it was provided that the tenant would enjoy the land from generation to generation and that the landlord would not claim more rent than what was settled:

*Held*, that the lessee was a *raiyat* at a fixed rate of rent and, therefore, under section 18 of the Bengal Tenancy Act his interest was subject to the same provisions with respect to the transfer of, and succession to, the holding as that of a permanent tenure-holder.

BENGAL TENANCY ACT—contd.

A sub-lessee from such a lessee acquires a valid interest and is competent to make a deposit under sub-section (3) of section 170 of the Bengal Tenancy Act to avoid a sale in execution of a decree for rent obtained by the landlord against the permanent lessee

The term "transfer" as used in section 11 or section 18 of the Bengal Tenancy Act includes a lease.

The provisions of section 85 have no application to a case where section 18 applies. C. HARI MOHAN PAL *v.* ATUL KRISHNA BOSE, 19 C. W. N. 1127 **503**

——S. 18 **503**

—— S. 29 **185**

——S. 29—*Landlord and tenant*—Hajat—*Landlord's right to claim full rent after allowing* hajat *for some years*—*Non-occupancy* raiyat—*Agreement to pay full rent stipulated in lease after getting* hajat *for some years, if valid*—*Evidence of subsequent agreement or of conduct, to vary rent stipulated in registered lease, admissibility of*—*Evidence Act* (*I of* 1872), *s.* 92—*Evidence that rent was always paid at lower rate than that stipulated in lease, admissibility of.*

An agreement of a non-occupancy *raiyat* contained in his *kabulyat* that for the term of the lease a portion of the stipulated rent will be deducted as *hajat* (kept in suspense) and after the expiry of the term, if he chooses to occupy the land full rent will be payable, does not contravene the provisions of the Bengal Tenancy Act and is not invalid.

The mere fact that the landlord on the expiry of the term of a written lease realised rent at a reduced rate for a few years, is not sufficient to deprive him of his right to claim rent at the rate stipulated in the lease.

Where such a lease is registered, evidence of any subsequent agreement or evidence of conduct is inadmissible for the purpose of varying the stipulated rent.

Evidence that since the execution of a *kabulyat* the tenant has been paying rent at a lower rate than that stated in the *kabulyat*, is admissible to show that from the very first the intention of the parties was that the *kabulyat* should not be acted upon or that there has been a waiver of the strict terms of the lease. C. KALIS CHANDRA SAHA *v.* DARBARIA SHEIK, 20 C. W. N. 347 **251**

—— SS. 30, 113, CH. X *Enhancement on ground of prevailing rate, limit of*—*Settlement of rent, proceeding for, after settlement under Chapter X, maintainability of*—*Non-joinder of party, effect of*—*Civil Procedure Code (Act V of* 1908), *O I, r.* 4.

A settlement of rent with reference to the prevailing rate is not illegal if it involves an enhancement of more than two annas in the rupee, as there is no limit to the amount of enhancement which can be effected on the ground of prevailing rate.

An entry of a certain sum as rent at a settlement made under Chapter X of the Bengal Tenancy Act is no bar to a proceeding for settlement of rent within the next fifteen years when the entry was merely an entry of the existing rate. It is only if the entry resulted from an actual settlement of rent that the bar of fifteen years under section 113 of the Act is applicable.

BENGAL TENANCY ACT—contd.

Under the Civil Procedure Code, 1908, an appeal is not to be dismissed on the mere ground of non-joinder of parties. C. BHAGABAN MAHAPATRA *v.* PALTURAM SINGH **749**

——S. 49, CL. (6)—*Notice*—*Transferees of non-transferable under*-raiyati *holding*—*Ejectment*—*Landlord, right of, to eject.*

The landlord of a non-transferable under-*raiyati* holding, who after being aware of its transfer (by exchange) continues to receive rent from the transferees in the name of the original under-*raiyat*, cannot eject them without notice under clause (6) of section 49 of the Bengal Tenancy Act. C. ABDUL HAMID *v.* UDOY CHANDRA ACHARJEE **614**

—— —— SS. 50, 105—*Proceedings under s.* 105—*Presumption of fixity of rent, rebuttal of*—*Enhancement, liability for*—Jama wasil baki *papers of more than* 70 *years, admissibility of*—*Genuineness, presumption of*—*Evidence Act* (*I of* 1872), *ss.* 90, 34.

In a proceeding under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent, *jama wasil baki* papers of more than 70 years were produced to rebut the presumption arising under section 50 of the Bengal Tenancy Act from proof of payment of uniform rent for 20 years:

*Held*, that the *jama wasil baki* papers were admissible in evidence and their genuineness could be presumed under section 90 of the Evidence Act.

*Held*, further, that the liability to enhancement was imposed not by the *jama wasil baki* papers but by the law which, in the absence of a presumption under section 50 or upon rebuttal of that presumption, imposed a liability to enhancement upon tenants. C. NIROD KRISHNA GHOSE *v.* PRODUT KUMAR TAGORE **794**

S. 67—*Interest payable, when* kabulyat *prior to Act fixing rate of interest is varied by* solehnamah *after passing of Act*—*Tenancy, if newly created*—*Construction of document.*

An original *kabulyat* creating a tenancy executed prior to the passing of the Bengal Tenancy Act provided for interest at the rate of 6¼ per cent. per mensem on overdue instalments, but after the passing of the Act there was a *solehnamah* between the landlord and the tenants by which a sum of Rs. 38 was agreed to be the rent after deducting the *abwab* Rs. 4-9-0 from the original rent of Rs 42-9-0 (including the *abwab*) fixed by the *kabulyat*, and a deduction was also made in the rent in respect of a portion of the land which was in the possession of the landlord. The *solehnamah*, so far as the question of interest was concerned, expressly stated that in case of default of payment of any instalment, the tenants shall pay interest at the rate stipulated in the *kabulyat* and that all other stipulations made in the *kabulyat* except those in respect of *abwab* shall remain in force:

*Held*, that by the *solehnamah* there was only a variation of some of the terms of the old *kabulyat* but that no new contract of tenancy was created; and that, therefore, the tenants remained liable to pay interest at the rate stipulated in the *kabulyat*.

*Held*, also, that if the *solehnamah* had created any new contract of tenancy, the tenants would not have been liable to pay interest at more than the rate

BENGAL TENANCY ACT—contd.

mentioned in section 67 of the Bengal Tenancy Act. C. ABDUL HAMID v ABDUL MIJI 710

—— S. 85 503

——S. 86—*Surrender of portion of joint holding, whether valid—Surrender when operating as transfer.*

Surrender by one of the joint tenants of his interest in a holding may operate as a valid transfer, if not as a valid surrender, to the landlord of his interest subsisting at the date of the surrender, when the deed of surrender is stamped as a conveyance and is registered.

*Quære.* Whether surrender of a portion of joint holding by one of the tenants is valid. C. ABDUL KARIM MEAN v. MIAJAN MIANJI 232

—— S. 87—*Non-transferable occupancy holding, abandonment of, by sale—Landlord's right of re-entry—Abandonment, finding of—Second appeal.*

A finding of a lower Appellate Court on the question of abandonment, arrived at on evidence on the record, is unassailable in second appeal

When an occupancy *raiyat* sells his non-transferable holding and abandons it, the lessee of the landlord, to whom the landlord's right of re-entry has been transferred, is entitled to an ejectment decree, even though the purchaser of the holding executes a deed of release in favour of the *raiyat* and puts him in possession. C. KAILAS CHANDRA AICH v. ROMESH CHANDRA SEN 355

——S. 105 794

— S. 105—*Incidents of holding, decision as to—Second appeal, maintainability of.*

A second appeal lies to the High Court from the decision of a Special Judge affirming the decision of an Assistant Settlement Officer on the question as to the incidents of the holding. C. AKBAR ALI KHAN v. ABBAS, 19 C. W. N. 1328 164

——SS. 105, CL. 4, 109A—*Settling rent—Enhancement—Second appeal—Civil Procedure Code (Act V of 1908), s. 115—Limitation, erroneous decision on, whether ground for revision.*

The expression settling rent in sub-section 4 of section 105, Bengal Tenancy Act, includes enhancement.

The decision of a Settlement Officer settling rent under sub-section 4 of section 105, Bengal Tenancy Act, which results in enhancement of the existing rent is not subject to second appeal.

A High Court cannot interfere under section 115 of the Civil Procedure Code, 1908, on the ground that the question of limitation was wrongly decided by the lower Court

Where the Settlement Officer in a proceeding under section 105 of the Bengal Tenancy Act settled rent at Rs. 5-4-0 per *bigha* and on the tenants' appeal, the Special Judge altered the rent to Rs. 8-8-0 per acre, though the cross-appeal of the landlord was withdrawn:

*Held*, that the decree of the Special Judge altering the rent in favour of the landlord was without jurisdiction and was liable to be set aside in revision under section 115 of the Civil Procedure Code, 1908 C RAMPAT MOHATO v. RAM GOLAM SINGH 982

—— S. 109 A 982

——S. 113 749

BENGAL TENANCY ACT—concld.

—— S. 153—*Conflicting claims to landlord's right, decision of—Second appeal, maintainability of.*

In a suit for rent, the plaintiff who had acquired the landlord's right by purchase at a sale in execution of a mortgage-decree, added as parties defendants, the successors of the previous landlord, who contested the suit on the ground that the plaintiff had not obtained possession of the landlord's right:

*Held*, that a second appeal lay to the High Court inasmuch as the plaintiff's title was assailed by the successors of the previous landlord and there were conflicting claims to landlord's right which were decided by the Court below. C. PEARY MANDER v. ANAND RAM 695

——S. 153—*Rent, suit for, for less than Rs. 50—Interest in land having conflicting claims thereto decided—Appeal, maintainability of.*

In a suit for rent for an amount less than Rs. 50 on the allegation that the plaintiff held the land under *A* and *B* and that the defendant was his sub-tenant, the defendant pleaded that he had the land under *B* and was not the plaintiff's sub-tenant. The first Court dismissed the suit and an appeal against it to the District Judge was dismissed as incompetent under section 193 of the Bengal Tenancy Act:

*Held*, that the appeal lay to the District Judge inasmuch as the decree decided a question relating to some interest in land as between parties having conflicting claims thereto. C. SATISH CHANDRA v. AMERUDDIN KHADIM 784

—— S. 170 (3) 503

BENGAL VILLAGE CHAUKIDARI ACT (VI OF 1870) 545

BOMBAY COTTON TRADE ASSOCIATION RULES, Rr. 15, 17 948

BOMBAY PREVENTION OF GAMBLING ACT (ACT IV OF 1887), S. 10—*Examination of accused person as witness, legality of—Evidence of such accused, admissibility of.*

A Magistrate is not justified, under section 10 of the Bombay Prevention of Gambling Act, to examine and therefore commits an irregularity, if he examines an accused person while he is still in the position of an accused person and has obtained no order of discharge or acquittal.

Statements made by accused persons under such circumstances are not admissible in evidence. B. BABILAL BALWANT v. EMPEROR, 17 BOM. L. R. 1078, 17 CR. L. J. 2 130

BOMBAY REVENUE JURISDICTION ACT (X OF 1876, S. 11 616

BUDDHIST LAW—*Adoption made shortly before death, whether valid.*

Under the Buddhist Law an adoption made shortly before the death of the adopter is valid. C. B. MI MAN v. MAUNG GYI, U. B. R. (1915), II, 87 539

—— *Burmese—Joint undivided ancestral property—Adverse possession—Burden of proof—Limitation Act (IX of 1908), Sch. I, Art. 144*

In a suit to which Article 144 of the First Schedule of the Limitation Act applies it is for the plaintiff

BUDDHIST LAW—concld.

in the first place to prove title and if the plaintiff succeeds in proving title, the onus of proving adverse possession for 12 years lies upon the defendant.

There can be no adverse possession between co-heirs in joint possession. L. B. MA NYEIN ME *v.* MA MAY 568

——— , *Burmese—Minor—Marriage—Marriage, compensation for breach of contract of—Parents, promise of, to marry their children, if enforceable.*

Under the Burmese Buddhist Law a male whether a minor or not cannot be married without his consent or against his will. If parents promise to make or compel their child to marry, the Court cannot enforce such promise or give compensation for breach of it, because by so doing it would infringe the essential principle that the consent of parties to a marriage must be free. L. B. MAUNG THEIN *v.* MA THET HNIN 507

— —, *Chinese—Marriage, forms of—Presumption—Long co-habitation.*

Though there are usually six preliminary steps to a first class marriage in China, these forms are not indispensable and there is nothing to show that any particular ceremony is essential for a valid marriage under the Chinese Law.

If the parties co-habit for several years as man and wife, the presumption that there was a valid marriage must prevail. L. B. MA SHEIN *v.* KIM SEIN, 17 CR. L. J. 112 848

BURDEN OF PROOF—Adverse possession—Joint undivided ancestral property 568

———*Bona fide* purchaser, without notice 41

——— Custom 526

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——— Debt—Suit against the heirs of original debtor—Consideration, full, passing of 454

Hindu Law—Joint family—Property acquired by one member—No nucleus of joint property—Presumption—Separate property 12

———Joint family—Separation—Allowance out of joint funds given by sons to mother, effect of 291

——— Manager in possession as *kanomdar* owning equity of redemption—Discharge 459

———Money due on bond, suit for—Bond lost—Payment pleaded 349

——— *Possession within limitation—Suit for possession*—Zemindar's *title in and possession over jungles, groves or tanks in village or scattered trees in* abadi *—Presumption as to* zemindar's *title and possession —Under-proprietary title, plea as to—Adverse possession.*

Where the plaintiff, the *zemindar* of a village, sued the defendant for possession and declaration in respect of certain plots of land, consisting of jungles, groves or tanks, situated in the village, and also in respect of some scattered trees planted in the *abadi* of the village and the defendant pleaded under-proprietary title in respect of the plots and ownership over the trees by adverse possession, and evidence was produced to show that some other trees in the *abadi* were the property of tenants;

BURDEN OF PROOF—concld.

*Held*, that the plaintiff could not be called to establish his possession within limitation, but that the burden of proving under-proprietary title and ownership lay on the defendant, inasmuch as the plaintiff being the *zemindar* of the village the presumption of title was naturally in his favour, and as having regard to the nature of the property in suit there was a further presumption that the plaintiff had had possession, because of the presumption that possession follows the title.

Where the plaintiff *zemindar* sued to recover possession of certain plots on the allegation that the defendant had encroached on them by including them in his holding, and it was found that the defendant was an occupancy tenant of these plots:

*Held*, that the plaintiff was not entitled to a decree for possession nor could he get a declaration of his proprietary title with respect to the plots as there was no cause of action for any declaratory suit. O. RAM SARAN *v.* PRITHIPAL SINGH, 2 O. L. J. 549 370

——— Pro-note—Consideration 40

———Stolen property found in accused's possession—Reasonable explanation of getting it—Prosecutor, duty of 660

——— Suit for compensation 551

——— *Under-proprietary rights, plea as to—Declaratory suit—Adverse possession, commencement of—Ejectment refused by Revenue Courts, effect of.*

The plaintiff who was a *talukdar* of certain villages sued for declaration that the defendants had no proprietary or under-proprietary rights in certain plots of land situate in those villages, and the defence was that they were under-proprietors of those plots:

*Held*, that the burden lay on the defendants to prove that they were under-proprietors.

Where in ejectment proceedings before a Revenue Court the persons sought to be ejected by the landlord set up under-proprietary rights, and the Revenue Court refuses to eject them on the ground that they are under-proprietors or that they have rights superior to those of an ordinary tenant, they may subsequently claim under-proprietary rights by adverse possession commencing from the date of such Revenue Court decision. O. MUHAMMAD MUMTAZ ALI KHAN *v.* HARPAL SINGH, 2 O. L J. 556 376

———Unregistered contract of sale—Subsequent registered sale-deed—Priority 953

———Widow—Life-interest—Special custom 522

BURMA LAND AND REVENUE ACT (II OF 1876) 630

BURMA LAWS ACT (XIII OF 1898), S. 13 488

CALCUTTA HIGH COURT RULES AND CIRCULARS OF 1910, R. 45 (*e*) 395

CATTLE TRESPASS ACT (I OF 1871), SS. 10, 24—*Occupier, whether entitled to seize cattle trespassing on his land—Claim by owners of cattle to ownership of land, effect of.*

A person who is in exclusive possession of a plot of land is an occupier thereof within the purview of section 10 of the Cattle Trespass Act and as

CATTLE TRESPASS ACT—concld.

such is entitled to seize or cause to be seized, any cattle trespassing on the land in his possession.

The fact that the owners of the cattle claim to be owners of the land as well does not affect his right, and if they resist the removal of the cattle they make themselves liable to a conviction under section 24 of the Act. P. EMPEROR *v.* SAUDAGAR, 3 P. R. 1916 CR.; 17 CR. L. J. 63 **655**

S. 24 **655**

CAUSE OF ACTION *See* MADRAS LANDS ENCROACHMENT ACT, S. 5.

Hundi *executed for balance of account due in respect of transactions effected elsewhere—Transactions no part of cause of action—Jurisdiction—Letters Patent (Bom.), cl. 12—Leave, when given and when refused.*

A *hundi* was executed at Bassam. The consideration for it was the balance of account due in respect of transactions effected in Bombay. The *hundi* was not made payable at Bombay. In a suit on the *hundi*:

*Held*, that the Courts at Bombay had no jurisdiction and that it was not necessary to prove the transactions out of which the claim arose as the claim on those transactions was satisfied by the passing of the *hundi*, and thus the transactions did not form a part of the cause of action in the case.

Under clause 12 of the Letters Patent, in suits on *hundis*, leave will be given when the money is payable in Bombay and when it is not payable in Bombay, leave will be refused. B. SEW-RAM GOKALDAS *v.* BAJRANGDAT HARDWAR, 18 BOM. L. R. 57 **918**

——Mortgage **95**

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 41 (2)—*'Give' notice, meaning of—Period of one month, starting point of.*

Under section 41 of the Central Provinces Tenancy Act, the period of one month within which a landlord is bound to intimate to the tenant his desire to purchase the absolute occupancy right, begins to run from the date of receipt of notice, and not from the date when such notice was posted to his address. The word 'give' in that section is equivalent to 'serve.' N. DINA *v.* PARASRAM, 12 N. L. R. 42 **991**

CHARGE. *See* DECREE: MORTGAGE; TRANSFER OF PROPERTY ACT, S. 100.

——TO JURY. *See* JURY TRIAL.

CHARTER ACT (24 & 25 VIC., C. 104), S. 15 **567**

CHETTY FIRM. *See* PRINCIPAL AND AGENT.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI OF 87), SS. 3, 12A—*"Heir", meaning of—Contract Act (IX of 1872), ss. 2 (d), 68—Necessity—Money required for* sradh *of mother—Consideration, promise to defer bringing suit on void contract if.*

The provision in section 3 of the Chota Nagpur Encumbered Estates Act of 1876 contemplates the existence of an heir of the holder of a property under management under that Act, during his life-time; and a contract made by such an heir of the holder during his life-time which may involve them or either of them in pecuniary liability is void.

A promise to defer bringing a suit upon a contract which is void, does not amount to a consideration.

CHOTA NAGPUR ENCUMBERED ESTATES ACT—concld.

During the life-time of his father money borrowed by a person incapable of entering into a contract, to pay for the *sradh* of his mother, is not a necessary within the meaning of section 68 of the Contract Act. C. GOPINATH BHAGAT *v.* LAKSHINARAIN SINGH **937**

——S. 12 A **937**

CHAUKIDARI CHAKRAN LANDS, *resumption of—Bengal Village Chaukidari Act (VI of 1870 B. C.), —Chaukidari Commissioner's report, final and conclusive against whom—Notice of proceedings, persons entitled to.*

The question whether certain resumed *chakran* lands are the *chaukidari chakran* lands of one *mauza* or of another is a question of parcel or no parcel and as such is purely a question of fact.

A person who is not impleaded in the enquiry of the Commissioner under Act VI of 1870, B. C., is not entitled to any notice and under section 61 of the Act, the report of the Commissioner is final and conclusive against such person without notice; although the absence of such notice would render the proceedings of the Commissioner of no effect against a person entitled to such notice. C. SARAT CHANDRA ROY *v.* SECRETARY OF STATE **545**

CHRISTIAN MARRIAGE ACT (XV OF 1872), S. 4 **897**

CIRCUMSTANTIAL EVIDENCE. *See* EVIDENCE ACT, S. 114.

CIVIL PROCEDURE CODE (ACT XIV OF 1882), S. 244 **769**

——S. 244—*Objections—Execution—Decree—Suit, maintainability of—Transfer of Property Act (IV of 1882), ss. 88, 89—Mortgage.*

One *B* sued and obtained a decree against one *F* for the enforcement of his mortgage under sections 88 and 89 of the Transfer of Property Act. *A*, the adopted son of *F*, raised certain objections against the execution of the said decree of *B* under section 244 of the Civil Procedure Code of 1882, some of which were disallowed. *A* then brought a suit raising the same objections as in the execution proceedings making two other persons parties also:

*Held*, that the suit was barred by section 244 of the Civil Procedure Code, 1882, as the questions raised in the suit could have been and were raised in the execution proceeding. P. C. AMIR CHAND *v.* HARIHAR PRASHAD SINGH, 30 M. L. J. 258; 3 L. W. 257 **354**

——S. 276 **276**

——S. 310A **783**

——S. 317—*Civil Procedure Code (Act V of 1908), s. 66—"Certified purchaser," meaning of—Suit against auction-purchaser, maintainability of—Recognition of title of real purchaser, how made effective.*

A Court auction-purchaser must be treated as the real purchaser for all purposes, and the term "certified purchaser" in section 317 of the old Code of Civil Procedure means and includes also persons claiming under such certified purchaser

Per *Coutts Trotter, J.*—A recognition by a *benamidar* of the title of the real purchaser, in order to

CIVIL PROCEDURE CODE—(1882)—concld.

take the case out of the disability created by section 66 of the present Code of Civil Procedure, is effective only when it takes the form of executing a sale-deed or gift-deed or any other act recognised by law as capable of transferring the ownership and not otherwise.

Per *Srinivasa Aiyangar, J.*—Section 66 of the new Code is, in this respect, merely declaratory of the true meaning of section 317 of the old Code and not an amendment of it. M. CHIDAMBARAM CHETTIAR *v.* SUBRAMANIA AIYAR, 3 L. W. 86; (1916) M. W. N. 220 434

——S. 317—*Civil Procedure Code (Act V of 1908), s. 66—Suit against private transferee of certified purchaser for confirmation of possession, maintainability of.*

Section 317 of the Civil Procedure Code, 1882, cannot be a bar to the maintainability of a suit for confirmation of possession of an immoveable property against a private transferee of the certified purchaser on the allegation that the certified purchaser as *benamidar* of the plaintiff purchased that property of the plaintiff in execution of a decree against him.

Section 66 of the new Code of Civil Procedure is more comprehensive than section 317 of the Civil Procedure Code of 1882. C. JOHAN BUKSH *v.* MOHAMMAD TASLIM 963

——S. 424—*Notice—Defective—Suit against Secretary of State, maintainability of.*

A notice under section 424 of the Civil Procedure Code, 1882, is not a proper notice if the case set up in the plaint is altogether different from the case stated in the notice and, therefore, a suit instituted upon such a notice cannot be maintained. C. ABDUL WAHAB *v.* SECRETARY OF STATE 235

CIVIL PROCEDURE CODE (ACT V OF 1908),

SS. 2, 47—*Arrest in execution, order deciding legality of—Appeal—Application to set aside* ex parte *decree—Order giving time for payment, whether operates as stay of execution.*

An order deciding the legality of an arrest made in execution of a decree falls under sections 47 and 2 of the Code of Civil Procedure and is appealable.

An order giving time to pay the decretal amount, passed on an application to set aside an *ex parte* decree, does not by itself operate as a stay of execution of the *ex parte* decree itself. M. SUBBARAMA AYYAR *v.* ARUNACHELLAM CHETTIAR, 3 L. W. 35 731

——S. 2 (11)—*Legal representative—Hindu Law—Hindu woman, suit by—Death of plaintiff pending suit—Right to continue litigation.*

A Hindu woman in possession of an estate as such represents the estate and a suit brought by her to recover possession of the estate can be continued on her death pending the suit by a person entitled to succeed to the estate after her.

Where, therefore, an unmarried daughter sued to recover her father's property making her married sisters *pro forma* defendants and died pending the suit:

*Held*, that the married sisters could continue the litigation as plaintiffs in the cause. A. JADUBANSI KUER *v.* MARPAL SINGH, 14 A. L. J. 8 104

CIVIL PROCEDURE CODE—(1908)—contd.

——S. 11 121

S. 11—*Muhammadan widow in possession of deceased husband's estate—Dower-debt, less than actually due, claimed in Court—Claim decreed—Decree satisfied from portion of property Possession, suit for, by deceased's heirs—Widow's right to retain property for balance of dower-debt, if sustainable.*

The widow of a deceased Muhammadan having taken possession of his estate brought a suit to recover the unpaid portion of her dower-debt, *confining her claim to a sum less than what was actuall due to her.* Her claim, as confined, was decreed in full, and the whole of the decretal amount was realised by sale of certain portions of the estate, but she retained possession of its remaining portions. Subsequently she resisted a claim for possession brought by one of the heirs of the deceased, on the ground that she was in possession of the estate with a charge on it for the portion of her dower-debt *that was actually due to her:*

*Held*, that in view of the decree obtained by the widow it was no longer open to her to say that *any portion* of her dower-debt was *still* unpaid, inasmuch as any right which she had under the marriage contract for dower had passed out of the stage of contract and had become a debt of record, and that such debt having been satisfied she had no longer any right to retain the deceased's estate. O. INAYAT ALI *v.* JAITUN BIBI, 2 O. L. J. 579; 18 O. C. 263 362

——S. 11—Res judicata—*Matter directly and substantially in issue, determination of—Incidental finding, effect of.*

The question what was "the matter directly and substantially in issue" in a previous suit depends on whether the parties to the suit and the Court have dealt with the matter as if there was a relief claimed in respect of that matter also, that is to say, though the matter was in the first instance brought in issue as ancillary or incidental to the matter in respect of which relief was claimed, it was dealt with and decided as if it formed a direct and principal issue in the suit.

An incidental finding as to the boundary of a plot of land not on a question directly and substantially in issue in a previous suit, is not *res judicata* as regards the question of title to that strip in a subsequent suit between the same parties. C. MUHAMMAD ABDUL QADIR *v.* JNAN CHANDRA PAL 738

——S. 11—Res judicata—*Suit between vendor and a previous purchaser, when operates as* res judicata *between two purchasers.*

*A* sold a certain property first to *C* and then to *E*. *A* thereafter sued *C* for cancellation of the sale as void for want of consideration. It was found that the sale was good. *E* then sued *A* and *C* for possession:

*Held* that the suit was not barred by *res judicata*, inasmuch as at the time of the previous suit *A* had no longer any interest in the land and could not, therefore, bind *E* by litigation determining the title of the land.

In order that a previous decision against a transferor be *res judicata* as against the transferee, the transferee's title must have arisen subsequent to the commencement of the previous suit. L. B. MA U *v.* MG. LU GALE 619

CIVIL PROCEDURE CODE—(1908)—contd.

——— SS. 11, 47—*Suit for possession on basis of decree, maintainability of—Decree barred by limitation.*

Where a person has obtained a decree for possession and has not executed it within limitation, he can maintain a fresh suit for possession basing it upon the judgment obtained in his favour, and his suit is not barred by sections 11 and 47 of the Code of Civil Procedure, 1908. A. LAKHRANI KUAR *v.* DHANRAJ SINGH, 14 A. L. J. 102 **634**

——— S. 11—*Suit for recovery of mortgage-money—Decree allowing defendant-mortgagor to obtain possession on payment not executed—Subsequent suit by mortgagor for redemption*—Res judicata.

In a suit brought by a mortgagee against his mortgagor's sons for recovery of the mortgage amount, the decree passed in favour of the mortgagee provided that the defendants were entitled to obtain possession of the land in execution through Court after satisfying the decree. The decree was not executed by the other party and 40 years afterwards the mortgagor's sons sued to redeem the same mortgage:

*Held*, that as in the former suit an executable decree was passed in favour of the plaintiffs, granting them substantially the same reliefs as they now claimed, they were barred by the rule of *res judicata* from maintaining the suit. M. RANGA AIYANGAR *v.* NARAYAN CHARIAR, 18 M. L. T. 596; 30 M. L. J. 13 **30**

——— SS. 13 (A), 44—*Application for execution of a foreign decree, when allowed—Competency of foreign Court's jurisdiction, how determined—Voluntary submission, effect of.*

An application under section 44 of the Civil Procedure Code for the execution of a decree of a foreign Court may be resisted on any of the grounds mentioned in section 13 of the Code.

Whether a foreign Court is or is not a Court of competent jurisdiction within the meaning of section 13 *(a)* has to be determined in accordance with the principles of international law, and not in accordance with the law of the country in which the foreign Court is situated.

Where a defendant submits himself to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour, there is a duty cast on him to obey that judgment if it goes against him; but where his appearance is not voluntary but brought about under duress, the case is treated as though he had not appeared.

Where, therefore, a defendant appeared in a foreign Court under protest because "he did not want to be arrested when he went there on business" and a decree having been passed against him, the decree-holder applied in British India under section 44 of the Civil Procedure Code for execution thereof:

*Held*, that the mere intention of avoiding an inconvenience that might happen in the future did not make the defendant's appearance involuntary and the decree was binding upon him. M. RAMA AIYAR *v.* KRISHNA PATTER, 3 L. W. 90; 19 M. L. T. 68; 30 M. L. J. 148; (1916) M. W. N. 83 **597**

——— S. 15—*Jurisdiction, what determines—Estoppel against pleading want of jurisdiction*

It is the value put by a plaintiff that *prima facie* determines jurisdiction.

CIVIL PROCEDURE CODE—(1908)—contd.

A defendant who opposes a plaintiff's claim in a lower Court on the ground of jurisdiction is precluded from objecting to the jurisdiction of a higher Court to which the same plaint is presented as urged by him. S. KHIATOMAL LALCHAND *v.* FATEH MUHAMMAD, 9 S. L. R. 164 **629**

——— S. 16 (*d*)—*Maintenance suit—Prayer for charge on land—Jurisdiction.*

In a suit for declaration that the plaintiff was entitled to a maintenance allowance against the defendant who was residing in a Native State, it was prayed that the liability to pay the sum claimed should be made a charge on the defendant's land in British territory:

*Held*, that the suit fell within the purview of section 16 (*d*) of the Code of Civil Procedure, and hence the Court within the local limits of which the land was situate had jurisdiction to try the suit. B. SITABAI RAGHUNATH *v.* LAXMIBAI VYANKATESH, 18 BOM. L. R. 67 **985**

——— S. 24—*Application for transfer—Plaintiff, right of, to choose his own Court Jurisdiction—Principle—Applicant, right of, to be heard first.*

A plaintiff has the right to choose his own Court for his own suit and in cases of disputes about property the Court where the property is situated is *prima facie* the better Court.

In determining whether a suit should be transferred from one jurisdiction to another the rule of equity, justice and good conscience should be followed and an applicant for transfer must be insisted upon making out a strong case of the "balance of convenience."

Where on an application for transfer of a suit no order other than a notice to the respondent entitling them to appear and to be heard has been made, the burden is on the applicant to show sufficient ground why the Court should grant the application and, therefore, he has the right to begin. A. *Musammat* SUBBA *v.* MAQBOOL HUSSAIN, 14 A. L. J. 242 **613**

——— S. 44 **597**

——— S. 47 **634, 731, 757**

——— S. 47, CL. 3, O. XXI, R. 16—*Decree, purchase of, question of—Decision—Appeal—Separate paras. in s. 47, effect of.*

The question as to the genuineness of the purchase of a decree, arising between the purchaser who applied for execution on the substitution of his name as decree-holder and a judgment-creditor of the decree-holder who, having attached the decree, opposes the application, comes within the purview of section 47, clause (3), Civil Procedure Code, and as such its decision is appealable as a decree, even though the judgment-debtor does not take any part in the dispute.

The fact that an application was made under Order XXI, rule 16, of the Civil Procedure Code does not prevent section 47 of the Code, from being applied for the decision of a question falling within its scope

*Semble.*—The object of separately numbering the sub-sections of section 47, Civil Procedure Code, is to make the several sub-sections independent of each other. C. MOHINI MOHAN *v.* SURENDRA CHANDRA DEY, 20 C. W. N. 679 **524**

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 47, O. XXI, Rr. 100, 103, *scope of—Execution proceedings—Delivery in execution of decree, question as to—Defendant against whom no relief granted, if a party—Civil Procedure Code (Act XIV of 1882), s.* 244

A question arising between a decree-holder and a defendant against whom no relief was granted relating to the propriety of a delivery in execution, is a question arising under section 47 of the Civil Procedure Code, 1908, and an order deciding such question is appealable. M. SIVASAMBA IYER *v.* KUPPAN SAMBAN, 29 M. L. J. 629 **769**

——— S. 63 (1)—*Property under attachment in execution of decrees of two Courts—Sale by Court of lower jurisdiction, whether valid*—Bona fide *purchaser without notice, rights of—Burden of proof—Notice—Test.*

Where property is under attachment in execution of the decrees of two separate Courts, a sale by the Court of lower jurisdiction is irregular but not invalid, and a purchaser will take an indefeasible or a defeasible title according to whether he does or does not know of the irregularity.

The burden of proof is upon such purchaser to show that he made the purchase *bona fide* and without notice of the pre-existing attachment.

In order to determine whether a purchaser had notice or not the test to be applied is, whether he acted in good faith without being aware, whether by direct and formal notice or otherwise, that his title was liable to be questioned by reason of the superior Court's attachment. M. SUBBIAH AIYAR *v.* MUTHUKUMARSWAMIA PILLI **41**

——— S. 63, O. XXI, R. 90—*Sale in execution—Property also under attachment in execution of superior Court's decree—Purchaser not in fault—Sale, whether can be impeached—Irregularities, how corrected.*

A sale held in contravention of the first clause of section 63, Civil Procedure Code, is not null and void but merely irregular.

The mere fact that the Court ordering the sale had notice of an attachment by a superior Court does not oust the jurisdiction of the former Court and the sale cannot be treated as a nullity.

The title of a purchaser at a judicial sale not himself in fault cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by way of collateral attack on the purchaser's title.

There cannot be a collateral impeachment of a judicial sale and a direct impeachment is possible only to the parties to the proceedings or persons interested therein in the manner prescribed by the Code. Persons not parties to such proceedings cannot impeach a judicial sale on the ground that it was held in contravention of section 63 of the Code of Civil Procedure.

A sale of certain immoveable properties was held under the orders of the Munsif's Court of Calicut in execution of a decree of that Court, while the properties were also under attachment in execution of a decree of the Subordinate Judge's Court at Calicut. The decree-holder of the latter Court applied to the Munsif to set aside the sale under Order XXI, rule 90:

CIVIL PROCEDURE CODE—(1908)—contd.

*Held*, that he was not entitled to have the sale set aside merely on the ground that it was in contravention of section 63, Civil Procedure Code. M. NARAYANAN NANBUDRI *v.* TAWKER J. MEGAJI SEIT **927**

——— S. 64, O. XXI, R. 54—*Attachment, effect of, from which date—Civil Procedure Code (Act XIV of 1882), s.* 276.

An order of attachment of property under the Civil Procedure Code takes effect only from the date of its actual promulgation, and not from the date of the Court's order. C. SIMRICK LAL BHAKAT *v.* RADHARAMAN KALIDAHA **276**

——— S. 66 **365, 434, 963**

——— S. 73, O. XXXVIII, R. 10—*Sale of mortgaged property—Subsequent attachment of sale-proceeds by puisne mortgagee, effect of—Attachment before judgment by simple creditor—No application for execution prior to realisation—Simple creditor, whether entitled to rateable distribution.*

A puisne mortgagee does not lose his rights under the mortgage simply by attaching the sale-proceeds in Court after the sale of the mortgaged property at the instance of a prior mortgagee.

An attachment before judgment cannot by itself give a simple creditor priority over a mortgagee, nor can the former come in for a rateable distribution under section 73 of the Code of Civil Procedure, when not only is there no application by him for execution of the decree but the money is realized before attachment. M. PRABHALA NARASIMHASOMAYAJULU GARU *v.* MUTTURY SOMAPPA **944**

——— S. 80, *notice under—Plaint, variance in, effect of— Bengal Land Revenue Sales Act XI of 1859)—Sale*—Noabad taluk, *purchaser of—Amendment of plaint, objection to, waiver of—Bengal Land Revenue Sales Act VII of 1868, B. C.), s.* 12.

Where in a suit against the Secretary of State for declaration of title to, and recovery of possession of, certain lands alleged to have formed a *noabad taluk*, the plaintiff in his notice under section 80, Civil Procedure Code, mentioned two Maghi Survey Dags as constituting the *taluk* but in describing the lands in the plaint, mentioned only six cadastral survey plots and omitted to mention some other plots, which omission was supplied by amendment of the plaint at a late stage of the suit:

*Held*, that inasmuch as the Maghi Survey plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint was not such as to lead to the dismissal of the suit.

Where the defendants, in their additional written statement filed after the amendment of the plaint, do not raise any objection to the amendment, they must be taken to have waived their objection on the point.

A purchaser of a *noabad taluk* (which is found to be a non-permanent tenure) at a sale held under the provisions of Act XI of 1859, acquires it in the state in which it was at the time of the last Settlement, as provided by section 12 of Act VII of 1868, B. C., and not in the state in which it was at its creation. C. GANGA DAS SIL *v.* SECRETARY OF STATE, 20 C. W. N. 636 **752**

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 92 211

— - - S. 92—District Judge, whether *qadi*—Subordinate Judge, powers of—*Mutwalli* appointed under s. 92 Suit to be declared *mutwalli* in Subordinate Judge's Court, maintainability of 21

——— S 92, O. I, R. 3—Mutwalli, *suit for removal of—Alienee, if proper party—Procedure.*

In a suit under section 92, Civil Procedure Code, for the removal of a *mutwalli* on the ground that he has committed a breach of trust by alienating a part of the trust property, the alienee may be made a party, and if the Court decides against him, he may be declared in that suit to be a trustee of the trust property and directed to convey the property.

*Obiter.*—But against such an alienee no relief by way of a decree in ejectment can be given. C ALI HAFFIZ *v.* ABDUR RAHMAN, 42 C. 1135 801

S 95, *scope of—"Expense or injury caused to the defendant," meaning of—Court, power of, to award general damages.*

Section 95 of the Code of Civil Procedure does not prescribe any particular procedure by which a defendant wrongfully arrested should claim compensation; it is enough if the Court becomes seized of the matter in some form or other.

The words "expense or injury caused to the defendant" in section 95 of the Code of Civil Procedure are not confined only to some tangible injury that can be measured directly in money but include also general damages for injury to reputation or the humiliation caused of necessity by the arrest. M. SUBRAYA DAVEY *v.* VENKATARAMA AIYAR, 3 L. W. 30; (1916) M. W. N. 76 592

S. 102, *scope of—Sale in execution of Small Cause Court decree—Suit to set aside sale dismissed by ordinary Court—Second appeal, whether lies.*

Section 102 of the Code of Civil Procedure is wide enough in its terms to cover the case of suits of the nature cognizable by Courts of Small Causes, whether they are tried by the Court of Small Causes or Courts in their ordinary original jurisdiction. No second appeal, therefore, lies against an order passed by a Court of ordinary jurisdiction refusing to set aside a sale in execution of a decree of a Court of Small Causes. M. SAMI RAO APPA *v.* VYRAVAN CHETTIAR 712

——— S. 102—*Suit, nature of, determination of—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13, scope of—Suit for dues against trespasser—Appeal, second, maintainability of.*

For the purposes of section 102 of the Code of Civil Procedure, the nature of the suit must be determined from the claim as laid, without regard to the nature of the defence.

Article 13 of the Second Schedule to the Provincial Small Cause Courts Act relates primarily to dues claimed from the person liable to pay them as such and not to dues improperly collected by him.

Certain *kotwars* of a village sued to recover Rs 36-14-3 from fellow *Mahars* of that village on the ground that the sum claimed was made up of certain items of different kind[illegible] by custom [illegible] th

CIVIL PROCEDURE CODE—(1908)—contd.

*kotwars'* exclusive perquisites and had been wrongfully taken by the defendants:

*Held*, that the suit was not one to enforce payment of a due from a trespasser but was akin to one for damages against a trespasser and that, therefore, a second appeal in the suit was barred by section 102 of the Civil Procedure Code, 1908. N. DHANYA *v.* TANYA, 12 N. L. R. 47 998

——— S. 107, O. XLI—*Remand—Appellate Court, power of—Party, addition of—Amendment of plaint—Ejectment, suit for—Landlord and tenant—Transferee of tenant's rights, if necessary party.*

In a suit for ejectment by a landlord against the tenants the transferee of the tenancy right from the tenants, who was rightly or wrongly admitted to their possession as tenants and under whom the tenants are holding as sub-tenants, is a necessary party.

There are possible cases of remand which are not included in Order XLI, Civil Procedure Code.

When an amendment of plaint is granted in appeal and when parties are added, the Appellate Court has the power of remanding the whole case without keeping it on its own file.

The general provision for remand in section 107, Civil Procedure Code, is not governed or limited by Order XLI alone but is subject to such conditions and limitations as may be prescribed in the rules and Orders. C. MEAH UZIR ALI SARDAR *v.* SAYAI BEHARA, 20 C. W. N. 547 791

——— S. 109—*Final order, meaning of—Order of remand—Privy Council appeal.*

A contract was challenged on various grounds, one of them being that it should have been under a particular seal. The High Court held that it did not require to be under the seal and remanded the case for decision upon the merits:

*Held*, that the decision of the High Court was not a 'final order' within the meaning of section 109 of the Civil Procedure Code, 1908. A. NURI MIAN *v.* GANGES SUGAR WORKS, LTD., 14 A. L. J. 50 360

——— S. 114 161

——— SS 114, 117—*Letters Patent (Mad.), s. 15—Appeal—Judgments—Review, maintainability of—High Court, jurisdiction of.*

The High Court has jurisdiction to entertain a review in appeals preferred under section 15 of the Madras Letters Patent.

As empowered under section 44 of the Letters Patent the Governor-General in Council has, by section 117 of the Civil Procedure Code, 1908, incorporated into the Letters Patent the provisions relating to review.

Section 114 of the Civil Procedure Code, 1908, applies to judgments in appeal under section 15 of the Letters Patent. M. ATYAM VENKATASUBBARAYUDU *v.* VELUGOTI GOVINDA KRISHNA, 3 L. W. 172; 19 M. L. T 126; (1916) M. W. N. 135 873

——— S. 115 330, 527, 567, 674

CIVIL BROCEDURE CODE—(1908) - contd.

——— S. 115, O. XLI, R. 10, CL. (2)—*Appeal rejected—Appeal to High Court, whether lies from an order refusing to set aside an order rejecting appeal—Revision, whether lies from refusal to review.*

No appeal lies from an order refusing to set aside an order rejecting an appeal under Order XLI, rule 10, clause 2, Civil Procedure Code, 1908.

A High Court ought not to interfere in revision with the order of a lower Appellate Court determining that in its view there was no good ground for a review of its order rejecting an appeal under Order XLI, rule 10, clause (2), Civil Procedure Code, 1908.

*Semble.*—An application for restoration of an appeal rejected under Order XLI, rule 10, clause (2), Civil Procedure Code, 1908, may be treated as an application for review of the order rejecting the appeal. C. MEJAJENNESSA BIBI *v.* SHEIK DIDARY **86**

———SS. 115, 114, 121, O. XLVII, R. (1), SCH. II, PARAS. 15, 16—*Arbitration—Agreement—Guardian* ad litem—*Signature on application for reference, absence of, effect of—Arbitration—Umpire—Award.*

A minor represented by a guardian *ad litem* was a party to a suit. The guardian *ad litem* entered into an agreement signed by all the parties to the suit including himself to refer the matters in dispute to two arbitrators and in case of difference between them to an umpire. The parties made an application for reference which was not signed by the guardian although he was present in Court. The Court made an order of reference to two arbitrators whose award being challenged an umpire was appointed. An application against the umpire's award was unsuccessfully made under para. 15, Schedule II of the Civil Procedure Code, 1908. On review of this order the arbitration proceedings were set aside on the grounds that the application for arbitration was not signed by the guardian *ad litem* and that the umpire had opened the case *de novo* and had not taken the evidence called for:

*Held*, that the application for order of reference did not require signature as of necessity and that no injustice was caused to the minor whose guardian was present in Court at the time the application was presented.

*Held*, further, that an award under arbitration proceedings could be set aside only on the grounds provided in Schedule II of the Civil Procedure Code of 1908. P. C. UMED SINGH *v.* SOBHAG MAL DHADHA, 20 C. W. N. 137; 30 M. L J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. T. 108; 23 C. L. J. 130; (1916) M. W. N. 67; 18 BOM. L. R. 308 **161**

———S. 115—Limitation, erroneous decision on, whether ground for revision **982**

———S. 115—*Limitation, point of—Judgment of Appellate Court not dealing with it—Material irregularity.*

The mere fact that a judgment of an Appellate Court does not deal with a point of limitation arising in a case, does not amount to a material irregularity in the disposal of the case so as to merit interference by a High Court in revision. M. DURAISAMI UDAYAN *v.* KADIRSA ROWTHEN, 3 L. W. 176 **785**

———S. 115, *scope of—Erroneous decision on point of law—Jurisdiction of High Court to interfere.*

An erroneous decision on a question of law relating to limitation by the Presidency Court of Small Causes is not a ground for interference in revision by the High Court under section 115 of the Code of Civil Procedure, when no question of jurisdiction is involved. M. KUPPUSWAMI IYENGAR *v.* NARAYANA IYENGAR, 19 M. L. T. 24; 3 L. W. 36 **3**

CIVIL PROCEDURE CODE—(1908)—contd.

——— S. 115, O. XXIII, R. 1—*Withdrawal of suit with liberty to bring fresh suit, order for—Plaint not defective, effect of.*

Where a lower Appellate Court made an order allowing an appellant to withdraw his suit with liberty to bring a fresh suit on a petition alleging that some persons not named in the petition were necessary parties but had not been made parties, and it could not be shown from the record that the plaint was, in reality, defective:

*Held*, that the order could not be sustained as it was not justified upon the record. C. UPENDRA CHANDRA DE *v.* GIRISH CHANDRA DE **402**

——— S. 117 **873**

———S. 121 **161**

———S. 122, O. IX, R. 13—*Application to set aside* ex parte *decree, if covered by s. 5 of Limitation Act—Power of High Court to make rules extending time—Limitation Act (IX of 1908), s. 5.*

Section 5 of the Limitation Act, as it stands, does not extend the applications to set aside *ex parte* decrees, but it is within the powers of a High Court acting under section 122 of the Code of Civil Procedure to frame a rule making its provisions applicable to the periods of limitation prescribed in that Act for presenting applications of this nature. M. SENNIMALAI GOUNDAN *v.* PALANI GOUNDAN **975**

——— S. 144, O. XXI, R. 35—*Application for restitution—Delivery of actual possession—Subsequent application, if barred.*

Where on an application for restitution, a Court directed delivery of actual possession under Order XXI, rule 35, of the Civil Procedure Code and the applicant accepted such delivery as satisfying his claim, on a subsequent petition being filed praying for execution in restitution:

*Held*, that the final order of the Court on the previous application could not be treated as a nullity and that the second application was barred as the process for delivery issued on the order passed on the first application had been carried out. M. CHOCKALINGA MUDALI *v.* GOPALATHATHACHARIAR **46**

———S. 151 **194, 401, 897, 967**

———S. 151, *scope of—Decree—Specific performance—Contract of sale—Deposit of money—Extension of time fixed—Application after expiry of time, if allowable.*

When an appeal is filed against a decree or order directing deposit of money by a certain date, an application for extension of such time should be made before the expiry of the time; but a Court may extend such time on an application made even after such date under section 151, Civil Procedure Code, if it is necessary to do so for the ends of justice. L. B. KO BAT *v.* MAUNG KYA BAW **509**

———S. 152 **194**

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. I, R. 1, *scope of—Suit by different sets of plaintiffs claiming in the alternative, whether maintainable*—Aroras *of Sialkot—Custom—Burden of proof.*

The provisions of Order I, rule 1, Civil Procedure Code, contemplate, even if they do not encourage, claims by different plaintiffs in the alternative, provided that there is a common question of law or of fact which would arise if such plaintiffs brought separate suits.

Where, therefore, two sets of plaintiffs, one the nephews and the other the daughters of the last male owner, sued to recover property from the widow of his grandson, alleging that either the nephews or the daughters were the legal heirs of the deceased owner and that they had agreed among themselves to divide the property in the event of either set of plaintiffs succeeding in the suit:

*Held*, (1) that the suit could not be dismissed on the ground that the plaint contained contradictory allegations and made inconsistent claims;

(2) that the parties being *Aroras* of Sialkot City were probably governed by Hindu Law and the burden of proving a special custom to the contrary lay upon the defendant. P. RUKMAN DEVI *v.* SHIB DEVI, 10 P. R. 1916 **526**

——— O. I, R. 3 **801**

——— O. I, R. 4 **749**

——— O. I, R. 10, O. XXII, R. 4—*Application to bring on record legal representative of deceased defendant in his individual capacity, maintainability of.*

An application made to implead as parties to a suit the legal representatives of a deceased defendant (wrongly impleaded as such) in their individual capacity and not as such legal representatives is within the purview of Order I, rule 10, of the Code of Civil Procedure. The fact that such application was once made under Order XXII, rule 4, and rejected, does not bar an application made under Order I, rule 10. M. JAGATH GURU CHANDRA SEKHARA *v.* KOMARASAMI GOUNDAN **320**

——— O. II, R. 2, O. XX, R. 12—*Mesne profits, claim for, subsequent to suit for possession, if barred.*

Though one may possibly be bound to include in a suit for possession of immoveable property mesne profits up to the date of suit, there is nothing which obliges one to include a claim for mesne profits which might accrue after the date of suit. L. B. SHWE BON *v.* MI U THA NYO **696**

——— O. II, R. 2—*Mortgage—Mortgagee entitled to profits—Right to possession on non-payment—Suit for profits—Subsequent suit for possession, maintainability of.*

A mortgage-deed provided that the mortgagee was entitled to receive a certain amount annually by way of profits from the mortgagors who were to remain in possession of the land mortgaged; and in the event of non-payment of the amount of profits agreed upon he was entitled to sue for recovery of the profits or to obtain possession of the land in lieu of the principal mortgage-money and the profits due. A default having been made, the mortgagee sued for profits only as the land was in possession of third parties. Subsequently the mortgagors came into possession of the land and the mortgagee sued for possession:

*Held*, that the suit was not barred by Order II, rule 2, of the Civil Procedure Code, 1908, inasmuch as at the time of the previous suit the mortgagee was precluded from suing for possession under the terms of the mortgage-deed. P. NATHU MAL *v.* TILOKA, 42 P. W. R. 1916 **719**

——— O. II, R. 2—Previous suit for profits of certain year withdrawn—Subsequent suit for entire profits, whether barred **899**

——— O. II, R. 3—*Jurisdiction—Combined suit on different causes of action each separately cognizable by Small Cause Court, whether cognizable by such Court—Pro-note—Burden of proof—Consideration—Special circumstances.*

Order II, rule 3, of the Civil Procedure Code permits a plaintiff to combine in one suit against a defendant several causes of action and the value of that suit for the purpose of jurisdiction is the aggregate value of all the causes of action comprised therein.

Therefore, a suit based on three pro-notes, the claim in respect of each of which is less than Rs. 500, is to be regarded as one single suit and is not cognizable by a Small Cause Court.

When a defendant admits execution of a pro-note but pleads absence of consideration, the initial onus is almost invariably upon the plaintiff to prove that consideration did pass but when the defendant, who is a man of business and has a good knowledge of English executes a promissory note comprising the expression "for value received" and further admits that at any rate some portion of the consideration reached him, the onus is shifted to him. P. CHIRAGH DIN *v.* BHAGWAN DAS, 100 P. R. 1915 **40**

——— O. III, R. 4 **395**

——— O. V, R. 17—*Service of summons—Fixation of summons on door when person to be served is temporarily away and is traceable—Service, if proper.*

Where a serving officer finds the person to be served with the summons to be away temporarily from home and knows where he is, it is not good service if he thereupon does no more than fix the summons to the outer door of his house. A. KUNY BEHARI LAL *v.* SARJU PRASAD **826**

——— O. VI, R. 17 **83, 906**

——— O. VI, R. 17—*Ejectment—Number of plot incorrect—Clerical error—Amendment.*

An error in the number of the plot from which ejectment is sought is a clerical error liable to amendment under Order VI, rule 17, Civil Procedure Code, 1908. U. P. B. R. SHEORAJ SINGH *v.* KOULHAN SINGH **512**

——— O. VI, R. 18 **906**

——— O. VII, R. 14—*Document relied upon in possession of third party—Plaintiff, whether may produce it in course of trial—Refusal to take a particular oath, effect of—Procedure—Practice.*

As a rule all documents that a plaintiff seeks to rely on should be produced at the opening of the suit. But a document which is in the possession of a third party and is called for in order to rebut a plea

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raised by the defendant may be produced in the course of the trial.

A mere refusal on the part of a party to a suit to take a particular oath is not a sufficient ground for deciding an issue against him. P. GAPPA MAL *v.* PIARA LAL, 38 P. W. R. 1916 **619**

——— O. VIII, R. 6—*Equitable set-off, whether can be pleaded—Suit for rent time-barred—Claim for unliquidated damages, whether can be set up.*

The Code of Civil Procedure does not prevent a defendant from claiming an equitable set-off in respect of unliquidated damages claimable in connection with the transaction on which the suit is brought; but the plea is available only in respect of sums legally recoverable.

Therefore, in a suit by the landlord for rent in respect of certain *faslis* it is not open to the defendant to set up by way of equitable set-off an unliquidated claim for damages, which has become barred by limitation, arising from obstruction to quiet enjoyment in previous years. M. VYRAVAN CHETTY *v.* SRIMATH DEIVASIKAMANI NATARAJA DESIKAR, 3 L. W. 24; 30 M. L. J. 59 **80**

——— O. IX, R. 4, O. XVII, Rr. 2, 3—*Non-appearance of parties at adjourned hearing—Dismissal of suit—Restoration.*

Where a suit was adjourned for want of time and was subsequently dismissed on the date of re-hearing on account of the failure of the parties to attend, though their Pleaders were present; on an application by the plaintiff for the restoration of the suit:

*Held*, (1) that the dismissal of the suit was not under Order XVII, rule 3, of the Civil Procedure Code, 1908, for no time was given to the plaintiff to do any of the acts specified in the rule;

(2) that there was a default of appearance by the parties within the meaning of Order IX, rule 4, Civil Procedure Code, 1908. M. VENKATAPPA NAYANUM VARU *v.* PADI RAMAKRISHNAPPA **714**

——— O. IX, R. 13 **975**

——— O. IX, R. 13, O. XLIII, R. 1 (d)—*Conditional order setting aside* ex parte *decree, whether appealable—Order not imposing any terms as to costs, whether* ultra vires.

An order which imposes a condition before setting aside an *ex parte* decree must be taken to be a conditional dismissal and as such covered by Order XLIII, rule (1), clause (*d*), of the Code of Civil Procedure and is appealable.

An order setting aside an *ex parte* decree under Order IX, rule 13, of the Civil Procedure Code, is not *ultra vires* if it does not impose any conditions as to costs. M. VENKATASWAMI NAIDU *v.* SHANMUGAM PILLAI **984**

——— O. XVII, R. 2 **714**

——— O. XVII, Rr. 2, 3—*Suit dismissed for default—Decree drawn up—Appeal, maintainability of.*

In disposing of a suit a Munsif passed the following order: "The plaintiff's Pleader says that he and his client would retire from the case as the plaintiff has no witness to-day, so the case is dismissed for default." A decree was, however, drawn up in the case:

CIVIL PROCEDURE CODE—(1908)—contd.

*Held*, that the order was an order under Order XVII, rule 2, and was not appealable. C. NASARAT KHAN *v.* MANULLA **766**

——— O. XVII, R. 3 **714, 766**

——— O. XX, R. 12 **696**

——— O. XXI, R. 2—*Decree—Payment out of Court, not certified—Court, power of, to take evidence as to such payments—Execution application, statement as to payment in, if can be relied on—Practice.*

No payment on foot of a decree having been "certified and recorded" within the meaning of Order XXI, rule 2, a Court is bound to assume that no such payments have been made and it is not entitled to go into evidence as to payments on an application for execution of the decree.

In case of payments made on foot of a decree the practice in Allahabad is that when payments are made in Court or out of Court there is a record on the execution file showing that the payments have been certified and recorded. A. CHHATTAR SINGH *v.* AMIR SINGH, 14 A. L. J. 132 **590**

——— O. XXI, R. 16 **524**

——— O. XXI, R. 16—*Application for execution by transferee of decree—Transferee, what must prove—* Benamidar *transferee, whether entitled to execute.*

Where an alleged transferee of a decree applies for execution under Order XXI, rule 16, Civil Procedure Code, he has first got to prove his right under the transfer set up by him and it is only after he has done so that the question of adjustment of the decree arises.

An alleged transferee of a decree is not entitled to execute the decree when he is found to be only a *benamidar* for the judgment-debtor. M. BAYYANA RAMAYYA *v.* NIDAMARTHI KRISHNAMURTHI, 3 L. W. 186; 19 M. L. T. 124; (1916) M. W. N. 133 **952**

——— O. XXI, R. 16, O. XXII, R. 10, O. XXXIV, R. 5—*Preliminary mortgage-decree for sale—Transferee, whether can apply for execution—Procedure.*

Where the transferee of a mortgage-decree for sale applied under Order XXI, rule 16, Civil Procedure Code, for execution and also prayed for the passing of a final decree and for sale:

*Held*, (1) that inasmuch as only a preliminary decree under Order XXXIV, rule 4, had been passed, there was no executable decree and the application for execution was premature;

(2) that as there was a prayer for passing a decree for sale, the applicant must be directed to amend the petition as one falling under Order XXII, rule 10, clause (1), and Order XXXIV, rule 5, of the Civil Procedure Code. M. KANNIAH NAIDU *v.* CHENGAMA NAIDU **981**

——— O. XXI, R. 32—*Decree granting permanent injunction—Power of Court to enforce obedience by punishment—Detention in prison after removal of obstruction, whether lawful.*

Order XXI, rule 32, of the Code of Civil Procedure, empowers a Court to secure the future enforcement of a decree granting a permanent injunction, by the punishment of the person disobeying the decree, either by imprisonment or attachment of his property.

CIVIL PROCEDURE CODE—(1908)—contd.

Where in spite of an injunction being passed against the members of a particular sect prohibiting them from interfering with the processions of a rival sect, the progress of such a procession was, on account of interference by the first sect, delayed for three hours, after which it was allowed to proceed:

*Held*, that the subsequent withdrawal of obstruction did not repair the breach of the injunction, although it might amount to a purging of the contempt of Court, and that the people causing the obstruction were liable to punishment. M AIYANA CHARIAR *v.* VATHIAR RAMANUJA, 3 L. W. 161; 19 M. L. T. 132; (1916) M. W. N. 147 698

——— O. XXI, R. 35 46

——— O. XXI, R. 35- *Decree-holder put in possession—Obstruction by third person on behalf of judgment-debtor—Second application for possession, whether sustainable.*

A decree-holder is not entitled to file a second application for possession under Order XXI, rule 35, of the Civil Procedure Code, after he has been put in possession in accordance with an order passed on an application filed under the same Order and rule. M. THANDAVAROYA MUDALY *v.* SUBRAMANIA GURUKKAL, 29 M. L. J. 504 44

——— O. XXI, R. 54 276

——— O. XXI, R. 59—*Claimant to attached property not adducing any evidence as to possession—Court, whether can decide on title.*

Where in an enquiry under Order XXI, rule 59, of the Civil Procedure Code, a claimant to an attached property does not adduce any evidence as to possession, the Court is justified in confining itself to the question of title. M. SEVUGAN CHETTI *v.* RUNGAMMAL 34

——— O. XXI, R. 63 226

——— O. XXI, Rr. 66, 67, 90—*Sale in execution of a decree—Irregularity in proclamation, whether enough for setting aside sale—Applicant, what must prove.*

The mere fact that, in a proclamation of sale by public auction in execution of a decree, certain fields were by mistake included in the lands mentioned in the first of the four lots advertised for sale whereas they should have been entered in the second, is not of itself such an irregularity as to afford good ground for setting aside the sale.

A judgment-debtor who stands by when an irregularity is committed within his knowledge and in his presence, cannot afterwards take advantage of that irregularity in support of his application to set aside a Court auction sale.

A person seeking to set aside a Court auction sale on the ground of an irregularity in the conduct of the sale and of consequent loss to himself must adduce direct evidence to connect the irregularity with the loss M. SWAMINATHA AIYAR *v.* SIVAGURUNATHA CHETTIAR 990

——— O XXI, Rr. 67, 70 990

——— O XXI, Rr. 71, 84—*Auction-sale in execution—Failure of purchaser to deposit—Re-sale—Defaulting purchaser, when liable for loss.*

In case of a default on the part of a purchaser at an auction sale to deposit the purchase-money, the property must be re-sold forthwith. Fresh bids should be invited soon afterwards and no fresh proclamation of sale is necessary.

Where, therefore, a period of nearly six months intervened between the default of the auction-purchaser and the final sale:

*Held*, that the requirements of Order XXI, rule 84, had not been complied with and the auction-purchaser could not be called upon to pay the deficiency in price. P. BELI RAM *v.* SOHAN SINGH, 45 P. W. R. 1916 907

——— O XXI, R. 84 907

——— O. XXI, R. 89—*Execution sale, setting aside of, if permissible without application, oral or written—Civil Procedure Code (Act XIV of 1882), s. 310A.*

A sale in execution cannot be set aside under Order XXI, rule 89, of the Civil Procedure Code, 1908, without an application (oral or written) within 30 days. M. POPOORU VENKATA NARASIMMA *v.* JAYANTI LAKSHMI NARASIHAM, 3 L. W 174 783

——— O XXI, R. 89—*Mere payment of money, if enough—Application to set aside sale, if to be in writing—Amendment, when allowed—Revision—Amendment.*

Mere payment of money under Order XXI, rule 89 of the Code of Civil Procedure without an application to set aside the sale is not sufficient.

It is not necessary that an application to set aside the sale should be in writing.

Where a petition is put in stating that the petitioner has paid the money into the treasury and the object of the petitioner is to have the sale set aside though the petition contains no formal prayer to that effect, the Court can allow the petitioner to amend it by adding a formal prayer.

But a High Court will not in the exercise of its revisional jurisdiction allow an unstamped memorandum, filed under the Civil Rules of Practice to notify a payment, to be stamped as a petition and to be amended by containing a prayer to set aside the sale under Order XXI, rule 89, Civil Procedure Code, nearly 15 months after the application is barred. M. PARAT VEETIL SEETHI *v.* AMBALATH VEETIL KOLATHUR 45

——— O. XXI, R. 90 927

——— O. XXI, Rr. 00, 103 769

——— O. XXII, R. 4 320

——— O. XXII, R. 6—*Judgment, validity of, passed after death of defendant—Joint tort-feasors, survival of claim against one—Compensation, suit for, right of—Fatal Accidents Act (XIII of 1855)—Judgment and evidence in criminal trial, whether admissible in civil suit—Admission to Police Officer in criminal trial, whether admissible—Evidence Act (I of 1872), ss. 17, 18, 21, 33, 42—Compensation, brother joint with deceased, whether entitled to—Amount of compensation, how estimated.*

Where a defendant dies after the hearing of the suit but before the judgment is delivered, the decree passed by the Court has the same force under Order XXII, rule 6 of the Civil Procedure Code, 1908, as if it has been passed in his life-time.

CIVIL PROCEDURE CODE—(1908)—contd.

The liability of joint tort-feasors is joint and several and consequently on the death of one the cause of action survives against the other.

A judgment of the Criminal Court is inadmissible as a piece of evidence in the civil proceedings and the facts alleged by the plaintiffs in the civil case should be proved independently of such judgment.

The depositions of witnesses taken in the criminal trial are inadmissible in civil proceedings.

Though an admission of guilt made by a defendant to a Police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an *admission* under sections 17, 18 and 21 of the Evidence Act.

A brother of a murdered man is not a person entitled to claim compensation under the provisions of Act XIII of 1855 and the mere fact that the two brothers were members of a joint Hindu family does not entitle him to claim compensation in respect of the death of his brother.

In awarding compensation in a suit for compensation for causing the death of a person, the amount should be fixed considering the members of the family left by the deceased. P. BISHEN DAS *v.* RAM LABHAYA, 106 P. R 1915 18

——— O. XXII, R. 10 981

——— O. XXII, R. 10, O XLIII, R. 1, CL. (*l*)—*Continuance of suit by plaintiff after devolution of interest No application—Appeal, maintainability of.*

A widow sued for recovery of possession of certain shares in a *zemindari* and thereafter adopted a son to her late husband. But before the adoption a registered agreement was entered into between the widow and the natural father of the adopted son to the effect that during the life-time of the widow she would continue to be in sole possession and enjoyment of the properties. The defendant raised an objection to the maintainability of the suit by the widow as her interest in her husband's property devolved on the adopted son as soon as the adoption took place. The objection was overruled:

*Held*, that the order was not an order under Order XXII, rule 10, of the Civil Procedure Code, inasmuch as the plaintiff did not make any application for being allowed to continue the suit in consequence of any assignment, creation or devolution of interest in her favour and was, threrefore, not appealable under Order XLIII, rule 1, clause (*l*) of the Civil Procedure Code, 1908 C. PRAMOTHA NATH ROY *v.* DINOMONI CHOUDHURANI, 20 C. W. N. 552 858

——— O. XXII, R. 11—*Abatement of appeal—Death of one respondent—Failure to bring his representative on record within time—Limitation Act (IX of 1908), s. 5—Sufficient cause Ignorance of law—Appeal, whether abates as a whole.*

Ignorance of the law of limitation is not a sufficient cause for failing to bring a representative of a deceased party on the record within time.

In order to support his claim for an extension of the time allowed by law for bringing on the record the legal representative of his opponent, an appellant must prove that he did not become aware of his opponent's death until such time as it was practically impossible for him to file an application within the expiry of six months from the date of death.

CIVIL PROCEDURE CODE—(1908)—contd.

Where the interests of defendants-respondents are joint, and the decree cannot be reversed withoug the representative of the deceased respondent beint brought on the record, the whole appeal must abate. P. INAYAT *v.* GANGA, 3 P. R. 1916 829

——— O. XXIII, R. 1 402

——— O. XXIII, R. 1, *scope of—Suit struck off as settled at request of parties, effect of—Suit for redemption—Mortgage sued on found to be invalid—Plaintiff, whether can fall back on earlier mortgage—Amendment of plaint, when can be allowed.*

Order XXIII, rule 1, of the Civil Procedure Code allows a plaintiff unfettered liberty to withdraw his suit against all or any of the defendants, in other words, he can abandon the whole or any part of his claim against every defendant or against any one or more of the defendants. But such withdrawal or abandonment is done at the risk of his losing all right to litigate the subject-matter of the claim or claims so abandoned or withdrawn from the adjudication of the Court, unless he gets the permission of the Court to re-litigate the same.

Where both parties to a suit appear on the date fixed for the trial of the suit and at their request, the suit is struck off as settled, it cannot be said to be dismissed for default of appearance of both parties, the striking off amounting, in effect, to a withdrawal by the plaintiff.

Where, therefore, in a suit for redemption of a certain *kanom*, the *kanom* was found to be invalid and the plaintiff fell back upon an earlier mortgage, in regard to which a previous suit had been brought but was subsequently withdrawn:

*Held*, that, as the suit for redemption of the old mortgage had been withdrawn without liberty to bring a fresh suit, Order XXIII, rule 1, clause (3), operated as a bar, and the plaintiff could not maintain his suit.

By a manipulation of the form of the plaint in a subsequent suit in which the subject-matter and the relief claimed are substantially the same as those of a previous suit, a plaintiff cannot be allowed to get round the statutory provisions enacted by the Legislature for the protection of the defendant from repeated harassments in respect of the same subject-matter and relief.

Where, therefore, a suit for redemption is withdrawn without liberty to bring a fresh suit, it is not open to the mortgagor to bring another suit for the same relief, even though the claim is based on his title as owner of the mortgaged properties.

But he can be permitted to redeem a mortgage admitted by the defendant to be subsisting and found to be binding on the plaintiff.

It is discretionary with a Court to allow a plaintiff to amend his plaint and the discretion should be freely exercised unless the amendment would make the suit relate to a wholly different subject-matter. M. PAYKAT MANAKKAL *v.* THEYYANKARAN, (1916) M. W. N. 171 624

——— O. XXIII, R. 1., SCH. II, PARA. 3 (2)—*Withdrawal of suit—Award, valid, effect of—Jurisdiction of Courts.*

Where a suit is referred to arbitration and the award made and found to be valid, the Court has

CIVIL PROCEDURE CODE—(1908)—contd.

no jurisdiction to permit withdrawal of the suit with leave to file a fresh one. O. ABDUL KARIM v. MUHAMMAD HUSAIN, 2 O. L. J. 497 347

——— O. XXV, R. 1 786

——— O. XXXII, R. 3 (4) 380

——— O. XXXII, R. 7 258

——— O. XXXII, R. 7, SCH. II, PARA. 1—*Agreement to refer to arbitration on behalf of minor, when valid —Decree passed in accordance with award, scope of—Suit for partition—Consent decree passed on appeal by father of minor parties—Leave of Court not obtained—Minor, whether entitled to avoid decree.*

The agreement to refer to arbitration contemplated in Schedule II, paragraph (1), of the Code of Civil Procedure, is an "agreement with reference to the suit" under Order XXXII, rule 7, and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule.

The principle of finality which attaches to a decree passed in accordance with an award given in arbitration proceedings, does not affect matters which are outside the arbitration proceedings.

Where a minor seeks to avoid a decree he can avoid it only *in toto*, and not only in part.

Where a Court simply records a compromise under Order XXXII, rule 7, Civil Procedure Code, and passes a decree in accordance therewith, this does not amount to sanction.

Plaintiffs, who were minors, were parties to a suit for partition brought by the 1st defendant. That suit was referred to arbitration and a decree was passed in accordance with the award. Plaintiffs' father having appealed, the appeal was compromised and a decree was purported to be passed therein by consent of parties. Plaintiffs now sued to have the decree set aside as not binding on them:

*Held*, that no leave of the Court having been obtained under Order XXXII, rule 7, of the Civil Procedure Code, the decree was not binding on the minor plaintiffs and they were entitled to avoid it. M. DAVULURU VIJAYA RAMAYYA v. DAVULU VENKATASUBBA RAO, 30 M. L. J. 465 881

——— O. XXXII, R. 7, SCH. II, PARAS. 15, 16—*Arbitration—Award—Decree based on award—Appeal—Revision—Grounds—Jurisdiction.*

No appeal lies from a decree based on an award when the decree is in accordance with the award.

An omission of sanction under Order XXXII, rule 7, Civil Procedure Code, 1908, is no ground for revision.

No revision is maintainable on the ground of objections as to the conduct of the arbitrators.

The revisional jurisdiction is exercised only in extraordinary cases where no other remedy is available to the aggrieved person. P. GULAB KHATUN v. CHAUDHRI, 99 P. R. 1915 250

——— O. XXXII, Rr. 12, 13—*Decree against minor —Judgment-debtor attaining majority before execution —Proceedings in execution against guardian* ad litem, *validity of—Suit to set aside sale—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 12.

Where a Court takes proceedings wholly without jurisdiction a defendant, who is not before the Court, can treat them as a nullity and remain unaffected by them.

In a suit to set aside a sale in execution of a decree brought after one year from the date of sale it appeared that the defendant was a minor at the date of the passing of the decree but had attained majority when proceedings in execution were taken and notice of such proceedings was served not on him, but on the guardian *ad litem*:

*Held*, (1) that the decree could not be treated as passed without jurisdiction and that the execution proceedings were not void but merely irregular;

(2) that the suit to set aside the sale in execution not having been brought within one year from the date of the sale was barred by Article 12 of the first Schedule of the Limitation Act. M. SESHAGIRI RAO v. TANGATURI JAGANNADHAM, 19 M. L. T. 93 391

——— O. XXXII, R. 13 391

——— O. XXXIV, Rr. 4, 5—*Mortgage-decree passed before the new Code—Final decree, whether necessary before execution—Application for execution within* 12 *years of decree—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 182.

There is nothing in Order XXXIV, rules 4 and 5, of the Code of Civil Procedure which expressly says that mortgage decrees passed before the new Code came into operation must be regarded in the nature of preliminary decrees and that, therefore, it would be necessary to have a final decree passed before there can be any further execution.

A decree-holder in such a case is, therefore, entitled to get an order absolute for sale within a period of 12 years from the date of the decree.

Such a case is governed by Article 182 and not Article 181 of the Limitation Act. An application for execution made within 12 years from the date of decree and within three years from the date of the last application is not, therefore, barred by limitation. M. BALAJI RAO v. HARIRAMA CHETTY 39

——— O. XXXIV, R. 5 39, 981

——— O. XXXVIII, R. 5 (1) (b)—*Attachment before judgment—Security for production of property—Attaching creditor, whether acquires charge on money deposited - Insolvency of defendant—Claims of Official Assignee.*

Per *Wallis, C. J.*—Order XXXVIII, rule 5 (1) (*b*), of the Civil Procedure Code does not give a plaintiff a charge on the money furnished by a defendant as security for producing and placing his property at the disposal of a Court whenever required.

Attachment of the property in default of such security being given does not confer title on the attaching creditor.

Per *Seshagiri Aiyar, J.*—The object of rule 5 (1) (*b*) of Order XXXVIII of the Civil Procedure Code is to give a control to the Court over the property and not to give a preferential right to the plaintiff who moves the Court over others who have claims against the debtor.

In order that a creditor should obtain a special charge upon some specific part of the property under the writ of attachment, he must obtain some order giving him special right to or charge on a specific part of the property.

CIVIL PROCEDURE CODE—(1908)—contd.

The plaintiff took out summons for attachment before judgment of certain properties belonging to the defendant who deposited a certain sum of money into Court as security in order to prevent the attachment. The defendant subsequently became insolvent and then the plaintiff claimed to withdraw the money:

*Held*, that, as the money was merely paid as security for the production of the property and to render attachment unnecessary, the plaintiff did not acquire a charge on it and could not claim it in preference to the Official Assignee in whom the entire property of the defendant vested on his becoming an insolvent. M. ERRIKULLAPPA CHETTY *v.* OFFICIAL ASSIGNEE, MADRAS **190**

——— O. XLI **791**

——— O. XLI, R. 6, *surety under—Surety, if can be discharged on death of decree-holder—Security—Continuing guarantee—Contract Act* (*IX of* 1872), *s.* 130.

A surety under Order XLI, rule 6, of the Civil Procedure Code, 1908, must be taken to have accepted all natural risks and is not entitled to be discharged on the death of the decree-holder for whom he has stood surety pending appeal.

Such a suretyship is not a continuing guarantee within the meaning of section 130 of the Contract Act.

No arrangement between a decree-holder and his surety entered into after the execution of the security bond can have any effect on the absolute undertaking by the surety to be responsible for any mesne profits, that might be found due to the judgment-debtor, to the extent of the amount of the security on the reversal of the decree. C. JAGDAMBA KUMARI *v.* NILKANTH NARAYAN SINGH **807**

——— O. XLI, R. 10 **86**

——— O. XLI, R. 10, *applicability of, to appeal from order in insolvency—Security for costs from appellant—Presidency Towns Insolvency Act* (*III of* 1909).

Order XLI, rule 10, of the Civil Procedure Code, 1908, applies to an appeal from an order passed by a Judge of the High Court in its Insolvency Jurisdiction under Act III of 1909. C. *In the matter of* GOBERDHONE SEAL, 20 C. W. N. 140; 23 C. L. J. 24; 43 C. 240 **3**

——— O. XLI, R. 10, O. XXV, R. 1—*Security for costs of appeal, when to be demanded.*

There is no hard and fast rule that unless a plaintiff-appellant has no interest in the litigation but is a mere puppet in the hands of others, there cannot be any order against him for security for costs. C. CHANDRA KANTA GANGULY *v.* SAROJINI DEBI **786**

——— O. XLI, R. 19—*Appeal—Date of hearing postponed—Date not communicated—Default—Dismissal of appeal—Restoration of appeal—Sufficient cause.*

An appeal set down for hearing was ordered to be put up for hearing on the following day, but there was nothing on the record to show that this order was communicated to any of the parties concerned. The appeal was dismissed for default of appearance on the part of appellant:

*Held*, that there was sufficient cause for the restoration of the appeal. A. BAIJ NATH *v.* WALI HASAN **936**

CIVIL PROCEDURE CODE—(1908)—contd.

——— O. XLI, R. 22, CL. (4)—*Appeal dismissed as time-barred—Respondent, whether entitled to be heard on cross-objections.*

Per *Abdur Rahim, J.*, (*Ayling, J., dubitante.*)—A respondent filing a memorandum of objections within time is entitled to be heard on it even if the appeal in which it was filed is dismissed as being presented out of time.

An appeal thus dismissed should be treated as one dismissed upon hearing for the purpose of hearing the memorandum of objections, though it does not come exactly within the scope of clause (4) of rule 22 of Order XLI. M. DEVIBHASHYAM VENKANNA *v.* PEDDINTI VENKATARAMANAYYA, 3 L. W. 109; 19 M. L. T. 86 **579**

——— O. XLI, R. 23, O. VI, Rr. 17, 18—*Plaint, amendment of, in appeal—Remand—Appellate Court, power of.*

There are other provisions for remand under the Civil Procedure Code, 1908, than given under Order XLI, rule 23.

When a plaint is amended in appeal under Order VI, rules 17, 18 and a defendant desires to traverse the facts stated in the amendment, the Appellate Court has power to remand the case. C. MANMATHA NATH BOSE *v.* KRISHNA PRAMADA DASI **906**

——— O. XLI, Rr. 23, 25—*Remand—Remanding Court, whether can re-consider decisions on issues decided on occasion of remand—Preliminary decree, when decisions on certain issues—Test—Interlocutory orders, effect of.*

A suit for ejectment was dismissed by the first Court after deciding the issues relating to the merits of the dispute between the parties but without deciding the issues relating to limitation and misjoinder. The lower Appellate Court decided the issues relating to the merits and remanded the suit to the first Court to dispose of it after the trial of the issues relating to limitation and misjoinder and according to its findings on the issues relating to merits. On appeal to the High Court from the order of remand it was held that the lower Appellate Court ought only to have sent the case back under rule 25 of Order XLI of the Civil Procedure Code. The officer of the Appellate Court was succeeded by another officer. On the record again coming up before the Appellate Court it refused to review the decision already arrived at on issues relating to merits:

*Held*, that the lower Appellate Court was not wrong in treating the decision of his predecessor upon the issues relating to merits in the suit as final and in refusing to re-consider those issues upon the evidence for the purpose of arriving at an independent determination in regard to them.

*Held*, (*Mullick, J., dubitante*) that the order of remand of the lower Appellate Court was not merely interlocutory but was a formal expression of an adjudication and as such amounted to a preliminary decree, and no appeal having been preferred from that decree as such, it became final.

Per *Richardson, J.*—An opinion incidentally or provisionally expressed by an Appellate Court while remanding a case under Order XLI, rule 25, is open to re-consideration by the same Court when the record again comes up to it after the remand,

CIVIL PROCEDURE CODE—(1908)—contd.

Interlocutory orders may be, and often are, decretal and final in their character and, therefore, (subject to review by a superior Court in appropriate proceedings) binding as between the parties in subsequent stages of the same litigation.

One test for the purpose of determining whether an adjudication is or is not final and conclusive so far as it goes, is whether it does or does not amount to a preliminary decree.

Per *Mullick, J.*—As a matter of practice a Court will not and ought not to revise after remand interlocutory decisions which were made either by itself or by an officer of co-ordinate jurisdiction on the occasion of remand.

When, however, the interlocutory decision amounts to a preliminary decree within the meaning of section 2 of the Civil Procedure Code the Court is incompetent to revise that decree till it is duly set aside or amended according to law. C. HIRA LAL PAL *v.* ETBAR MANDAL, 20 C. W. N. 43 **866**

——— O. XLI, R. 25 **866**

——— O. XLI, Rr. 25, 28, O. XLII—*Court of second appeal, issues remanded by, for recording evidence and findings—Lower Appellate Court, power of, to delegate the function to Original Court.*

Judicial functions cannot be delegated without statutory authority.

When issues are remanded by a Court of second appeal to the lower Appellate Court against whose decree an appeal has been preferred, the latter cannot delegate this function to the Original Court, but it has authority under rule 28, Order XLI, Civil Procedure Code, 1908, to require evidence to be recorded by the Original Court and then itself record the findings on the issues remanded. S. MOTISING *v.* SOBHOMAL, 9 S. L. R. 148 **634**

——— O. XLI, R. 27—*Appellate Court—New evidence, admission of, legality of.*

Where a lower Appellate Court admitted a document in evidence without recording any reasons as required by Order XLI, rule 27, Civil Procedure Code, and in the absence of an application for the admission of this evidence, and where no reasons were suggested in the Court of further appeal for the failure to produce the said document in the Court of first instance:

*Held*, that the admission of the document in evidence was illegal. M. KAKI MUTYALU *v.* KANIGOLA SIVA RAGHAVAYYA, 3 L. W. 163 **826**

——— O. XLI, R. 27—*Appellate Court, when can admit fresh evidence—"Substantial cause," interpretation of—Necessity, proof of—Recitals in documents, whether enough.*

An Appellate Court has no power to call for fresh evidence in cases where no evidence has been adduced in the lower Court in respect of any issue and where there is consequently no room for any doubt. It can do so only when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent.

Where, therefore, the defendants adduced no evidence in the original Court and gave no explanation for the omission to do so and in appeal made no application for further evidence:

*Held*, that there being no evidence on record, the lower Appellate Court could and should have given judgment against the party on whom the onus lay, and that the provisions of Order XLI, rule 27, did not justify the Court in ordering fresh evidence to be recorded.

Recitals in documents as to the existence of necessity are not by themselves evidence of necessity in the absence of any other evidence *aliunde*.

Per *Phillips, J.*—In interpreting the words "for other substantial course" in Order XLI, rule 27, the facts of each case must be taken into account and an answer supplied accordingly subject to the principles governing the case. M. MARIMUTHU PILLAI *v.* VELU PILLAI **908**

——— O. XLI, R. 27—*Secondary evidence of document given at trial Appellate Court, whether can admit document itself.*

Where a document material to the plaintiff's case could not be found at the time of the trial and the plaintiff gave secondary evidence of its contents, but produced it in the Appellate Court alleging that it had been found in the meantime:

*Held*, that since the genuineness of the document was unimpeachable, the lower Appellate Court could admit it as it filled up a lacuna in the plaintiff's case. M. MANCHALA NARAYANA MURTHY *v.* PENUMETCHA VENKATAPATIRAJU **711**

——— O. XLI, R. 28 **634**

——— O. XLI, R. 33 **401**

——— O. XLI, R 33—*Appeal by plaintiff against partial decree No appeal or cross-objection by defendant—Appellate Court, whether can dismiss suit entirely.*

Order XLI, rule 33, of the Civil Procedure Code, is very widely expressed but it is not to be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of Statutes like those which relate to limitation or payment of Court-fees.

Order XLI, rule 33, should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience.

In a suit for arrears of rent the plaintiffs claimed rent at the rate of Rs. 34-6-0 a year. The defendants admitted that rent was payable at the rate of Rs. 24 a year. The Court of first instance allowed the claim at the rate of Rs. 24 a year. The plaintiffs appealed against this decree. The defendants did not prefer an appeal, nor did they file a cross-objection. The lower Appellate Court dismissed the entire suit:

*Held*, that the lower Appellate Court was not justified in dismissing the suit entirely on the appeal of the plaintiffs.

*Held*, further, that the judicial discretion vested in the Court of Appeal below was not properly exercised. C. ABJAL MAJHI *v.* INTU BEPARI, 22 C. L. J. 394; 20 C. W. N. 542 **494**

——— O. XLI, R. 33—*Appellate Court, power of—Suit against two defendants—Decree prayed for against both or either of them—Decree against one—*

CIVIL PROCEDURE CODE—(1908)—contd.

*Appeal—No appeal by plaintiff—Appellate Court, power of, to decree against other defendant.*

In a suit against two defendants for contribution for arrears of rent realized from the plaintiff, the plaintiff prayed that a decree may be passed against both the defendants or against either of them who may be found to be the true owner. The first Court passed the decree against one defendant, who filed an appeal. The lower Appellate Court found that it was the other defendant against whom the decree ought to have been passed and as the plaintiff had not appealed, dismissed the suit:

*Held*, that under the circumstances the lower Appellate Court should have passed a decree against the other defendant and not dismissed the suit entirely. C. ANANGA MOHUN *v.* BEJOY CHANDRA, 22 C. L. J. 391 491

——O. XLI, R. 33, *applicability of—Suit partly decreed—Appeal by defendant—No appeal or cross-objection by plaintiff—Leave to withdraw from suit, if allowable.*

Order XLI, rule 33, must be cautiously applied and should not be permitted to be invoked in favour of a litigant so as to enable him to evade the provisions of other Statutes, *e. g.*, the Limitation Act and the Court Fees Act.

A suit for recovery of possession of land on declaration of title was decreed in part. The defendants appealed against the decree in so far as it was adverse to them. The plaintiff neither preferred a cross-appeal nor presented a memorandum of cross-objections. On the appeal coming up for hearing a local investigation was ordered. After the investigation the appeal came up for final disposal. After the arguments on behalf of the appellants had been concluded and while the arguments on behalf of the plaintiff-respondent were in progress, an application was made on behalf of the plaintiff to withdraw from the suit with liberty to bring a fresh suit upon the same cause of action:

*Held*, that leave under Order XLI, rule 33, of the Civil Procedure Code, 1908, ought to be granted with respect to that portion of the plaintiff's claim which had not been decided adversely to him, inasmuch as the plaintiff did not ask for a relief which had been denied to him by the Court below but he merely sought to be relieved from the position of embarrassment in which he had been placed by the decree of the primary Court.

*Obiter dictum.*—Where a plaintiff has obtained a decree for a portion of his claim and has appealed for relief in respect of the remainder, the defendant, who has not taken the statutory steps to assail the decree in so far as it is adverse to him, should not be allowed to contend that not only the appeal by the plaintiff but the entire suit should be dismissed. C. AKIMANNESSA BIBI *v.* BEPIN BEHARI MITTER, 22 C. L. J. 397; 20 C. W. N. 544 499

——O. XLII 634

——O. XLIII, R. 1, CL. (*l*) 858

——O XLIII, R. 1 (*d*) 984

——O. XLVII, R. 1—*Review—Discovery of fresh evidence—Due diligence at original trial, necessity of, proof of.*

In making an application for review of a judgment on the ground of discovery of fresh evidence, the applicant must satisfy the Court that after exercise of due diligence he was not able to produce that piece of evidence at the trial of his case. A. PALIA *v.* MATHURA PERSHAAD, 14 A. L. J. 204 622

——O. XLVII, R. (1) 161

——O. XLVII, R. 2—*"Judge who passed the decree", meaning of—Review—Jurisdiction.*

The expression "the Judge who passed the decree" in rule 2 of Order XLVII of the Civil Procedure Code, 1908, means the Judge who has decided the case and not the Judge who has merely signed a decree after satisfying himself that it has been drawn up in accordance with the judgment delivered by his predecessor.

Therefore, a Judge who merely signed a decree which was in accordance with a judgment passed by his predecessor, has no jurisdiction to review the decree and the fact that a review was granted by his predecessor which was set aside by the High Court on the ground that no notice was sent to the other party, does not validate his order. C. TAMIJUDDI SHEIKH *v.* SATYA SHANKER GHOSAL, 20 C. W. N. 391 101

——O. XLVII, R. 7—*Order granting application for review for "other sufficient reason", whether appealable—Revision.*

No appeal lies under Order XLVII, rule 7, of the Civil Procedure Code against an order granting an application for review for "other sufficient reason" within the meaning of rule 1.

Such an order cannot be interfered with in revision, especially as there is a right of appeal from the final decree. P. BASHESHAR NATH *v.* RAMKISHAN DAS 860

——SCH. II, PARA. 1 881

——SCH. II, PARA. 3 (2) 347

——SCH. II, PARA. 15 161, 250

——SCH. II, PARA. 15—*Award, setting aside of—Date for making of award not fixed by order of reference, effect of—Notice of filing of award not given, effect of—Material irregularity—Opinion, mere, unsupported by reasons—Decision, insufficient.*

A Court set aside an award on the ground that no date had been fixed by the order of reference for the making of the award and that no notice of its filing was given to the plaintiff. An objection to the filing of the award had, however, been made within time:

*Held*, that in setting aside the award the Court acted illegally and with material irregularity.

A mere expression of opinion one way or the other as regards any point, without any reasons being set forth in support of that opinion, cannot be regarded as a sufficient decision of that point. O. ABDUL KARIM *v.* MUHAMMAD HUSAIN, 2 O. L. J. 493 345

——SCH. II, PARA. 16 161, 250

CLOG ON EQUITY OF REDEMPTION. *See* MORTGAGE.

COMPANY—*Director, duty of—Personal interest—Taking part in meeting in which personal matter discussed, effect of—Meeting of Directors, validity of.*

No one who has a duty to perform can place

COMPANY—concld.

himself in a situation in which his interest conflicts with his duty and he must not make profit by a trust.

A Director of a Company cannot, as a rule, enter into a contract with the Company for profit to himself as the Directors of a Company are agents of the Company and trustees for the share-holders of the powers committed to them.

The articles of an association provided that the Company shall only be bound if two of the Directors exercise authority, consider its interests and act on its behalf. At a meeting in which only two Directors were present, one of the Directors present was appointed as Managing Director and co-editor of the paper run by the Company:

*Held*, that the appointment was not made with the authority of the Company and was invalid, inasmuch as there was, in law and in fact, only one Director acting on behalf of the Company, the other being incapacitated by his interest from acting in the particular matters that were discussed. M. RAMASWAMI IYER *v.* MADRAS TIMES PRINTING AND PUBLISHING CO, LTD., 38 M. 991 **350**

COMPANIES ACT (VI OF 1882), S. 68—*'Officers of the Company,' meaning of—Charge in favour of officers, legality of—Floating security, nature of—Debenture-deed—Provision allowing Company to carry on business till happening of certain event—Business, if automatically determines on happening of the event.*

A charge created by the Directors of a Company on its assets when the Company is still a going concern is not illegal; but a charge created in favour of its own officers is void when not registered under section 63 of the Indian Companies Act.

A person who ceases to hold any office at the time of creation of a charge is not "an officer of the Company" within the meaning of section 68 of the Indian Companies Act and a charge created in his favour is not illegal.

When a deed of debenture, after charging all the assets of the Company by way of a floating charge, provides that notwithstanding such charge the Company should have power to carry on business and deal with the assets until the happening of a certain event, the right to carry on the business is not determined automatically by the happening of the event indicated but continues until the debenture-holder intervenes to show his desire that it should cease.

It is of the essence of a floating security that it should remain dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. M. BALASUBRAHMANIA IYER *v.* KANDASAMI PILLAI **91**

COMPANIES ACT (VII OF 1913), S. 153—*Creditors, meeting of, after Bank stopped payment—Agreement by majority of creditors to re-open and conduct Bank's business, effect of.*

At a meeting, held under the provisions of section 153 of Act VII of 1913, of the creditors of a Bank which had stopped payment, a majority in number, representing three-fourths in value of the creditors present in person or by proxy, agreed to a scheme for its re-opening and the conduct of its business. The arrangement having been sanctioned by the High Court came into force accordingly.

COMPANIES ACT—(1913)—concld.

One of the creditors had, between the date when the creditors voted upon the proposal and the date when the High Court sanctioned the arrangement, obtained a decree in respect of his debt:

*Held*, that the agreement was binding on him and that such an agreement when sanctioned took effect from the date when it was arrived at, and not merely from the date of sanction. O. RAGHUBAR DAYAL *v.* BANK OF UPPER INDIA, LTD., 18 O. C. 275 **451**

COMPENSATION. *See* FATAL ACCIDENTS ACT; SUIT.

———Deficiency in property to be purchased—Equity, principle of **47**

———Express and implied contract **511**

COMPROMISE—Contract entered into by a person accused of a compoundable and a non-compoundable offence, for compounding the compoundable offence, validity of **227**

———Deed, construction of **468**

———*Instalments—Decree—Default in payment of instalments—Decree-holder, remedy of—Execution of decree.*

A compromise arrived at in a suit for partition provided that the amount due under the compromise decree should be paid by instalments but made no mention as to what would happen on default being made:

*Held*, that on default being made the decree-holder's remedy was not to bring a separate suit but to recover the amount decreed by executing the decree for each instalment falling due. A. MUSTAFA BEGAM *v.* SIRAJ-UL-NISSA **693**

———DECREE—Stipulation to pay whole amount on default of payment of any instalment—Interest, excessive, provision for—Penalty **697**

CONFESSION, retracted, disagreeing with other evidence in case, effect of **321**

CONFESSION TO POLICE. *See* EVIDENCE ACT, S. 27.

CONSIDERATION. *See* CONTRACT ACT, S. 2 (*d*); GIFT; HINDU LAW; MORTGAGE.

———Endorsement on promissory note—Presumption **233**

———Pro-note—Burden of proof

CONSTRUCTION. *See* MALABAR LAW; WILL.

———OF DEED. *See* DEED.

——— OF DOCUMENT **209, 337, 717**

——— Intention of parties **582**

——— *Kabuliat* **710**

———*Pleading—Plaintiffs, position of—Mortgage—Covenant that mortgagor not to redeem previous mortgage without paying subsequent advances, if valid and enforceable—Charge—Mortgaged property not described in deed of further charge, effect of—Subsequent advances tacked on to previous mortgage—Clog or fetter on equity of redemption.*

A plaintiff cannot, in second appeal, be permitted to resile from the position he took up in the plaint.

The construction placed on one document cannot be of any material help in construing another.

CONSTRUCTION OF DOCUMENT—concld.

Where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the latter without paying the former, is valid and enforceable.

If the intention of parties to a transaction, as gathered from the document as a whole evidencing that transaction, is to create a charge, the mere fact that the mortgaged property is not described therein, because the money advanced is tacked on to a previous mortgage, does not detract from the validity of that charge.

Where certain deeds, styled as "*rehennama zar mazid*," provided that the property mortgaged by previous deeds of mortgage and further charge should not be redeemed until the amounts due on the former deeds were first paid, and that without paying up those amounts the mortgagors and their heirs should have no right to redeem the mortgaged property, but did not specifically describe in them the mortgaged property, although the context clearly showed that the amounts due on them were tacked on to the previous deeds of mortgage and further charge:

*Held*, that the said deeds created a charge on the mortgaged property and could not be treated as clogging or fettering the equity of redemption and were valid and enforceable deeds. O. CHAUHARJA BAKHSH *v.* RAM HARAKH, 2 O. L. J. 601 **740**

——— *Sale—Mortgage—Surrounding circumstances.*

The mere fact of the conditions on which a mortgage can be redeemed being onerous is not sufficient to justify a Court in coming to the conclusion that the transaction which purports to be a mortgage is a sale. A Court has to look to the surrounding circumstances as well. A. MUHAMMAD QASIM *v.* SHEO LING SWAMI JANGAM **192**

——— OF PENAL PROVISIONS **512**

———OF STATUTE **5, 158**

CONTRACT. *See* LEASE; SALE-DEED; VENDOR AND PURCHASER.

———Money advanced as partial guarantee for performance of contract, if can be recovered **205**

———, part of, unenforceable—Contract, validity of **486**

——— *Vendor and purchaser—Specific performance—Court of Equity—Principle—Deficiency in property to be purchased—Compensation.*

In exercising its jurisdiction over specific performance a Court of Equity looks at the substance and not merely at the letter of the contract.

If a vendor sues, and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. If the purchaser is suing, he may elect subject to conditions of hardship to take all that he can get, and to have a proportionate abatement from the purchase-money. This right applies only to a deficiency in the subject-matter described in the contract, but not to a claim to make good representation about that subject-matter made not in the contract, but

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collaterally to it, in which case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract. P. C. RUTHERFORD *v.* ACTON-ADAMS, 84 L. J. P. C. 238 **47**

———Vendor and purchaser—Specific performance of contract—Terms uncertain—Contract, if concluded before stipulated writing — Earnest money, payment of, whether conclusive evidence of completion of contract—Purchaser, right of, to vacant possession **53**

———Vendor and purchaser—Suit for specific performance **49**

CONTRACT ACT (IX OF 1872), S. 2 (*d*)—*Consideration—Abstention from taking legal proceedings, whether sufficient consideration.*

Where at the instance of a debtor, a creditor abstains from taking legal proceedings against an estate which is likely to come into the hands of the former on a future date, that is sufficient consideration for a promise to pay a debt due to the latter under section 2 (*d*) of the Contract Act. M. LAKSHUMANAN CHETTIAR *v.* BOMMACHI NAICKER **416**

——— SS. 2 (*d*), 68—Necessity—Money required for *sradh* of mother—Consideration, promise to defer bringing suit on void contract if **937**

——— S. 11 **388**

——— S. 11—*Minor—Contract to purchase, validity of—Suit by minor, maintainability of—Sale of minor's property by guardian, if valid—Benefit or necessity of minor.*

If there is only an agreement on the part of a minor to buy and on the part of a major to sell and nothing more, and the former afterwards refuses to perform his part of the contract, the latter would not be able to hold him liable under the contract, because a minor is not, under the Indian Contract Act, competent to make a contract; but where in addition to the agreement the minor has paid the price and has obtained a transfer of the property, the *transfer* is not void, as it was the act of the seller who was at the time competent not only to contract but also to make a transfer to any one he liked.

A sale of a minor's property by his *de facto* guardian for the benefit or necessity of the minor is valid. L. B. MAUNG AUNG NYUN *v.* MAUNG GYI **638**

——— S. 23 **913**

——— S. 23—*Public policy—Compromise—Contract entered into by a person accused of a compoundable and a non-compoundable offence, for compounding the compoundable offence, validity of—Penal Code (Act XLV of 1860), ss. 147, 325.*

Where in a complaint against a person accusing him of offences under sections 147 and 325, Penal Code, the Magistrate after perusing the complaint and examining the complainant issued summons only under section 325 and the accused, with the permission of the Magistrate, compounded the case by entering into a contract in favour of the complainant:

*Held*, that in the absence of anything to show that there was any truth whatsoever in the allegations as to the offence under section 147 or that

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there was any apprehension in the mind of the accused that he would be convicted under that section, the contract was not void as being opposed to public policy. C. MUHAMMAD ISMAIL *v.* SAMAD ALI BHUYAN **227**

——— S. 24 **913**

——— SS. 37, 38 (3)—*Delivery of goods—Vendor, duty of—Vendee, right of, to refuse to accept, after drawing samples.*

A vendor is (apart from special contract) under no obligation to see that the purchaser takes delivery within time; all that he has to do is to offer delivery within time and give all customary assistance to the purchaser in taking delivery.

Where it is necessary for the vendee before accepting delivery to take samples and analyse the same, to satisfy himself that the goods tendered are according to the contract, the vendor should tender goods for delivery sometime before the date specified in the contract, so as to give the vendee reasonable opportunity for doing these acts.

A vendee after accepting the tender of goods for delivery and drawing samples cannot refuse to accept delivery on the ground that the goods were not tendered for delivery in time. S. FIRM OF RUTTONJI BURJORJI *v.* FIRM OF MUTUMAL BHAGCHAND, 9 S. L. R. 160 **720**

——— S. 38 **861**

——— S. 38 (3) **720**

——— S. 45 **173**

——— S. 47 — *Bombay Cotton Trade Association Rules, rr.* 15, 17—*Vendor to tender goods before specified time—Giving Railway receipt, effect of.*

Under a contract governed by the Rules of the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 P. M. of due date.

The practice of giving Railway receipts instead of delivery orders is adopted merely in order to secure the advance payment of 90 per cent. of the price, and is not understood in the trade to absolve the vendor from any of his obligations as laid down in rules 15 and 17.

The framers of the rule 17 meant the word "tender" to have its full legal connotation.

Where the vendor has not tendered the goods before the specified time, he fails, under section 47 of the Contract Act, to perform his part of the contract and thus precludes himself from approaching the Court as a plaintiff in a suit for damages on the contract. B. MUKANCHAND *v.* NIHALCHAND, 18 BOM. L. R. 96 **948**

——— S. 55—*Contract—Specific performance—Time as essence of contract Express stipulation or nature of property or circumstances, effect of—Jurisdiction—Equity Intention—Requisitions as to title, when valid.*

Under section 55 of the Contract Act, which lays down the same principle as obtains under the law of England a Court of Equity will relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by a contract, either for completion or for the steps towards completion, if it can do justice between the parties, and if there

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is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. But the special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance, may be excluded by any plainly expressed stipulation; and to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie* equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified.

Equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction

Equity will infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract.

*R* agreed in writing by a document to sell his lease-hold interest in a certain property to *B*. *B* paid a certain amount as a deposit or earnest agreeing to complete the purchase in two months or forfeit the earnest money In investigating the title *B* made certain requisitions some two months after the date of the contract. *R* did not comply with these requisitions and gave notice to *B* that the contract to sell was at an end and the earnest money forfeited, on the ground that *B* had failed to complete his purchase within the date fixed:

*Held*, that the case was governed by section 55 of the Contract Act, 1872, and that there was nothing in the language of the contract or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain.

*Held*, further, that the requisitions were legitimately made. P. C. JAMSHED KHODARAM IRANI *v.* BURJORJI DHUNJIBHAI, 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J 225; (1916) M. W. N. 229; 18 BOM. L. R. 162; 23 C. L. J. 358; 20 C. W. N 744 **246**

——— S. 65—*Contract of sale—Vendor, lunatic—Purchaser, right of, to refund of consideration money paid—Specific Relief Act (I of* 1877), *ss.* 38, 41, *applicability of—Equitable relief*

A person who by payment of consideration money entered into an unenforceable contract for the purchase of property with another who was of unsound

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mind at the time of the contract, is not entitled to a refund of the money paid, either under the provisions of section 65 of the Contract Act or sections 38 and 41 of the Specific Relief Act or on principles of equity. C. DOULATUDDIN *v.* DHANIRAM CHHUTIA **804**

——S. 69—*"Person bound to pay," meaning of—"Person interested in payment," meaning of—Rent, a first charge—Purchaser of tenure, liability of, to pay arrears of rent accruing before purchase—Contribution, suit for.*

One who is not personally liable to pay but to whose land liability is attached, is a person "bound by law to pay" within the meaning of section 69 of the Contract Act.

A person whose land would have been sold had he not made a payment, is "interested in the payment of money" within the meaning of section 69 of the Contract Act

Rent is, by operation of law, the first charge on a tenure and the person who purchas s the same at an execution-sale must, in the absence of anything to denote the contrary, be taken to purchase it charged with the rent due at the time of its purchase and there being no privity between him and the judgment-debtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due.

The plaintiff and the defendant No. 1 were co-sharers of a *taluk*. The share of the defendant No. 1 was purchased by the defendant No. 2 in execution of a mortgage-decree. Prior to the purchase of the defendant No. 2, the landlord had obtained a decree for arrears of rent, and after the purchase by the defendant No. 2, put up the *taluk* to sale in execution of the rent decree. The plaintiff deposited the entire amount due to the landlord and saved the *taluk*. He then brought a suit for contribution against defendants Nos. 1 and 2:

*Held*, that the plaintiff was entitled to a decree for contribution against the defendant No. 2, and the defendant No 2 could not raise the question of the liability of the defendant No. 1 for plaintiff's claim when the plaintiff did not insist upon his claim against the defendant No. 1. C. CHANDRADAYA SEN *v.* BHAGABAN CHANDRA SEN, 20 C. W. N. 125 **200**

—— S. 70, *applicability of—Express and implied contract - Compensation.*

Where there is an express contract between *A* and *B* that *A* would deliver certain goods to *C*, *C* is not bound to compensate or pay to *A* though he makes use of those goods.

Section 70 of the Contract Act applies only in the absence of an express contract. L. B. SADIK MAISTY *v.* MAHOMED AUZAM **511**

——S. 74—*Compromise decree—Stipulation to pay whole amount on default of payment of any instalment—Interest, excessive, provision for—Penalty.*

An executing Court can go behind the terms of a compromise decree.

A compromise decree provided that the defendant do pay a less amount than originally claimed according to certain instalments stated therein and that in default of payment of any instaiment the whole amount do become payable at once together with interest at the rate of 36 per cent. per annum:

*Held*, that the liability to pay the whole amount in default of payment of any instalment was not a

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penalty but that the provision for the payment of interest at the rate of 36 per cent. per annum upon the whole amount was in the nature of penalty within the purview of section 74 of the Contract Act. C. JAMIR FAKIR *v* RAM LAL GHOSE **697**

—— S. 130 **807**

CONTRACT OF SALE—Decree—Specific performance - Deposit of money—Extension of time fixed—Application after expiry of time, if allowable **509**

——Dispossession of vendee—Suit to recover purchase-money, maintainability of **176**

—— Sale, non-registration of, effect of—Land worth more than Rs. 100—Contract to sell—Specific performance, suit for—Limitation Act (IX of 1908), Sch. I, Art. 113 **536**

——Contract to sell lands—Decree fixing time for payment of purchase-money Confirmation of decree by Appellate Court, effect of—Appellate Court, whether can extend time **401**

Contract to sell land Prayer for possession, whether can be included in suit for specific performance - Vendor's mortgagee, whether can be impleaded **237**

CONTRIBUTION—*Mortgagor relieving his co-mortgagors of burden if entitled to contribution Muhammadan Law—Minor*, de facto *guardian of—Mortgage by such guardian, when binding on minor.*

A mortgagor is entitled to contribution from his co-mortgagors for what he has paid for their benefit either under compulsion of law or as a private transaction, and it is not necessary that he should have been put into possession of the property of his co-mortgagors.

Under the Muhammadan Law if the mother of a minor, who was his *de facto* guardian, makes a mortgage of the minor's property for the benefit of the minor and for necessity, the mortgage is binding on the minor. A. ABID ALI *v.* IMAM ALI, 4 A. L. J. 18; 38 A. 92 **177**

——, suit for—Purchaser of tenure, liability of, to pay arrears of rent accruing before purchase **200**

CONVICTION—Principal, if convicted as accessory after the fact—Mere suspicion, if bar to conviction—Murder, evidence of, causing to disappear—Alternative indictments, propriety of **132**

COSTS—Discretion of Court **291**

Mortgage—Title paramount to mortgaged property pleaded—Costs against defendant contesting mortgage suit on title paramount, order for, setting aside of **358**

COURT FEES ACT (VII OF 1870), S. 5 **534**

—— S. 7 (*iv*), SCH. I, ART. 1 **121**

CRIMINAL MISAPPROPRIATION—Son's liability to pay father's debt—Debt incurred by appropriating money due to another, if immoral **969**

CRIMINAL PROCEDURE CODE (ACT V OF 1898), S. 87 (3) **670**

——S. 96 (1) - *Search warrant directing seizure of all goods of certain description, legality of—Duty of Magistrate to state reasons.*

A Magistrate has no authority for issuing, on the

CRIMINAL PROCEDURE CODE—contd.

application of the complainant, a search warrant ordering the summary seizure of all the goods of a certain description in the possession of the accused.

Where, therefore, in the course of a trial under sections 482, 483 and 486 of the Penal Code, the Magistrate issued, on the application of the complainant, a search warrant directing seizure of all articles bearing the complainant's trade mark and remarked without giving reasons that the accused would not produce these things if he were required by summons to do so:

*Held*, that inasmuch as the Magistrate gave no reasons whatever for believing that the accused would not produce the articles in question if a summons were issued to him for their production, the requirements of sub-section (1), section 96, Criminal Procedure Code, were not complied with and the order of the Magistrate issuing the search warrant was illegal and improper. P. PIYARE LAL *v.* THAKAR DAT SHARMA, 12 P. W. R. 1916 CR.; 17 CR. L. J. 60 **652**

——— SS. 107, 114—*Warrant of arrest issued under s. 114—Bail—Accused, rights of—Jurisdiction.*

A Magistrate has no jurisdiction to refuse bail to a person arrested under section 114, Criminal Procedure Code, against whom proceedings have been taken under section 107 of the same Code. S. FAIZ MUHAMMAD *v.* EMPEROR, 9 S. L. R. 158; 17 CR. L. J. 77 **669**

——— SS. 109, 118, 122—*Sureties, fitness of.*

In a bad livelihood case when several sureties are required it is not necessary that each one of them should live in the immediate neighbourhood of the accused. C. ROMESH CHANDRA *v.* EMPEROR, 17 CR. L. J. 95 **687**

——— S. 109—*Surety, fitness of—Immoveable properties, if to be considered—Relationship of surety, relevancy of.*

The sufficiency of a surety should be considered from a general view of his stability and the property which he holds; it should not be regarded simply from the point of view of the moveable property which he possesses.

*Semble.*—In a bad livelihood case the question of relationship of the surety with the accused has some relevancy in considering the fitness of the surety. C. NASURUDDI KARIKAR *v.* EMPEROR, 17 CR. L. J. 97 **833**

——— S. 109—*Sureties, fitness of—Surety's immoveable properties, if to be taken into consideration.*

In deciding as to the stability of sureties for a person bound down under section 109, Criminal Procedure Code, their immoveable properties should be taken into consideration. C. PURNA CHANDRA *v.* EMPEROR, 17 CR. L. J. 91 **683**

——— S. 110—"*Any person within the local limits of his jurisdiction,*" *meaning of.*

The words "any person within the local limits of his jurisdiction" in section 110, Criminal Procedure Code, apply also to a person undergoing a sentence of imprisonment in a Jail within the local limits of the Magistrate's jurisdiction. L. B. EMPEROR *v.* NGA SAING, 17 CR. L. J. 88 F. B. **680**

——— SS. 110, 117 (2), 256—*Defendant in security proceedings, whether entitled to re-call witnesses for cross-examination.*

CRIMINAL PROCEDURE CODE—contd.

A person against whom proceedings under section 110 of the Criminal Procedure Code are taken, is not entitled to re-call witnesses, who have given evidence against him, for further cross-examination. P. AHMAD BAKHSH *v.* EMPEROR, 1 P. R. 1916 CR.; 17 CR. L. J. 84 **676**

——— S. 110—*Imprisonment for failure to furnish security—Accused, whether can be bound down on suspicion soon after release.*

An order under section 110 of the Criminal Procedure Code cannot be made against an accused person who has been imprisoned for failure to furnish security under that section, until he has had time after his release either to retrieve his character or to show that he has no intention of doing so. U. B. NGA PO HMI *v.* EMPEROR, U. B. R. 1915, II, 86; 17 CR. L. J. 85 **677**

——— S. 114 **669**

——— S. 117 (2) **676**

——— SS. 118, 122 **687**

——— S. 145 **667**

——— S. 145—*Joint possession of property in dispute—Magistrate, jurisdiction of.*

Where both parties to a dispute relating to immoveable property are found to be in joint possession thereof, a Magistrate has no jurisdiction to issue an order under section 145 of the Code of Criminal Procedure, prohibiting either the one party or the other from disturbing the possession of the other till evicted in due course of law. M. VEERABHADRA PILLAI *v.* SHUNMUGAM PILLAI, 17 CR. L. J. 76 **668**

——— SS. 195, 476—*Sanction for prosecution—Application for sanction, if necessary—Deputy Commissioner, whether authorised to act under s. 476—Penal Code (Act XLV of 1860), s. 182—"Public servant," meaning of.*

A sanction to prosecute given under section 195 of the Criminal Procedure Code implies an application for sanction and not a mere general and vague order.

A Deputy Commissioner passed an order dismissing a complaint and saying that the accused was at liberty to prosecute the complainant if he so wished:

*Held*, that this was not a sanction within the meaning of section 195 of the Criminal Procedure Code.

Section 476 of the Criminal Procedure Code, while it authorises the sending of a case for trial by a Civil, Criminal or Revenue Court of its own motion, gives no authority to a Deputy Commissioner.

The public servant referred to in section 182 of the Indian Penal Code is the public servant to whom the information is given and not the public servant whom it is sought to injure, and it is the former whose sanction is required by section 195 (1) (*a*) of the Criminal Procedure Code. U. B. NGA KYAW ZAN *v.* NGA KYI DAN, U. B. R. 1915, II, 91; 17 CR L. J. 59 **651**

——— SS. 195, 476, 439—*Sanction to prosecute—Application, if necessary—Duty of Court to exercise due care—Notice to accused, whether necessary—Order under s. 476—High Court's power of interference—Civil Procedure Code (Act V of 1908), s. 115.*

CRIMINAL PROCEDURE CODE—contd.

A High Court cannot interfere under section 439 of the Criminal Procedure Code with the proceedings of a Civil Court taken under section 476 of the Code, as section 439 must be read with section 435 and the power of revision is expressly confined to the records of inferior Criminal Courts.

An order passed by a District Judge under section 476 of the Criminal Procedure Code can only be interfered with by a High Court in the exercise of its civil jurisdiction under the provisions of section 115 of the Civil Procedure Code.

The Code of Criminal Procedure does not contemplate a Court or public servant giving sanction for prosecution where no application for sanction has been made.

The authority given by section 195 (5) of the Criminal Procedure Code to a Court taking cognizance of a case to frame a charge of any offence referred to in that section, when sanction is given in respect of it, does not relieve the Court of the necessity to exercise due care and consideration before it orders a criminal prosecution.

Sanction to prosecute may be granted without the issue of a notice and is not vitiated by the absence of such notice; but notice should ordinarily be issued and in a case of non-attendance, where a person may be prevented from attending by illness or any other sufficient cause, it is desirable that notice should issue. U. B. NGA SAN CHEIN *v.* SO OKARAM, U. B. R. 1915, II, 83; 17 CR. L. J. 82 **674**

——— S. 195—*Sanction to prosecute—Contradictory statements—Discretion, exercise of.*

An application for sanction when made under section 195, Criminal Procedure Code, must be carefully considered before the sanction is given, especially when the application is on behalf of an old offender in Jail and is directed against a Sub-Inspector of Police.

A sanction given on account of the contradictory statements made by a person without giving him an opportunity to explain those contradictory statements is not a sanction given with due consideration. A. IQBAL HUSAIN *v.* WILAYAT HUSAIN, 17 CR. L. J. 93 **685**

——— S. 195 *(b)*—*Sanction to prosecute—Procedure.*

In a proceeding under section 195 of the Criminal Procedure Code, a Sessions Judge sitting as a Court of Appeal proceeded to hold a very thorough and searching enquiry, in the course of which he examined on oath the person against whom the sanction was sought and recorded a quantity of other evidence, and having done this he rejected the application for sanction:

*Held*, that the Sessions Judge was right in adopting the procedure which he did. A. RAHMATULLAH *v.* EMPEROR, 17 CR. L. J. 29 **157**

——— SS. 222, 234, 403—*Misappropriation of money entrusted to more than one person—Joint trial, whether legal—Separate trials for misappropriating different items of money during the same period, whether allowed—Construction of Statute.*

Where in a trial for criminal misappropriation, it appears that there are several false entries in the accounts, that is sufficiently good evidence to show that the accused, who had the charge of the money and kept the accounts, misappropriated the sums of money to which the false entries or omissions relate.

If a person entrusts a sum of money to more than one person and those persons in collusion commit criminal breach of trust or dishonestly misappropriate the amount, all of them being accused of the same offence committed in the course of one transaction can be tried jointly, and there is nothing in the language of section 222 of the Code of Criminal Procedure which makes it compulsory that there should be a separate trial of each accused.

The intention of the Legislature by enacting section 222 of the Criminal Procedure Code is that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation.

Where, therefore, a person was tried and convicted for misappropriating certain sums of money during a certain period and was again put on trial in respect of certain other sums of money alleged to have been misappropriated during the same period:

*Held*, that the charge in the previous case should be taken to include all the items misappropriated by the accused in the course of the same transaction during that period and that the subsequent trial was barred by section 403 of the Code. M. *In re* APPADURAI AYYAR, 17 CR. L. J. 30 **158**

——— S. 234 **158**

——— S. 237—*Charge—Procedure.*

When a Court finds it necessary to make use of section 237 of the Criminal Procedure Code in order to convict an accused person of an offence with which he has not been charged, the Court should be particularly careful to formulate to its own mind the charge upon which, had it been duly framed, it would be prepared to convict. A. ABDUL RAB *v.* EMPEROR, 17 CR. L. J. 64 **656**

——— S. 256 **137, 676**

——— SS. 284, 326, 327—*Trial by assessors—Summoning of assessors for particular date—Selection on another date, legality of—Procedure—Trial, if valid.*

A person was summoned to serve as an assessor on the 14th of June 1915 in a particular case. He failed to appear in Court on that date but appeared on the 17th *idem* when another trial had to commence. He was selected to act as one of the assessors in that trial:

*Held*, that his selection was not improper and the trial in which he took part was not invalid. A. CHUTTA *v.* EMPEROR, 17 CR. L. J. 17 **145**

——— S. 297—*Charge to Jury—Common object of riot, omission to mention, whether vitiates trial—Rioting—Unlawful assembly—Penal Code (Act XLV of 1860), ss. 141, 147—Evidence Act (I of 1872), s. 114.*

In his charge to the Jury a Judge should draw the attention of the Jury to the case set up by the defence and the non-production by the prosecution of witnesses who were present at the time of the alleged occurrence, pointing out to them that the non-production created a presumption under section 114, Indian Evidence Act, which did not help the prosecution case.

CRIMINAL PROCEDURE CODE—contd.

In cases of riot it is essentially necessary for a Judge to mention, in his charge to the Jury, what an unlawful assembly is.

Where a Judge in his charge to the Jury said: "The offences of rioting, culpable homicide, voluntarily causing grievous hurt and the provisions of sections 34, 149, Indian Penal Code, are explained" and there was nothing to show that the Jury were told that a rioting can only take place when there is an unlawful assembly consisting of at least five men with one of the common objects mentioned in section 141, Indian Penal Code:

*Held*, that the charge was most inadequate.

*Semble.*—In cases of riot the omission to mention the common object in the charge-sheet does not necessarily vitiate the trial. C. ABDUL SHEIKH *v.* EMPEROR, 17 CR. L. J. 92 **684**

——— SS. 297, 298, 299—*Charge to Jury—Trial of several accused together—Omission to place defence evidence regarding each accused before Jury, effect of —Misdirection.*

Sections 297 to 299 of the Code of Criminal Procedure make it imperative on a Sessions Judge to place in his summing up to the Jury the evidence both for prosecution and defence.

A charge to the Jury, therefore, in the following words "as for the defence made by the other accused, the Vakils for the accused have not laid much emphasis upon it; and so it is unnecessary to go into it. You have heard how, when I now asked them if they want me to place the defence of the other accused before you, they said that the defence on the whole would rather be content with challenging the credibility of the prosecution evidence than to rely upon the evidence they have put in", omitting to place before the Jury the evidence regarding the *alibi* set up by the defence when the question turned entirely upon the identity of the accused, and to sum up separately the evidence against the accused when many persons are involved, is a clear misdirection likely to prejudice the accused at their trial. The fact that the Vakils did not lay much emphasis upon the defence evidence is no reason why the Judge himself should not place it before the Jury. A conviction on such a charge is illegal and must be set aside. M. *In re* SANGAN, 17 CR. L. J. 19 **147**

——— SS. 297, 299, *ill.* (*a*)—*Trial by Jury—Judge's duty—Interpretation of Statute—Weight to be attached to illustrations—Penal Code* (*Act XLV of* 1860), *s.* 300, *excep.* 4—*Evidence Act* (*I of* 1872), *s.* 105.

An omission on the part of a Judge to explain to the Jury the difference between murder and culpable homicide not amounting to murder is not in every case a material misdirection.

The statements of law in the illustrations used in an Act cannot be taken as laying down substantive law; they merely go to show the intention of the framers of the Act and may be useful if correct.

The only express provision as to the duty of a Judge in charging a Jury is that in section 297. It is not incumbent on a Judge to explain a part of the law to the Jury, which if they acted on they would have gone wrong.

Before a Judge leaves a case to the Jury for finding as to whether the accused's case comes within

CRIMINAL PROCEDURE CODE—contd.

one of the exceptions to section 300, Indian Penal Code, there must be evidence, at least an allegation by the accused, on which they might reasonably and properly conclude the facts to be established.

It is not the duty of a Judge to invent facts in the interest of accused persons.

Per *Twomey, J.*—When the facts appearing in a case are consistent only with an intention to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence can only be murder and it would, in such a case, clearly be misleading to discuss culpable homicide done with any lesser criminal intention.

In doubtful cases of murder a Judge is bound to explain the law as to the minor offence of culpable homicide not amounting to murder as well as the major offence of murder.

Per *Parlett, J*—A judicial decision must be taken as arrived at under the particular circumstances of the case in which it was given and to govern another case only if its circumstances are similar.

It is quite possible to explain fully and correctly what murder is without stating what it is not. A Court is bound to presume the absence of circumstances bringing the case within an exception unless and until the existence of these circumstances is proved or at least alleged. If there is material only for some of such circumstances but not others, it would not be right for a Judge to raise the applicability of the exception before the Jury as by so doing he might mislead them into contravening section 105 of the Evidence Act.

Per *Ormond, J.*—The examination of an accused is to be taken as evidence in the case. The facts, therefore, stated by an accused must be considered by the Jury in the same way as facts deposed to by the witnesses in the case, the Jury being at liberty to accept as true all or some only of the facts stated by the accused. But it is the duty of a Judge to explain to the Jury not only the law applicable to the facts as deposed to by the witnesses in the case, but also the law which is applicable to the facts as stated by the accused. L. B. NGA MYA *v.* EMPEROR, 8 BUR. L. T. 220; 17 CR. L. J. 49 F. B. **641**

——— SS. 298, 299 **147**

——— S. 299 *ill.* (*a*) **641**

——— SS. 326, 327 **145**

——— SS. 350, 435, 439—*De novo trial, if cancels charge previously framed—Order subsequently passed in favour of accused, whether amounts to discharge or acquittal—Revision against acquittal by private party, whether competent.*

A *de novo* trial held under section 350, Criminal Procedure Code, does not imply the cancellation of a charge previously framed against the accused and consequently an order subsequently passed letting off the accused is one of acquittal and not of discharge.

Though the High Court has power to interfere on revision with an order of acquittal at the instance of a private party, that power is only exercised when the order has resulted in grave injustice. M. BUGTHA SIMHADRI NAIDU *v.* BEHAVA SITHARAMA PATRUDU, 2 L. W. 1244; 17 CR. L. J. 1 **129**

CRIMINAL PROCEDURE CODE—contd.

——— S. 369—*Rejection of application for revision—Review—Power of High Court—Order, if required to be sealed—Allahabad High Court Rules, Ch. VII, rr.* 5, 8.

A High Court has no power under section 369 of the Code of Criminal Procedure to review an order dismissing an application for revision made by an accused person.

An order of a High Court dismissing an application for revision requires under the Rules of the Allahabad High Court to be sealed. A. GOBIND SAHAI *v.* EMPEROR, 14 A. L. J. 61; 17 CR. L. J. 47; 38 A. 134 **335**

——— S. 403 **158**

——— Ss. 408, 413—*Appeal—Co-accused—One sentenced to* 4 *months' imprisonment other to fine of Rs.* 50.

It is not in the fitness of things that a Sessions Judge should be able to decide a case involving a sentence of four months' imprisonment and at the same time be forced to refer to the Chief Court a pettier sentence based on the same or closely similar incidents.

Two persons were tried together before a first Class Magistrate. One was sentenced to imprisonment exceeding one month and the other to a fine not exceeding Rs. 50:

*Held*, that both had a right of appeal to the Sessions Court under section 408 of the Criminal Procedure Code and that the right was not taken away by section 413 of the Code. P. EMPEROR *v.* NAURATI, 30 P. R. 1915 CR.; 17 CR. L. J. 27 **155**

——— S. 413 **155**

——— S. 417 **833**

——— Ss. 417, 256—*Acquittal, appeal from—Evidence, consideration of, in criminal cases—Presumption of innocence—Burden of proof—Appellate Court's duty in regard to findings of fact by Trying Court—Unlawful assembly - Common object to enforce right—Riot—Mischief*—Bona fide *claim of right—Penal Code (Act XLV of* 1860*), ss.* 141, 147, 148, 149, 324, 326, 430—*Written statement by accused persons, filing of—Practice.*

No distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction.

An appeal from an acquittal may lie on a question of fact and there are no special rules for dealing with the evidence in such appeal.

In all criminal cases the innocence of the accused person must be presumed; and the burden lies upon the prosecution of completely rebutting that presumption.

If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of the accused, he is entitled to the benefit of that doubt.

An Appellate Court should give weight to the opinion of the trying Court which had the witnesses before it and was, therefore, able to judge from their demeanour whether or not they were telling the truth.

There cannot be a conviction under section 430 where there is a right or a *bona fide* claim of right.

CRIMINAL PROCEDURE CODE—contd.

The Code of Criminal Procedure does not provide for filing written statements by the accused. Such statements are entirely irresponsible and should not be allowed to be filed. C. DEPUTY LEGAL REMEMBRANCER, BEHAR AND ORISSA *v.* MATUKDHARI SINGH, 20 C. W. N. 128; 17 CR. L. J. 9 **137**

——— S. 417—*Acquittal, revision against order of—Local Government refusing to appeal—Jurisdiction of High Court.*

In cases of acquittal of an accused the revisional jurisdiction of a High Court should ordinarily be exercised sparingly and only where it is urgently demanded in the interests of public justice, and a High Court should not entertain an application by a complainant to revise an order of acquittal after the Local Government has declined to direct an appeal against it. L. B. GRAHAM & CO. *v.* ELSEY, 17 CR. L. J. 91 **683**

——— S. 435 **129**

——— S. 437—*Order of discharge—Acquittal—Further inquiry, order for, if competent.*

A Sessions Judge has no jurisdiction to order further enquiry, under section 437 of the Code of Criminal Procedure, in a case in which an order of discharge amounting in effect to one of acquittal was passed. M. *In re* POTHURI VENKATARAMAYYA, 17 CR. L. J. 95 **687**

——— S. 439 **129, 660, 674**

——— S. 439—*Complaint, non-mention of assault in—Conviction for assault, illegality of—Penal Code (Act XLV of* 1860*), s.* 323.

Where a complaint merely mentioned the fact of the accused having used abusive language, but did not contain any mention of assault and the accused was convicted under section 323, Indian Penal Code:

*Held*, that the conviction was bad and liable to be set aside in revision. P. MOOL CHAND *v.* EMPEROR, 1 P. W. R. 1916 CR.; 17 CR. L. J. 111 **847**

——— S. 439—*High Court, power of, to enhance sentence—Laches of prosecution, effect of—Penal Code (Act XLV of* 1860*), ss.* 380, 454.

Where a person is convicted under sections 380 and 454, Indian Penal Code, and subsequently it is discovered that he has been previously convicted seven times, a High Court would not enhance the sentence under section 439, Criminal Procedure Code, in the absence of any irregularity or impropriety in the Magistrate's proceedings.

The powers of revision are not to be invoked to supply the laches of the prosecution. S. EMPEROR *v.* USMAG, 9 S. L. R. 95; 17 CR. L. J. 3 **131**

——— S. 476 **651, 674**

——— S. 476—*Offence committed before one Magistrate—Succeeding Magistrate, if can order prosecution—Jurisdiction—Penal Code (Act XLV of* 1860*), s.* 193.

A Deputy Magistrate, being of opinion that a Police officer appearing as a witness in a case before him had not told the truth, left him to the mercy of the Superintendent of Police and of the District Magistrate. The District Magistrate remarked that the Magistrate should take proceedings under section

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476 of the Criminal Procedure Code. The Deputy Magistrate having been transferred the succeeding Deputy Magistrate ordered the prosecution of the Police Officer under section 193, Indian Penal Code:

*Held*, that the succeeding Deputy Magistrate had no jurisdiction to initiate the proceedings under section 476 of the Criminal Procedure Code inasmuch as the offence under section 193, Indian Penal Code, was neither committed before him nor was brought to his notice in the course of any judicial proceeding. O. AJUDHIA SARAN SINGH *v.* EMPEROR, 2 O. L. J. 546, 17 CR. L. J. 40 **328**

———S. 476—*Order for prosecution of plaintiff in course of trial, whether justifiable—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 & 25 Vict., C. 104), s. 15—Difference of opinion among Division Bench Judges exercising powers of revision—Letters Patent (Mad.), s. 36.*

Where in the course of the trial of a suit, a Court ordered the prosecution of a plaintiff for perjury on the basis of a statement which he made while negotiations were going on for a compromise but which he contradicted when, the negotiations having fallen through, the case was taken up and he was put in the witness-box:

*Held* (per *Abdur Rahim, J.*), (*i*) that the proceedings of the Court were highly irregular and a High Court had jurisdiction to interfere under section 115, Civil Procedure Code, as also under section 15 of the High Courts Act, as the action of the Court amounted to an abuse of the powers vested in it by law;

(*ii*) that if the prosecution was for making two contradictory and inconsistent statements, it could not be sustained as the first statement was not made on oath.

Per *Ayling, J.* (*dissenting*)—(*i*) That though the order of the Court was passed with insufficient regard to the possible indirect prejudice resulting from it, it was neither illegal nor irregular, nor passed in the exercise of a jurisdiction not vested in it by law and a High Court was not justified in setting it aside under section 115, Civil Procedure Code;

(*ii*) that it was desirable to defer the passing of an order under section 476 of the Criminal Procedure Code till the conclusion of the trial;

(*iii*) that the power of superintendence vested in a High Court by section 15 of the Charter Act was of the most general character and was not restricted by anything in the section, but as regards interference with the orders of subordinate Courts, it should be exercised most sparingly and only under very exceptional circumstances;

(*iv*) that in the exercise of the powers under section 15 of the Charter Act, it was not the business of a High Court to gauge the probability of a conviction.

BY THE COURT.—Where the Judges constituting a Division Bench differ in opinion in a matter in which their powers of revision are involved, the proceedings are regulated according to section 36 of the Letters Patent and not section 98 of the Civil Procedure Code. M. *In re* KARRI VENKANNA PATRUDU, 18 M. L. T. 591; 17 CR. L. J. 42 **330**

———S. 476—*Sanctioning prosecution of witness for perjury pending trial, propriety of.*

Although proceedings under section 476, Criminal

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Procedure Code, against a witness for giving false evidence ought not to be taken until the close of the trial, as such action is eminently calculated to intimidate subsequent witnesses and defeat the object of the trial; yet this is a consideration which affects the accused under trial, and not a witness. S. NASIRSHAH *v.* EMPEROR, 9 S. L. R. 176; 17 CR. L. J. 77 **669**

———S. 488—*Maintenance for illegitimate child, application for dismissal of—Order, if final—Magistrate, jurisdiction of, to entertain another application.*

A Magistrate's order dismissing an application for maintenance under section 488 of the Criminal Procedure Code, 1898, is a final order so far as his Court is concerned and he has no jurisdiction to entertain a second application on the same facts. C. MUTESARI *v.* NAND KUMAR SINGH, 17 CR. L. J. 106 **842**

———S. 488—"*Unable to maintain itself,*" *meaning of—Well-to-do child, whether entitled to order for maintenance.*

The words "unable to maintain itself" in section 488 of the Code of Criminal Procedure apply as much to the case of a child, which has got means of its own or which is entitled in law to be maintained and is being maintained, as to a child which is able to earn a living by its own exertions.

A child which possesses a legally enforceable right to maintenance from its mother's *tarwad* is in the same position as a child which possesses property in its own right, and neither is entitled under section 488 to an order for maintenance against its father. M. CHANTAN *v.* CHAKKAPAYYAN MATHU, 19 M. L. T. 23; (1916) M. W. N. 111; 17 CR. L. J. 16 **144**

CRIMINAL TRIBES ACT (III OF 1911), Ss. 22, 24 *Trial, regularity of—Charge, framing of, necessity of—Conviction, legality of.*

An accused was convicted under the Criminal Tribes Act without framing any charge and without being given an opportunity for cross-examining the prosecution witnesses and without any evidence that he was a registered member of the criminal tribe:

*Held*, that the accused was prejudiced and his trial was bad in law.

*Obiter dictum.*—A charge can be framed against an accused prosecuted under the Criminal Tribes Act on his mere statement before a Magistrate if it shows that he has no real defence, and he can be convicted under section 22 if not under section 24 of the Act. A. JANU BHAR *v.* EMPEROR, 17 CR. L. J. 70 **662**

——— S. 24 **662**

CULPABLE HOMICIDE. *See* PENAL CODE, S. 299

CUSTOM. *See* HINDU LAW; MEMONS.

———, *proof of—Proof, sufficiency of—Document, construction of—Fact, finding of—Oudh Civil Digest (1912), Vol. I, Chap. VII, para. 272, rule III, as corrected, effect of.*

A second Appellate Court is bound by the finding of the lower Courts that certain documents constitute sufficient proof of an alleged custom.

CUSTOM—contd.

Rule III of para. 272, Chapter VII, Oudh Civil Digest (1912), Vol. I, as corrected by the correction slip, dated 18th February 1914, does not introduce any new rule, but declares the meaning of the rules as they stood before. O. BASDEO SINGH *v.* RAM PHAL SINGA, 2 O. L. J. 607 **748**

———Family custom—Widow succeeding to her husband's property in joint family, custom as to, proof of—*Wajib-ul-arz*, interpretion of **291**

——— Suit by different sets of plaintiffs claiming in the alternative, whether maintainable—*Aroras* of Sialkot—Burden of proof **526**

———, trading—Marine Insurance—Loss of goods on return journey **540**

——— ADOPTION—*Evidence—Statements in other cases, admissibility of—Admission of adoption by widow in favour of daughter's son, effect of—Admission of adoption by illiterate person, weight of.*

An Appellate Court can rely upon statements made in a separate case and admissible in evidence, although not brought on the record of the case before it, when the record containing the statements was in the original Court and was referred to in the judgment of that Court.

The use of the words 'adopted son' by an illiterate villager in statements made by him does not bind him when by his conduct and other statements it appears that he did not regard the person in respect of whom the words were used as his appointed heir.

Findings of fact in a case as to the factum or validity of adoption are not evidence against persons who were not parties to the case in which the findings were given.

The admission by a widow of the adoption of her daughter's son by the widow's husband is of little value to establish the adoption. P. ARJAN SINGH *v.* DARBARA SINGH, 193 P. L. R. 1915; 140 P. W. R. 1915 **312**

——— ALIENATION—*Awans of Fatehjang Tahsil, right of, to bequeath property to prejudice of reversioners.*

A sonless Awan proprietor of the Fatehjang Tahsil is, not by custom, entitled to bequeath his property to the prejudice of his reversioners. P. SHER ZAMAN *v.* KARAM BAKHSH **806**

——— ——— *by father of ancestral property, ratification of—Sons, if bound*—Mala fides—*Civil Procedure Code (Act V of 1908), s. 11—"Claiming under," meaning of—Daughter's daughter's or son's marriage by widow—Legal necessity—Appeal—Court Fees Act (VII of 1870), s. 7 (iv), Sch. I, Art. 1.*

In a case in which the whole subject-matter of the suit is also the subject-matter of appeal, the amount or value of the subject-matter of appeal is nothing more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain.

A more remote reversioner is not bound by a ratification made by a nearer reversioner which is demonstrably improper and when *mala fides* on the part of the nearer reversioner is established, the next reversioner will not be bound even by a decree.

CUSTOM—contd.

Under the Customary Law a son has a right in his ancestral property independently of his father and has thus an independent right of suit with regard to the ancestral property and cannot be said to be "claiming under" his father within the meaning of section 11 of the Civil Procedure Code, 1908, and is not bound by anything done by his father with regard to such property.

The expenses incurred by a widow for the marriage of a daughter's daughter and a daughter's son out of her husband's property are not for valid necessity under the Customary Law of the Punjab. P. SOHAN LAL *v.* SARDAR KHAN, 16 P. W. R. 1916 **121**

———ALIENATION *by father—Succession—Hindu Law—Mitakshara—Adoption of custom in some matters, effect of—Ancestral property—Property acquired as income of ancestral property—Presumption—Right to succeed with father in estate of grandfather—Special custom, proof of.*

The *Aroras* of *Mauza* Vidor, Dera Ghazi Khan District, are generally governed by Hindu Law, but they have adopted the rule observed by their agricultural neighbours which gives a father the ordinary estate for life enjoyed by an agricultural proprietor in the Province, but it is not proved that they have still further departed from Hindu Law by adopting any other agricultural custom or ideas and in particular it is not proved that a father has the power to disinherit any of his sons in respect of ancestral property.

Property acquired from the income of ancestral property is ancestral property according to Hindu Law

Where a Hindu governed by the Mitakshara system is found in possession of immoveable property, of which a part is ancestral, the presumption is that the other part is either ancestral property or was acquired from the proceeds of the ancestral property in his possession.

Among *Aroras* of *Mauza* Vidor a claim by a grandson to succeed to a share in the property of his grandfather along with his father is untenable. P. BUDHU RAM *v.* MUHAMMAD DIN, 196 P. L. R. 1915; 86 P. R. 1915; 165 P. W. R. 1915 **315**

——— ——— *Property inherited by adopted son from adoptive father, whether ancestral—Ancestral property, what is*—Status *of son of adopted son to challenge alienation—Custom, how established.*

A property which is ancestral in the hands of an adoptor does not become ancestral *qua* the adoptee and a son of the latter cannot challenge his disposal of it.

Ancestral property is that which has descended to the holder from a male ancestor.

Custom cannot be extended by logical process; it must be established inductively, not deductively; in the absence of any authoritative statement of the custom, it can be established only by instances, and not by *a priori* methods. P. AMIN CHAND *v.* BUJHA, 107 P. R. 1915 **29**

——— ——— *—Collaterals, remote, suit by, for declaration, when maintainable.*

The proper person to object to an alienation is the nearest reversionary heir, but if that person

omits without sufficient cause to protect the estate, the remoter reversioners can take action.

Where, therefore, the collaterals of a vendor sued within one year after the sale effected by him for a declaration that the sale should not affect their reversionary rights or in default of being able to obtain such a declaration, claimed a decree for pre-emption, and there was a nearer collateral of the vendor who took no steps to protect the estate but subsequently brought a suit for pre-emption:

*Held*, that the plaintiffs as remote reversioners could under the circumstances maintain the suit for declaration. P. BAHADUR SINGH *v.* BHAGEL SINGH, 104 P. R. 1915 **11**

——SUCCESSION—Bhatti Rajputs *of* Mauza *Kum*, Tahsil *Pind Dadan Khan—Assent of father to mutation, when binding on son.*

In matters of succession, *Bhatti Rajputs* of *Mauza* Kum, Tahsil Pind Dadan Khan, are governed by agricultural custom and not by Muhammadan Law.

Where in a suit for declaration that a certain mutation shall not affect the plaintiff's reversionary rights, it appeared that the plaintiff's father gave his assent to the mutation not because the parties had been observing Muhammadan Law in the past, but because he wished it to be followed in the future:

*Held*, that his assent could not be held to be a *bona fide* assent so as to be binding upon the other members of the family. P. *Musammat* JANNAT *v.* ABDULLA, 4 P. R. 1916; 25 P. W. R. 1916 **817**

——*Hindu Law*—Kapur Khatris *of Hafizabad —Succession, if governed by custom—Daughters, right of, to succeed.*

In a suit against the widow and daughters of a deceased member of a big landowning *Kapur Khatri* family of Hafizabad for a declaration that the plaintiff was the reversionary heir of the deceased, the question arose as to whether such family was governed by custom or by Hindu Law:

*Held*, (1) that the family, being exogamous and being for generations past intimately connected with *zemindari* work, could not be taken to be governed by Hindu Law;

(2) that in the absence of *wajib-ul-araiz* and *riwaj-i-ams* limiting the collaterals' preferential rights merely to ancestral property, a daughter in the family had, according to custom, no right to succeed *as an heir* to either the ancestral or the self-acquired immoveable property of her deceased father. P. RUKMAN *v.* SAIN DAS, 19 P. W. R. 1916 **875**

——*Self-acquired property, gift of, to daughter*—Akali Nihangs *of Tarn Taran—Proof.*

Where a property has not been proved to be ancestral, a gift by an *Akali Nihang* of his self-acquired property to his daughter is valid.

Custom cannot be proved established or extended by logical process, it can be proved only by instances. P. PALA SINGA *v.* LACHHMI, 105 P. R. 1915 **16**

——Tribal custom—Daughters, exclusion of, from inheritance—Custom as regards family in question to be proved—Court, discretion of **734**

——*Village proprietary body, rights of—Village, nature of—Mortgage—Redemption.*



A mortgagor who was a member of a village proprietary body died leaving no direct heir of his own. The plaintiffs who were of the same tribe and *got* as the mortgagor sued as members of the village proprietary body to redeem lands belonging to the mortgagor. The village was, however, found to be homogeneous and did not consist of a number of proprietors of different tribes, religions and castes. The mortgagees though distantly related to the mortgagor were not proprietors in the village:

*Held*, that the mortgagees had no right to succeed and that the plaintiffs were entitled to redeem. P. BUDHIE SINGH *v.* MOHAN SINGH, 40 P.W. R. 1916 **768**

CYPRES. *See* TRUST.

DAMAGES—Abuse of process of Court—Interlocutory application in a suit, effect of—Suit for damages, maintainability of—Application for attachment before judgment, whether gives rise to damages **448**

——Marine Insurance—"Covering note", how far contract for sea insurance—Insurers, liability of—Loss of goods on return journey—Trading custom **540**

DAMDUPAT, rule of **231**

DANCING GIRL, adoption by. *See* HINDU LAW.

DEBT. *See* HINDU LAW.

DEBTOR & CREDITOR **965**

——Debtor unable to pay on account of creditor's act, effect of—Interest for such period, if recoverable—Penal interest, relief against—Court, power of **536**

——Transfer with intent to defeat or delay creditors—Preference of one creditor over another, when valid—Bankruptcy, consideration of—Conveyance, when valid **343**

DECLARATION, suit for, maintainability of—Relief, vague, based on allegations outside pleadings—Court, power of **365**

DECLARATORY SUIT. *See* SPECIFIC RELIEF ACT S. 4 ; SUIT.

——*Digwari* tenure—Civil Court, jurisdiction of, to reinstate a *ghatwal* dismissed **437**

——*Suit to declare that property attached is judgment-debtor's, maintainability of—Vizagapatam Agency Rules—Appeal, right of—Inherent power—Civil Procedure Code (Act V of 1908), O. XXI, r. 63.*

Under the law prevailing in the Vizagapatam Agency a suit will not lie for a declaration that a certain property in respect of which a claim petition has been allowed, is the property of the judgment-debtor

*Obiter dicta.*—Where a question is raised whether one of the items attached by the Court does in fact belong to the judgment-debtor, the parties have in justice and equity a right to get this question determined even in the absence of express rules providing for claim petitions.

There is no inherent right of appeal where the Statute does not create one.

*Quære.*—Whether there is a Common Law right vested in every subject to have his title, which is in dispute, declared? M. MAHARAJA OF JEYPORE *v.* HARI KRISHNA PATRO, 29 M. L. J. 730 **226**

DECREE—*Attachment — Objections*—Res judicata—*Limitation to contest order on objection—Party neglecting to contest within time, effect of.*

A decree for a sum of money with lien on mortgaged property by attachment and sale is not a decree under the Transfer of Property Act or under Order XXXIV of the Civil Procedure Code, 1908, and the decree-holder in such a case can ask for the attachment of the mortgaged property and objections to attachment can also be made.

A decision *inter partes* as to the non-liability of certain property to attachment in execution of a decree against a mortgagor bars further attachment of the same property in another decree against the same mortgagor.

An executing Court has to decide an objection to an attachment although the value of the property might greatly exceed the value of the decree.

An order passed on an objection to an attachment if not contested by regular suit within the year, becomes final and a party who is dissatisfied with the order but neglects to contest it by regular suit within the year, cannot evade it by the simple device of getting another decree and making a fresh attachment. P. KAHAN DEVI *v.* NIHAL DEVI, 101 P. R. 1915 **43**

———, *date of—Execution, erroneous order for, when binding upon judgment-debtor—Notice, proper service of—Amendment of barred decree—Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (4).*

A decree has to bear the same date as that of the order making it, and not the date on which it is signed by the Court.

An erroneous order for execution of a decree passed after notice to the judgment-debtor cannot, although unreversed, be treated as valid against him where the service of the notice has not been made in accordance with law and there is nothing to show that the judgment-debtor became aware of the execution proceeding.

A service of a notice by affixing a copy on the entrance door of the house of a judgment-debtor without making a diligent search for him is not a service in accordance with law.

An amendment of a decree after its execution has been barred by limitation, cannot give a fresh start to limitation from the date of the amendment under Article 182, clause (4), of the First Schedule of the Limitation Act, 1908. C. ANANDRAM *v.* NITYANANDA BARHAM **744**

——— Ex parte *decree—Decree-holder auction-purchaser, purchaser from—Plea of* bona fide *purchase for value, raising of—Consent decree obtained by forging name of judgment-debtor in* solenamah, *effect of—Fraudulent consent decree, whether requires to be set aside—Consent decree, value of—Evidence Act (I of 1872), s. 44.*

A purchaser from a decree-holder auction-purchaser in execution of an *ex parte* decree cannot avail himself of the plea of *bona fide* purchase for value.

In a suit for the recovery of possession of a property on declaration of plaintiff's right as auction-purchaser in execution of a rent decree, it was found that in execution of a mortgage-decree by consent on a *solenamah* executed by the mortgagors and the mortgagee the same property was purchased by the mortgagee-decree-holder and sold to the

DECREE—concld.

defendant No. 1, and the plaintiff though made a party to the mortgage suit was no party to the decree by consent but his name was forged in the *solenamah*:

*Held*, that the plaintiff was in a stronger position than a mere *ex parte* judgment-debtor and the defendant No. 1 could not resist his title on the plea of *bona fide* purchase for value but must look to his fraudulent vendor for compensation.

*Held*, also, that the plaintiff being no party to the consent decree could attack it in his suit by virtue of section 44 of the Evidence Act and did not require to have it set aside.

*Held*, further, that the consent decree against the plaintiff was a nullity and did not require to be set aside, as it would if there were an *ex parte* decree against him after making him a party.

A consent decree differs from a decree of Court in this, that no one is a party to the decree who has not willingly contracted to govern himself by the decree if *sui juris* and if he is not, the Court must have declared the decree contracted for him by his guardian to be for his benefit. C. ABDUL HAKIM GAZI *v.* PANCHI DASI **849**

———, *interpretation of—Charge or mortgage—Limitation Act (IX of 1908), Sch. I, Arts. 136, 144, 148.*

Where a decree directed that *A* should obtain possession of the house in suit from *B* if he paid *B* a certain sum and subsequently *A* sold such interests as he had in the house to *C*, and after that *C* brought a suit against *B*, who was never paid and thus retained possession of the house, for possession on payment of the said sum:

*Held*, that the decree did not create a mortgage or a charge and that the suit was governed by Article 136, and not by Article 144 or 148, Schedule I, of the Limitation Act. O. RAGHUNATH PRASAD *v. Musammat* KETKI, 2 O. L. J. 500 **353**

——— Preliminary decree, when decisions on certain issues—Test **866**

DEED, construction of **468**

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 72, *applicability of—'Person,' meaning of—Cause of action—Agriculturist, bond executed by—Suit for recovery on bond—Limitation.*

The word 'person' in section 72 of the Dekkhan Agriculturists' Relief Act is equivalent to the word 'defendant' which occurs in section 3, clause (*w*), of the Act.

The words 'cause of action' in section 72 of the Act refer to the whole bundle of material facts which it is incumbent upon a plaintiff to prove in order to establish his case.

The defendant's father executed a registered bond on the 18th June 1900 when the defendant was not born. The plaintiff sued for recovery on the bond in 1912. The defendant resisted the suit as barred by limitation on the ground that he not having been born when the cause of action arose was not an agriculturist:

*Held*, that the suit fell under section 72 of the Dekkhan Agriculturists' Relief Act and was not barred by limitation. B. PIRAPPA MALKAPPA *v.* ANNAJI APPAJI, 17 BOM. L. R. 974; 40 B. 189 **495**

DIGWARI TENURE—*Ghat Bharra—Ghatwal, position of—Civil Court, jurisdiction of, to reinstate a* Ghatwal *dismissed—Declaratory suit, maintainability of—Specific Relief Act (I of 1877), s. 42—Arguments from analogy, when to be made—Object or motive of party—Presumption—Plaint—Relief.*

A Civil Court has no jurisdiction to reinstate a Ghatwal who has been dismissed by the Executive Government as unfit for the discharge of his duties. But where a Commissioner decides against a claimant not in the exercise of his discretion, but upon an erroneous view of the relative title of his contestant, a Civil Court is competent to grant to the claimant relief by way of a declaratory decree under section 42 of the Specific Relief Act, so that he may approach the Executive Government and seek their decision on the question of the appointment of a successor to the office of Digwar.

If a bill (plaint) contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert the specific relief prayed and, under the general prayer, ask specific relief of another description, unless the facts and circumstances charged by the bill will consistently with the rules of the Court maintain that relief.

Per *Jenkins, C. J.*—At Ghat Bharra the Digwari position is that of an office remunerated by the enjoyment of land and on the death of a Digwar holding office there is a general usage to appoint his heir in his place as the successor to his office but his claim and tenure of office are dependent on the approval of the Government.

Per *Mookerjee, J.*—An argument from analogy may arise where a principle of law is involved, but where Courts are dealing with the positive enactment of a Statute, reasons founded upon analogy are scarcely applicable.

A Civil Court is not concerned with the object or motive of a party who comes into Court in assertion of his alleged right and he should not be refused declaration merely because he seeks it with a view to influence the opinion of the Revenue Authorities, unless the declaration sought can be based only on the investigation of a question which is by Statute or otherwise expressly excluded from the cognizance of the Civil Court.

The Digwars of Ghat Bharra always enjoyed certain lands attached to it and when a person was dismissed from the office of Digwar he was forthwith deprived of the lands. When dismissed, the Digwar was at liberty to appeal from the decision of the Magistrate to the superior authorities:

*Held*, that under the circumstances the presumption was that there was not a grant of lands burdened with a certain service but the grant of an office the performance of whose duties was remunerated by the use of lands.

*Held*, further, that the office was not hereditary in the sense that the heir of the last holder was entitled as a matter of right to discharge the duties of the office and to remunerate himself from the usufruct of the lands attached thereto. C. HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY, 22 C. L. J. 419; 20 C. W. N. 446 437

DIRECTOR. *See* COMPANY.

DIVORCE. *See* MUHAMMADAN LAW.

EASEMENTS ACT (V OF 1882), SS. 52 TO 64 346

EJECTMENT. *See* AGRA TENANCY ACT, S. 58; BENGAL TENANCY ACT, S. 49, CL. (6).

——— for arrears of rent—Possession, effect of—Agra Tenancy Act, s. 11. 386

——— Agra Tenancy Act (II of 1901), ss. 60, 61—Decree for arrears of rent—Fifteen days' notice not given—Gross and palpable error of law—Revision 755

——— Number of plots incorrect—Clerical error—Amendment 512

———, suit for, by four out of five brothers—One brother absent abroad—Agent—Presumption—781

———, suit for—Erection of buildings on *waqf* property 558

ENDOWMENT. *See* TRUST.

ENHANCEMENT OF RENT. *See* AGRA TENANCY ACT, s. 43; OUDH RENT ACT, s. 33.

EQUITY. *See* CONTRACT.

ESTOPPEL. *See* EVIDENCE ACT, s. 114.

——— Acquiescence—Unregistered deed of exchange 5

—— Judgment-debtor — Decree — Correctness of amount claimed in execution, acknowledgment of 754

—— Minor, contract by, if binding by means of estoppel 388

—— *Non-transferable occupancy holding, sale of, in execution of money decree without objection of tenant—Co-sharer landlord—Purchaser of co-sharer landlord's interest—Civil Procedure Code (Act V of 1908), s. 47—Landlord and Tenant Procedure Act (VIII of 1869, B. C.), s. 27—Limitation, special, applicability of.*

Where the proprietors of a share in a *mauza* held a non-transferable occupancy holding within it and in execution of a money decree against them, the holding was sold without any objection on their part to its saleability in the execution proceedings:

*Held*, that a purchaser of the proprietary share of these proprietors was estopped from objecting to the sale on the ground that the holding was not saleable by the custom of the locality, inasmuch as his vendors having opportunities of taking the said objection in the execution proceedings did not do so.

Section 27 of the Bengal Act VIII of 1869 applies only to a case where dispossession of the tenant has been made by the whole body of the landlords. C. RAMU PAL *v.* PRAKASH CHANDRA 757

—— against pleading—Want of jurisdiction 629

—— *Sir*, sale of—Land ceasing to be *sir*—Land recorded as *sir*—Co-sharer, no objection by—Co-sharer becoming tenant—Estoppel 387

EVIDENCE—Agreement to pay full rent reserved in *kabuliat* on expiry of its term, during which large portion of rent to be kept in *hajat*, effect of—Evidence that rent was never realised at rate stipulated for in lease, value of—Instalments for payment of rent numerous, whether contrary to usage—Agreement to accept reduced rent, consideration for—Evidence that stipulated instalments were never enforced, value of **185**

———Books of account, how proved **454**

———, consideration of, in criminal cases—Presumption of innocence—Burden of proof **137**

———Contract—Terms uncertain—Earnest money, payment of, whether conclusive evidence of completion of contract **53**

———Conviction both for forging document and for using it as genuine, whether illegal—Entries in account books proved to be in handwriting of deceased person—Books not proved to be kept in regular course of business—Objection as to admissibility, when to be taken **665**

———*Credit of witnesses—Witnesses interested in result of suit, testimony of, worth of—Minor, major defendant described in plaint as, effect of—Guardian* ad litem*—Representation, if proper—Notice not served upon minor prior to appointment of guardian* ad litem, *effect of—Proceedings, subsequent, validity of—Decrees, if binding on minor—Civil Procedure Code (Act V of* 1908), *O. XXXII, r.* 3 (4)*—Hindu Law—Joint trading family—Debts contracted by managing member, when binding on whole family—Creditor, duty of—Limitation Act (IX of* 1908), *s.* 5*—Extension of period of limitation—Decision of first Appellate Court on technical point set aside in second appeal—Merits, trial on—Second Appellate Court, election of.*

The mere fact that a party's witnesses upon a certain point are his relations or are in some way connected with him, and are thus more or less interested in the result of the suit, is no ground for disbelieving them, when the point is such as can reasonably be expected to be reliably established only by their testimony.

If a defendant is of full age at the time that he is sued, but is described in the plaint as a minor, and a guardian *ad litem* is appointed for him, he is not properly represented in the suit by such guardian. Nor is a minor defendant so represented in a case where no notice has ever been served upon him prior to the date of the order by which his guardian is appointed, for the language of Order XXXII, rule 3 (4), Civil Procedure Code, is peremptory and requires a very strict construction. And, in such cases, the subsequent proceedings are invalid so far as the minor is concerned, so that he is not bound by the decrees obtained against him under such circumstances.

Debts contracted by a managing member of a joint Hindu family are binding on the other members *only when they are for a family purpose*. But where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes and the creditor is not bound to inquire into the purpose of the debts in order to bind the whole family thereby, because that power is necessary for the very existence of the family.

EVIDENCE—concld.

Two suits of different valuations filed in a Subordinate Judge's Court were disposed of in one judgment. In the smaller of them the appeal lay to the District Judge's Court, and in the other to the Judicial Commissioner's Court direct. The appellant applied for a copy of judgment and decree. When he got the copy he found out that that decree related to the suit in which the appeal lay to the Judicial Commissioner' Court. The result was that by the time that an appeal was filed in the District Judge's Court, its period of limitation had already expired, and the District Judge, therefore, dismissed it as time-barred:

*Held*, that under the above circumstances the provisions of section 5 of the Limitation Act were applicable and that the appeal ought not to have been dismissed as time barred.

Where a first Appellate Court decides a first appeal only on a technical point, for example, on a point of limitation, and in second appeal the second Appellate Court sets aside that decision, it may itself, if proper, dispose of the case on the merits instead of sending it back to the first Appellate Court for that purpose. O. Ghanshyam Das *v.* Hardei, 2 O. L. J. 562 **380**

———Deed dealing with moveables and immoveables, admissibility of, to prove partition of moveables- Intention of parties **486**

——— Examination of accused person as witness, legality of—Evidence of such accused, admissibility of **130**

——— Good faith, evidence of **616**

———Judgment and evidence in criminal trial, whether admissible in civil suit—Admission to Police Officer in criminal trial, whether admissible **18**

——— Secondary evidence of document given at trial—Appellate Court, whether can admit document itself **711**

——— Statements in other cases, admissibility of—Admission of adoption by widow in favour of daughter's son, effect of—Admission of adoption by illiterate person, weight of **312**

EVIDENCE ACT (I of 1872). Ss. 17, 18, 21 **18**

——— Ss. 24, 27—*Information given by accused to Police officer on threat, admissibility of—Confession retracted, disagreeing with other evidence in case, effect of.*

The fact that a Police officer got by means of a threat an information from a prisoner as to a circumstance incriminating the latter, does not render that information inadmissible in evidence.

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. O. Emperor *v.* Tilak, 2 O. L. J. 468; 17 Cr. L. J. 33 **321**

——— S. 27 **321**

——— S. 27—*Confession—Pointing out of* dhatura *tree by accused to Police—Statement, if admissible.*

In a Police investigation of a case under section 328, Indian Penal Code, the accused said to the

EVIDENCE ACT—contd.

*Darogha* "I gave seed of *dhatura*." On being asked from where the seed came, the accused pointed out to the officer a *dhatura* tree.

*Held*, that the statement was inadmissible in evidence. A. EMPEROR *v.* PANCHU, 13 A. L. J. 1077; 17 CR. L. J. 8 136

——S. 33 18

——S. 34 794

——S. 35—Revenue Records, admissibility in evidence of 548

——S. 42 18

——S. 44 849

——S. 65 774

——S. 65 (c)—*Secondary evidence—Loss of document—Duty of Court in admitting secondary evidence.*

A Court should be very stict, before admitting secondary evidence, in insisting on strict proof on the loss of a document like a mortgage-deed or a special power-of-attorney authorising the creation of a mortgage. A. JASPAT RAI *v.* DEVI DAYAL 399

——S. 69—*Proof of mortgage bond—Finding by first Court—Document "legally proved"—Appellate Court, whether should interfere.*

A Court of first instance that records the evidence in a case is in the best position to say what a witness means, and when it comes to a finding as to a document having been "legally proved" within the meaning of section 69 of the Evidence Act, an Appellate Court should be very slow to interfere with the finding especially when no objection has been taken to its admissibility at the time of the hearing. M. MANCHUKONDA APPADU *v.* ATCHI APPALASWAMY 760

——S. 85—Registration of special power-of-attorney, if necessary 395

——S. 90 794

——S. 92—"Collateral", meaning of—Plaint not properly framed—Points at issue well known to parties—Court, whether can grant relief 941

——S. 92—*Contract to pay rent at fixed rate—Oral evidence, whether admissible to prove variation of contract—Payment for long time of smaller sum, whether entitles tenant to pay that rate always—Agreement to accept lower rate for particular period, effect of.*

Where the rent payable by a tenant is fixed by a *muchilika* properly executed, it is not open to the tenant to let in oral evidence to prove that the contract has been varied.

Payment for a long time of a smaller rent than that agreed upon does not give the tenant a right for all time to come, to compel the landlord to receive only that rent.

A communication from the landlord to the tenant to the effect that the reduction hitherto made in the rent will not be granted after the date of that letter is a mere agreement to discharge the tenant from liability to pay the contract rate for a particular period and to accept in lieu thereof a smaller sum. No consideration is necessary for this remission; and it does not offend against section 92 of the Evidence Act. M. MAHARAJA OF BOBBILI *v.* RANKU APPALA NAIDU, (1916) M. W. N. 749 703

EVIDENCE ACT—contd.

——S. 92—*Endorsement on promissory note—Pesumption—Consideration—Oral evidence, whether admissible to prove contract between parties.*

The law will raise a presumption that, as between an endorser and an endorsee of a promissory note, the endorsement is for the consideration recited in the note, but that presumption will not make it "a contract in writing" within the meaning of section 92 of the Indian Evidence Act, so as to exclude oral evidence to prove what the consideration for the endorsement really was. M. AYYATHURAI AYYAR *v.* SIVARAMA PATTAR KARIKAR 233

——S. 92—Evidence that rent was always paid at lower rate than that stipulated in lease, admissibility of 251

——S. 92—*Written agreement—Addition of new terms, if permitted—Transfer of Property Act (IV of 1882), s. 40.*

Criminal proceedings between the parties were compounded on certain terms arranged between them and set forth in great detail and with much care and elaboration in a written agreement. The agreement contained no reference to the subject-matter of the suit which the plaintiff subsequently instituted, alleging in the plaint that the said subject-matter formed part of the consideration for the compromise in the criminal proceedings:

*Held*, that in putting forward the case as alleged in the plaint, the plaintiff was attempting to add a new term to the written agreement which settled the terms of the compromise, and that, therefore, under the provisions of section 92 of the Indian Evidence Act, the plaintiff could not be permitted to do so. B. JAGJIVAN MULJI *v.* NATHJI JAGESWAR, 18 BOM. L. R. 90 938

——S. 94—Misdescription and mutual mistake—Oral evidence, admissibility of 174

——S. 105 641

——S. 114 684

——S. 114 (*b*) 843

——S. 114—*Circumstantial evidence—Proof—Prosecution, duty of.*

In criminal cases, as a rule, it is for the prosecution to prove their case and an accused person should not be convicted merely because he has told lies in his defence. In cases of circumstantial evidence, however, where facts are put forward on behalf of the prosecution which unless explained justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts which the accused puts forward in his defence. A. ABDUL AZIZ *v.* EMPEROR, 17 CR. L. J. 23 151

——S. 114—Compromise between widow and next reversioner, whether binding on later reversioners—Party accepting conveyance from legatee, whether can contest Will—Estoppel by conduct 50

——S. 114—*Money due on bond, suit for—Bond lost—Payment pleaded—Burden of proof.*

Where a plaintiff sues for money due upon a bond but alleges its loss, and the defendant admits its execution but pleads payment, the onus lies on the defendant to prove payment either by the production

EVIDENCE ACT—concld.

of the bond or by other evidence or both. And if the defendant does not produce the bond, the question of its loss is only material in so far as it may raise a presumption one way or the other under section 114 of the Evidence Act. O. JAGAN NATH *v.* KAMTA SINGH, 2 O. L. J. 498 **349**

——— S. 114, *ill.* (a)—*Presumption—Possession of stolen property.*

Where a thief got into a house by house-breaking and the stolen property was found in his possession, he may be presumed not only to have committed the theft but also house-breaking. L. B. HUSEIN *v.* EMPEROR, 17 CR. L. J. 32 **160**

——— S. 115—*Minor—Estoppel - Contract by minor, if binding by means of estoppel—Contract Act (IX of* 1872), *s.* 11.

No question of estoppel arises where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.

The law of estoppel must be read subject to other laws such as the Indian Contract Act.

Therefore, a minor cannot be made liable upon a contract by means of an estoppel under section 115 of the Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract. C. GOLAM ABDIN *v.* HEM CHANDRA, 20 C. W. N. 418 **388**

——— S. 145 **267**

——— S. 145—Discrepancies in witness's present and previous statements—Court, duty of—Ancestral property—Collateral succession, whether rule of survivorship applicable in cases of—Judgment, value of—Authority. **291**

EXCISE ACT (XII OF 1896), S. 51—*Possession of over* 4 *quarts of* tari.

Where an accused had affixed ten receiving pots to his two toddy trees the previous night and the Excise Officer early next morning found that these pots contained over four quarts of *tari* allowable under the Excise Act:

*Held*, that the accused was in possession of the *tari* and was rightly convicted under section 57 of the Excise Act. L. B. EMPEROR *v.* NGA AW, 16 CR. L. J 670; 8 BUR. L. T. 286 **654**

EXECUTION OF DECREE—Application for execution of a foreign decree, when allowed—Competency of foreign Court's jurisdiction, how determined—Voluntary submission, effect of **597**

———Application for execution by transferee of decree—Transferee, what must prove—*Benamidar* transferee, whether entitled to execute **952**

——— *Application returned for amendment but not re-presented—Step-in-aid of execution.*

An execution application which is presented but returned for amendment and is not re-presented within the time limited, is sufficient to save limitation so far as a subsequent application is concerned. M. NARAYANASWAMI NAIDU GARU *v.* KROVIDI GANTAYYA, (1915) M. W. N. 865. **691**

——— *Application for substitution of name—Decree, validity of, if can be impeached.*

Where an application was made for the substitution of the petitioner's name in place of the decree-holder with a view to the execution of the decree:

EXECUTION OF DECREE—contd.

*Held*, that the question of the validity of the decree did not arise in such a proceeding. L. B. MAHOMED HADY *v.* JOAKIM, 8 BUR. L. T. 216 **492**

———Arrest in execution, order deciding legality of—Appeal—Application to set aside *ex parte* decree—Order giving time for payment, whether operates as stay of execution **731**

——— *Assignment of mortgage decree fraudulently, effect of—Sale in execution—Assignee, whether obtains good title—Insolvency of judgment-debtor—Official Assignee, if necessary party.*

Where, in a suit to recover certain property on the strength of the plaintiff having purchased it from the Official Assignee in execution of a money-decree against the insolvent, it appeared that the defendant purported to have purchased the same property sometime before in execution of a mortgage-decree which had been fraudulently and collusively assigned to him without consideration:

*Held*, (1) that the purchase of the defendant was not a *bona fide* one and gave him no title to the property.

(2) that the judgment-debtor having been adjudicated an insolvent and all his property having vested in the Official Assignee before the sale to the defendant, the Official Assignee was a necessary party to all proceedings affecting that property, and a sale held without his being brought on the record was not binding and did not convey any title. M. DEVARAJA AIYANGAR *v.* TIRUMALASAMI NAIDU **489**

———Attachment, effect of, from which date **276**

——— Auction sale in execution—Failure of purchaser to deposit—Re-sale—Defaulting purchaser, when liable for loss. **907**

——— *Auction sale set aside—Auction-purchasers, several—Some appealing against order setting aside sale, effect of, as regards auction-purchasers not appealing.*

When on an appeal preferred by one of the auction-purchasers at an execution sale, an Appellate Court reverses the order of the first Court setting aside the sale, the order of the first Court does not stand good even against the other auction-purchasers who did not appeal. C. TULSI RAUT *v.* NABI BUX **193**

——— Compromise—Instalments—Decree—Default in payment of instalments—Decree-holder, remedy of—Execution of decree **693**

——— *Court, power of—Decree absolute—Premia paid by decree-holder on account of insurance of mortgaged property subsequent to decree, whether recoverable in execution—Judgment-debtor, position of—Objections in execution department*—Res judicata—*Estoppel.*

No addition can be made by a Court executing a decree beyond such as the decree directs, other than the costs arising out of the execution proceeding.

Thus, in mortgage suits, a decree absolute determines the amount which is recoverable from the mortgaged property and no execution can be granted for any sum not covered by the decree or incidental to its execution.

EXECUTION OF DECREE—contd.

Where, therefore, a decree-holder claimed to add certain premia paid by him on account of the insurance of the mortgaged property against fire subsequent to the date of the decree obtained by him on his mortgage, but the decree did not contain any authority for adding such premia, although the mortgage-deed empowered him to insure the mortgaged property against fire and to add the premia paid by him to the mortgage-money:

*Held*, that the decree-holder could not recover the premia claimed by him.

A judgment-debtor who puts forward objections in the execution department is not always bound to put forward all possible objections once and for all. If he omits any, the matters which he omits and which were never raised or decided cannot always be treated as *res judicata* against him.

Where a judgment-debtor acknowledged the correctness of the amount claimed in execution on previous occasions but objected to the same amount being claimed in subsequent execution proceedings:

*Held*, that the judgment-debtor was not estopped by his previous acknowledgment unless it was shown that he had knowledge of the details of the amount previously claimed. O. DELHI AND LONDON BANK, LTD. *v.* RAM RATAN, 2 O. L. J. 611 **754**

——*Decree awarding personal remedy in case sale-proceeds of mortgaged property do not suffice—Interpretation of decree—Execution Court, duty of—Jurisdiction.*

In a suit on a mortgage a Court passed an order for a preliminary decree and decided *inter alia* that in case sale of the property mortgaged should not suffice to liquidate the decretal debt with costs and interest the defendants should be held personally liable for any deficiency. The decree drawn up however, contained the words "shall be at liberty to apply for a personal decree":

*Held*, that the words in the decree must be interpreted in conformity with the judgment to mean "shall be at liberty to apply for execution of the decree against the defendants personally", and that the Court on the execution side had no power to go into the question whether the defendant was personally liable or not but was bound to execute the decree as it stood. P. MADHOO MAL *v.* MUHAMMAD ZAKARIA **820**

——Decree, date of—Execution, erroneous order for, when binding upon judgment-debtor—Notice, proper service of—Amendment of barred decree—Limitatian Act (IX of 1908), Sch. I, Art. 182, cl. (4). **744**

——Decree granting permanent injunction—Power of Court to enforce obedience by punishment—Detention in prison after removal of obstruction, whether lawful **698**

——Decree—Payment out of Court, not certified—Court, power of, to take evidence as to such payments—Execution application, statement as to payment in, if can be relied on—Practice **590**

——*Limitation Act (IX of 1908), Sch. I, Art. 181—Fresh application—Question of substance and not of form—Simple question of fact.*

The question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a simple question of fact and is also a question of substance and not of form. A. SANT LAL *v.* SRI NEWAS DAS **1005**

EXECUTION OF DECREE—concld.

——Order in execution passed by Small Cause Court, whether appealable—Revision—*Batta* memorandum, whether a step-in-aid of execution **484**

——*Pendency of appeal, if gives right to defer execution—Application for execution, prevention of—Fraud—Suspension of execution.*

The mere pendency of an appeal from a decision which has removed all obstacles from a decree-holder's way to execute his decree, cannot give him a right to defer execution for an indefinite period.

Where there is no intervention of fraud or force which prevented the consideration of a previous application for execution, there is no suspension of execution. C. KARTIC CHANDRA MONDAL *v.* NILMANI MONDAL, 20 C. W. N. 686 **931**

——Preliminary mortgage-decree for sale—Transferee, whether can apply for execution—Procedure **981**

——Sale in execution of a decree—Irregularity in proclamation, whether enough for setting aside sale—Applicant, what must prove **990**

——Sale in execution—Property also under attachment in execution of superior Court's decree—Purchaser not in fault—Sale, whether can be impeached—Irregularities, how corrected **927**

——Sale in execution of prior mortgagee's decree against mortgagor alone—Purchaser of mortgage property, position of—Suit by puisne mortgagee against both mortgagor and prior mortgagee—Puisne mortgagee, right of, to bring equity of redemption to sale—Auction-sale of mortgaged property pending another suit regarding same, effect of **359**

——*Sale in execution set aside—Re-sale—Part of decree barred, if realizable—Limitation.*

The execution of a decree cannot be barred by limitation in part.

In execution of a decree for money, only a portion of the decretal amount was realised by the sale of the judgment-debtor's property. But on the sale having been subsequently set aside, the decree-holder applied for the re-sale of the property:

*Held*, that he could by the re-sale realise not only the sum which was the price obtained at the sale which was set aside, but also the balance of his decree, though an application to execute it for the balance would have been barred by limitation. C. KRISHNA PROSAD SINGH *v.* MATI CHAND **699**

——Sale of mortgaged property—Subsequent attachment of sale-proceeds by puisne mortgagee, effect of—Attachment before judgment by simple creditor—No application for execution prior to realisation—Simple creditor, whether entitled to rateable distribution **944**

EXECUTION PETITION—Return for amendment—No representation—Step-in-aid **816**

EXECUTION PROCEEDING Delivery in execution of decree, question as to—Defendant against whom no relief granted, if a party—Civil Procedure Code (Act XIV of 1882), s. 244 **769**

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EXECUTION PROCEEDING—concld.

———, question to be left to be decided in 862

EXECUTION SALE, setting aside of, if permissible without application, oral or written—Civil Procedure Code (Act XIV of 1882), s. 310A 783

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EXECUTORS AND ADMINISTRATORS, accounts required to be filed by Court, power of, to inquire into—Legatee, right of, to inspection of accounts—Remedy, where inspection denied or result unsatisfactory—Executor, when becomes trustee 554

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FOREIGNERS ORDINANCE, 1914, Ss. 3, 8—*Delegation of power of Governor-General in Council to Local Government—Notification of Local Government regulating liberty of foreigners, whether* ultra vires—*Change of residence, meaning of.*

Where the Governor-General in Council has delegated his powers under section 3 of the Foreigners Ordinance to a Local Government, a notification of that Local Government compelling foreigners residing or being in British India to notify their change of residence is not *ultra vires.*

Change of residence implies something of a more definite character than a mere casual journey involving a couple of nights spent away from home. M. *In re* CHARLES GEORGE HEDINGER, 17 Cr. L. J. 67 659

———S. 8 659

FORGERY. *See* PENAL CODE, s. 463.

FRAUD. *See* EXECUTION OF DECREE.

——*Fraudulent transfer—Object of fraud accomplished—Transferor, whether can recover—Defrauded party recovering his share, effect of.*

Where a transfer of property is fraudulently sought to be effected but the object of the fraud is not accomplished either wholly or partially, then the person in whose hands the property is, is liable to give up the property to the transferor who effected the fraud, but not otherwise.

The plaintiff effected a sale of a half share of certain lands which included his own share and that of his brother. At the time of partition between the plaintiff and his brother the share of the property sold was excluded and the plaintiff's brother was thus deprived of his share. He, however, recovered his share subsequently by a suit on discovering this fact. The plaintiff then brought this suit to recover his share from the vendee on the same state of facts:

FRAUD—concld.

*Held*, (1) that the object of the plaintiff's fraud was accomplished when the transfer was effected and the property excluded from the partition, and that the plaintiff could not, therefore, maintain this suit;

(2) that the fact that the defrauded party had recovered his share did not purge the plaintiff of his guilt and he was not entitled to recover his share. M. SULUGU SURYANARAYANA NAYAKARAM *v.* GUNDABOLU BUTCHAIAH; 3 L. W. 111; (1916) M. W. N. 107 810

——— Sale of occupancy and fixed-rate holding by one deed—Plaintiff, if can set up illegality of his own contract 913

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———Custom—Succession—Self-acquired property, gift of, to daughter—*Akali Nihangs* of Tarn Taran—Proof 16

——— by Hindu widow to her married daughter—Declaration that plaintiff's reversionary rights not affected, relief as to, if entertainable 734

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——, rent free—Sale of proprietary rights—Reservation of certain area free from all payments—Right to hold free of revenue 4

GROVE. *See* OUDH RENT ACT, s. 107.

——— land—Ejectment, suit for 395

———, *when losing its character as such—Landholder not objecting to grove-holder's planting new trees, effect of—Grove-holder, right of, to retain possession of grove—Trees, portion of grove becoming devoid of—Resumption, piecemeal, if permissible.*

There is no criterion laid down by law for judging when a grove ceases to retain its character as such. The question is more or less one of inference to be drawn from the surrounding circumstances. And the fact that the landholder took no objection to the grove-holder's planting new trees when the grove began to lose its character as such, must be taken into account in judging the character of the property.

A grove-holder is entitled to hold possession of the plot covered by the grove so long as it retains the character of a grove. And the mere fact that a portion of the grove has become devoid of trees does not entitle the landholder to resume that portion of it, inasmuch as the plot must, in the absence of proof of an agreement or a custom to the contrary, be taken to have been granted as a whole and the tenure must, therefore, stand or fall in its entirety. O. HAR SAHAI *v.* DHANPAL SINGH, 2 O. L. J. 589 368

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 17(3)—*Minor, intelligent preference by, consideration of.*

A boy of 14 and a girl of 16 years of age are 'old enough to form an intelligent preference' within the meaning of section 17 (3) of the Guardians and Wards Act, and their wishes have a right to the consideration of a Court appointing or declaring a guardian. N. BATTOOLAL v. MRS. EKSTRAND, 12 N. L. R. 35 **977**

——— S. 19 (a)—*Minor child, presumption as to the religion of—Duty of guardian—Marriage of Christian minor with* Chamar, *whether valid—Christian Marriage Act (XV of* 1872*), s.* 4*—Right to be appointed guardian.*

A child in India must, under ordinary circumstances, be presumed to have his father's religion and his corresponding civil and social status, and it is, therefore, ordinarily the duty of a guardian to train his infant ward in such religion.

An Indian Christian who was originally a *Chamar* died leaving behind his wife and a minor daughter. Shortly after this the wife was received back into the *Chamar* brotherhood and immediately afterwards she married the minor girl to a *Chamar* to whom she had been already betrothed by her father. On an application for the appointment of a guardian to the person of the minor:

*Held*, (1) that the mere fact that the Indian Christian betrothed his daughter to a *Chamar* did not warrant the inference that he renounced the Christian religion;

(2) that inasmuch as the father of the girl was, and died, a Christian, the girl must be presumed to be a Christian and the alleged marriage was, therefore, invalid;

(3) that the mother of the girl having renounced the Christian religion was not a fit person to have charge of the girl, who must be brought up as a Christian until she reached years of discretion when she could choose for herself. P. ALLUNTT *v.* BADAMO, 46 P. W. R. 1916 **897**

HIGH COURTS ACT (24 & 25 VIC. C. 104), S. 15 **330**

HINDU LAW. *See* AGRA TENANCY ACT, s. 22.

——— Hindu woman, suit by—Legal representative—Death of plaintiff pending suit—Right to continue litigation. **104**

———Successive life-estates, if permitted in endowment **823**

———ADOPTION—*Adopted son, status of.*

Under the Hindu Law an adopted son occupies the same position in the family of the adopter as a natural-born son, except in matters relating to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father.

Authorities on the position of an adopted son according to the Hindu Law reviewed. (P. C.) NAGINDAS BHUGWANDAS *v.* BACHOO HURKISSONDAS, 30 M. L. J. 193; 14 A. L. J. 185; 3 L. W. 259; 19 M. L. T. 193; 18 BOM. L. R. 172; (1916) M. W. N. 258; 23 C. L. J. 395; 20 C. W. N. 702 **403**

——— *Dancing girl, when can adopt—Taking child for purpose of household duties—Adoption, validity of—Calling child* "abimanaputhri," *effect of.*

An adoption of a daughter by a dancing girl is valid in Madras Presidency if it is not made for the purpose of making the girl a prostitute.

HINDU LAW—contd.

An adopted girl does not cease to be such if she is called "*abimanaputhri*" and does not thereby lose her right of succession to her adoptive mother.

Where, therefore, a dancing girl took a young girl to help her in her household duties out of compassion for the helpless child and without any intention of forcing her to a life of prostitution and adopted her, though she was designated as "*abimanaputhri*:"

*Held*, that the adoption was valid and the adopted girl was entitled to succeed the adoptive mother. M. NAGAMUTHU PILLAI *v.* DASI SUNDARAM **743**

———ADOPTION *by widow—Consent of* sapindas*—Remoter* sapindas, *when may be consulted—Widow ignoring nearer* sapindas *on account of hostility—Adoption with consent of remoter* sapindas, *whether valid—Authority acted upon long after it was given, effect of.*

A Hindu widow desirous of making an adoption can do so only with the assent of the *sapindas*. As the assent is regarded as a substitute for the authority of the husband and as the Hindu Law enjoins that such an assent should be obtained from those who would be the natural advisers and protectors of the widow, *prima facie* it should be sought from those who are next in the line of succession.

Where there are one or two near "*sapindas*" who from improper motives withhold their consent, it is open to the widow to apply to more remote *sapindas*. But before doing so she must consult the nearer ones: even though they be inimical to her, she has no right to conclude on *a priori* reasoning that the consultation would be futile.

Courts will be justified in conning with care an adoption which purports to be based on an authority given many years before the event.

Where, therefore, a Hindu widow after the death of her unmarried son adopted a son with the consent of the remote *sapindas* of her husband but without having consulted the nearer *sapindas*, who were entitled to succeed to the property of her son in case she did not make an adoption, and they sued as reversioners to recover the property:

*Held*, that it was her duty to have applied to the plaintiffs for the consent and that this not having been done, the adoption was invalid and the plaintiffs were entitled to recover. M. ADDSUMALLI KRISHNAYYA *v.* ADUSAMALLI LAKSHMIPATHI, 30 M. L. J. 265; 19 M. L. T. 286 **253**

——— ALIENATION — Limited owner — Widow —Family settlement, validity of—Consent of expectant reversioners, effect of—Mere attestation of deed, effect of—Compromise-deed, construction of—Decree, admissibiiity of **468**

——— *by mother of last male-holder—Mitakshara—Half-sister, if can object.*

According to the Mitakshara School of Hindu Law only females expressly named in the text can inherit. The half-sister of a deceased Hindu being not so named is not entitled to succeed to his estate. Therefore, she is not competent to question an alienation made by his mother, the sole surviving heir. P. MALAN *v.* JIWAN, 47 P. W. R. 1916 **910**

HINDU LAW—contd.

———ALIENATION, *suit to set aside—Minors—Limitation, running of—Alienation by managing member and mother as guardian of minor for necessity, validity of—Interests of minor—Court, duty of.*

In a suit to set aside an alienation by the guardian of minor brothers in a joint Hindu family limitation begins to run from the date of the elder brother attaining majority.

Where an alienation is made by an elder brother afters attaining majority and by the mother as guardian of the minor and the sale is found to be for a *bona fide* family purpose, the transaction is valid even though the mother is unnecessarily joined in the deed.

*Seshagiri Aiyar, J.*—The decision of the Privy Council in *Mata Din* v. *Ahmad Ali*, 13 Ind. Cas. 976; (1912) M. W. N. 183; 34 A. 213 (P. C,); 16 C. W. N. 338; 11 M. L. T. 145; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 23 M. L. J. 6; 39 I. A. 49, is only authority for the position that a minor is not bound by acts done by persons who presume to act on his behalf without any power to do so. But when the alienation is made by a person who is competent to represent the minor, the sale cannot be vitiated because somebody else who has no right to do so has joined in the execution.

Where an executant covenants to convey all the interest of which he is then possessed, the fact that the various capacities in which that interest vests in him are not specifically referred to in the conveyance, will not affect the right of the purchaser.

Therefore, where a brother was competent to sell family property for justifiable purposes, the non-mention of the fact that he executed the conveyance as a managing member will not render the deed any the less effective.

What the Courts have to look to in such transactions is that the interests of the minor have been properly represented. If that requirement is satisfied Courts will be slow to set aside an alienation. This rule is subject to the exception that it is not open to every one to intermeddle with the estate of the minor on the ground that he is acting for the minor's benefit. M. GOTTUKKULA SURAPA *v.* GOTTUMKKULA VENKAYYA, (1915) M. W. N. 808 **802**

——— DEBT—*Immoral purposes—Consideration—Onus—Necessity—Books of account, how proved.*

If all necessary and legal debts of a person are defrayed from one known source, the presumption that all other loans were expended on immorality arises only when the debtor had no debts or business on which the loans *might* have been expended with propriety.

In a suit brought against the heirs of an original debtor for the recovery of moneys advanced on the security of mortgage-deeds, the onus lies on the plaintiff to establish that full consideration passed

Where a person advances money to another on that other's assurance that the loans were required for business purposes, the person advancing the loan is not bound to see to the proper application of the money.

HINDU LAW—contd.

Where plaintiffs in a suit to recover moneys advanced on the security of mortgage-deeds attempted to prove consideration by reference to their books of account and on appeal the objection was taken that the books were not proved but it was established that the production of the books by the plaintiffs, the Trial Court had ordered a commissary to inspect and report on the books in the presence of parties and their Counsel which was done, and the defendants' Counsel after inspection furnished the commissary with a set of questions none of which suggested that the books were irregular or unreliable:

*Held*, that the books must be taken to have been adequately proved. P. INDAR NARAYAN *v.* NANAK CHAND **454**

——— DEBT—*Son's liability to pay father's debt—Debt incurred by appropriating money due to another, if immoral—Criminal misappropriation.*

*H* and *T* bought a property at a revenue sale but the sale having been reversed, *T* withdrew the whole of the purchase-money. In a suit by *H* to recover his share of the purchase-money a decree was made against *T* in execution of which ancestral property belonging to *T* was sold. The son of *T* brought a suit to recover his half share of the property, on the ground that the debt incurred by his father was an immoral debt which he was not bound to repay:

*Held*, that the debt was not an immoral one and it was incumbent upon the son to repay it and that, therefore, he was not entitled to recover his share of the ancestral property. C. HARI SINGH *v.* SANT PROSAD SINGH **969**

——— JOINT FAMILY—*Father, suit by—Presumption—Oath, agreement to be bound by, if binding on sons.*

A Hindu father with one of his three adult sons sued to recover debts due to the joint family, and on trial agreed to be bound by the oath of the defendant. The son, however, did not and withdrew from the suit with permission to bring a fresh suit. The suit, as brought by the father, was dismissed. Subsequently the son with his other brothers sued for the three-fourths share of the debts:

*Held*, that as the suit by the father was not one as by the manager of the family the agreement by him did not bind the sons and that they were entitled, on proof, to a decree of their share of the family debt.

*Obiter dicta.*—Where a Hindu father, a member of a joint family, sues or is sued alone, the presumption is that he sues or is sued in his representative capacity. An agreement by him, therefore, to be bound by an oath of the opposite party is binding on his joint sons who are not parties to the suit even if they are adults, in the absence of fraud or collusion on the part of the father. N. RAMESHWAR *v.* BHANGI LAL, 12 N. L. R. 45 **996**

——— Joint trading family—Debts contracted by managing member, when binding on whole family—Creditor, duty of **380**

——— Manager **997**

——— *Manager, whether guardian of minor co-parceners—Sale by manager of family property—Suit by minor co-parcener on attaining majority for possession of his share—Limitation Act (IX of 1908) Sch. I, Arts. 114, 14, 91.*

HINDU LAW—contd.

The manager of a joint Hindu family is the manager of the whole family property, whether his co-parceners are minors or majors, but cannot be called the guardian of the property of the minors in the sense in which the word guardian is used in Article 44 of the first Schedule of the Limitation Act nor can such a manager alter the real relations between the parties by calling himself guardian of his minor co-parceners.

A suit by a minor co-parcener on attaining majority to set aside an alienation by a manager of joint family property is governed by Article 144 and not by Article 44 or 91 of the first Schedule of the Limitation Act. N. ASARAM *v.* RATANSINGH, 12 N. L. R. 12 **242**

——— JOINT FAMILY—*Money borrowed by father for family purposes—Son, whether liable for re-payment—Deathof son pending appeal—Liability of family property.*

Where, in a suit to recover money due on a deed, it appeared that the father of the defendant borrowed the money for family purposes, the father and the son forming a joint Hindu family:

*Held*, (1) that the father in borrowing the money acted as the agent of the family and, therefore, the son was as much liable for the payment of the debt as the father;

(2) that under the circumstances the question of the son's personal liability did not arise, as he had died during the pendency of the appeal leaving his widow as his sole heir, and that the family property was liable for the amount. P. ANANT RAM *v.* MANSA RAM, 39 P. W. R. 1916 **780**

——— *Property acquired by one member—No nucleus of joint property—Presumption—Separate property—Burden of proof.*

Property acquired by a member of a joint Hindu family, when there is no nucleus of joint property, is presumed to be his separate property, and the burden of proving that he threw it into the common stock is upon those who assert it. This burden is not discharged by the mere fact that he lived with his son in the same house and carried on business with him or even raised money for the purposes of the business by mortgaging that very property. M. ETHIRAJULU NAIDU *v.* GOVINGARAJULU NAIDU **12**

——— *Self-acquired property, whether can be converted into family property—Right of widowed daughter-in-law to be maintained out of family property—Wedding-presents, nature of.*

*Coutts Trotter, J.*—If a man has property which he has acquired by his own exertions, but shows by his subsequent conduct and subsequent dealings with that property that his intention was that it should be regarded, and he himself regards it, as being property in which his family has a share, then that becomes thenceforward family property under the Hindu Law.

Where, therefore, in a suit for maintenance by the widow of a predeceased son against her father-in-law, it appeared that the defendant had been constantly associating his eldest son with him on different business transactions and there was no evidence to show that he had any intention of

HINDU LAW—contd.

drawing any distinction in tenure between the different classes of property:

*Held*, that the defendant had by his conduct converted the suit properties into family properties out of which the plaintiff had a right to be maintained. M. THYALAMBAL *v.* KRISHNA PATTAR **955**

——— JOINT FAMILY—*Separation—Burden of proof—Allowance out of joint funds given by sons to mother, effect of—Lease executed by all members and not by managing member alone, effect of—Evidence, quality of—Custom—Family custom—Widow succeeding to her husband's property in joint family, custom as to, proof of—Wajib-ul-arz, interpretation of—Maintenance to widow in joint family, decision as to—Costs—Discretion of Court—Collateral, encumbered property inherited from—Encumbrance paid out of joint family funds—Property, acquisition of, from joint funds—Mitakshara Law—Survivorship—Obstructed and unobstructed heritage, effect of—Evidence Act (I of 1872), s. 145—Discrepancies in witness's present and previous statements—Court, duty of—Ancestral property—Collateral succession, whether rule of survivorship applicable in cases of—Judgment, value of—Authority.*

Per *Stuart, A. J. C.*—Where a party admits that a certain Hindu family was joint in the first instance but pleads that it became separated subsequently, the burden of proof lies upon him to prove separation.

The mere fact that sons in a joint Hindu family gave their mother a small separate allowance out of the joint family funds for her private use, especially to be expended on religious purposes, does not show separation of the family; nor does the fact that a lease is executed by all the family members, and not by the managing member alone, establish such separation.

Very strong and cogent evidence should be produced to prove that under a family custom a widow succeeds to the property of her husband even although he is a member of a joint Hindu family.

Where a *wajib-ul-arz* stated that a widow of a co-sharer succeeds to the property of her husband:

*Held*, that the statement referred to the case of a separated co-sharer, and not to one in a joint Hindu family.

Where a plaintiff claimed as member of a joint Hindu family property of a deceased member by right of survivorship, and the defendant, the deceased's widow, pleaded separation of the family and further asked the Court to decide the amount of maintenance to which she would be entitled in case the alleged separation was not established, and the Court found that the family was joint but refused to decide the question of maintenance:

*Held*, that on the finding that the family was joint the question of fixing the defendant's maintenance did not arise, and that the Court acted rightly in refusing to decide it.

A Court has full discretion to award costs to the plaintiff against all or any of the defendants according to the circumstances of each particular case.

Where an encumbered property is inherited by a joint Hindu family from a collateral, the mere fact that the encumbrance is paid off out of the joint

family funds does not show that the property is *acquired* from such funds. And the mere fact that the property is managed by the managing member of the family does not establish whether it is or is not treated as joint family property.

Where a property is not self-acquired but inherited by the members of a joint Hindu family governed by the Mitakshara Law, and is such as could have been partitioned among them at the time that it was inherited, the rule of survivorship applies *irrespective of the fact whether such property came by obstructed or unobstructed inheritance*, i. e., *whether it was inherited from a direct ancestor or from a collateral.*

Per *Kanhaiya Lal, A. J. C.* (dissenting)—Section 145 of the Evidence Act requires that where a Court finds that there are discrepancies between a witness's statement made before it and the one previously made by him before another Court, it should ask him to explain them.

The payment of a joint liability out of joint funds does not make the property on which that debt is charged a joint acquisition.

Although a property inherited by the members of a joint Hindu family from their maternal grandfather can be treated as ancestral or joint family property and thus governed by the rule of survivorship, yet that rule cannot be extended to *cases of collateral succession*, because the property inherited from separated collaterals cannot be treated as ancestral or joint family property, inasmuch as unless a property comes by descent from a lineal ancestor in the male line, it cannot be deemed ancestral or joint family property, there being in principle no distinction between separately acquired property and property separately inherited by two or more members of a joint family.

A judgment is an authority for what it decides, but not for what may seem logically to follow from it. O. SURAJ BAKHSH *v.* SUKHDEI 2 O. L. J. 502 **291**

——— MAINTENANCE, *daughter-in-law, if entitled to—Joint family property.*

A Hindu widow is entitled to receive maintenance from her father-in-law when the latter lived with his son as a member of a joint Hindu family and had considerable ancestral property and on his death took by survivorship all his rights in the joint family property. P. BUDHAN *v.* RADHA KISHEN, 108 P. R 1915 **33**

——— MITAKSHARA—Custom in adoption of some matters, effect of—Ancestral property—Property acquired as income of ancestral property—Presumption—Right to succeed with father in estate of grandfather - Special custom, proof of **315**

——— PARTITION—*Partial partition, whether allowed—Property left out of account as worthless, whether remains joint—Presumption in case of partition - Burden of proving the contrary—Mortgage suit, whether can be instituted for part only of mortgage-money.*

In a suit for partition between a father and his son, a certain mortgage-bond was left out of account as worthless. Subsequently the father brought a suit on the mortgage-bond and it was pleaded that the plaintiff and his son were not divided in respect of the properties covered by the mortgage-



bond and that the son was, therefore, a necessary party:

*Held*, per *Napier, J.*—(1) that, all the properties of the family not having been included in the partition suit, only partial partition had taken place and that therefore, the property covered by the mortgage-bond remained joint family property;

(2) that the son was a necessary party under section 67 of the Transfer of Property Act, 1882, being a co-owner of the property in suit, and that the suit was, therefore, bad for non-joinder of parties.

Per *Sadasiva Aiyar, J.*—(1) that a complete partition having taken place between the father and the son, the latter was not a necessary party to the suit on the mortgage-bond;

(2) that where there was a partition, the presumption was that it was a complete one and that it embraced the whole family property and that if property was afterwards found in the exclusive possession of one member of the family and it was alleged that such property was still undivided and divisible, the proof of such an allegation rested upon the party making it.

A co-parcener who wishes to get a partition of family properties has only a single cause of action in respect of all the joint properties and hence a suit for partial partition cannot lie. M KANDUM VENKATASAWMY *v.* BALIGADU, 19 M. L. T. 43; 3 L. W. 74 **179**

——— SUCCESSION—*Insane, exclusion from inheritance of—Heir of such insane, whether has any legal title—Illegitimate child, whether can inherit father's property as against legitimate child—Suit for declaration and possession—Limitation Act (IX of 1908), Sch. I, Art. 141.*

A person is disqualified under the Hindu Law from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable. A daughter of such lunatic has no legal title to the estate left by her grandfather.

Under the general principles of Hindu Law an illegitimate daughter cannot succeed to her father's property as against a legitimate daughter by a lawful wife.

A suit by a Hindu daughter for possession of her share in her father's estate on the death of the mother falls within Article 141 of the first Schedule to the Limitation Act and time begins to run from the date of the mother's death. A. RAM SINGH *v. Musammat* BHANI, 14 A. L. J. 11; 38 A. 17 **127**

——— Sudras—*Illegitimate son* — Dasi putra—*His share in competition with legitimate son or daughter.*

Among *Sudras* the illegitimate sons of a kept woman or concubine are on the same level as to inheritance as the *dasi putra* or the son of a female slave by a *Sudra.*

An illegitimate son's share must be determined by dividing the whole estate in such a way as to give each of the illegitimate sons exactly half of the share of each of the legitimate sons.

An illegitimate son in competition with a legitimate daughter would have the same share as he would have in competition with a legitimate son B. GANGABAI PIRAPPA *v.* BANDU PIRAPPA, 18 BOM. L. R. 70

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——— WIDOW—*Alienation—Surrender—Mortgage by widow—Subsequent surrender by widow of her estate in favour of reversioners, whether affects rights of mortgagee—Writer of document, whether can be treated as attestor—Transfer of Property Act (IV of 1882), s. 59.*

A widow cannot relinquish her widow's estate to the reversioners of her husband, so as to affect the validity of an alienation made by her before such relinquishment, which, though not binding on the reversioners, is binding upon her for life.

A widow has got the power to alienate her estate so as to enure during her life-time notwithstanding any event which may happen after the alienation.

Just as the survivorship doctrine and the son's-right-by-birth doctrine are made powerless against the equities and rights of attaching creditors and alienees for value, in the same way the surrender doctrine (which is not less artificial than the above two,) does not affect alienees for value, who are entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life.

The writer of a document may be treated as an attestor for the purposes of section 59 of the Transfer of Property Act.

Where in a suit brought on a mortgage-bond executed by a Hindu widow in favour of the plaintiff, it appeared that the widow surrendered after the execution of the mortgage her life-interest in the mortgaged property orally to her husband's reversionary heir, also a defendant in the case but the deed of surrender was executed after the institution of the suit:

*Held*, that the surrender was intended to defeat the plaintiff's claim to bring to sale the widow's life-interest in the property, and was not binding on him. M. KOTTAPALLI SUBBAMMA *v.* JATAVALLABHULA SUBRAHMANYAM, 30 M. L. J. 260 **813**

——— , *decree against, interpretation of—Test—Sale in execution of decree against Hindu widow's interest, effect of.*

Where a decree against a Hindu widow directs her right, title and interest in the husband's property to be sold, the test to be applied in order to determine the exact interest that will pass by the sale depends upon the question, whether the suit in which the sale is directed is one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in suit.

In making a decree against a Hindu widow, a Court ought to state specifically whether the decree is a personal decree or one against her as representing her deceased husband.

In the absence of such specification it is open to any Court dealing with the decree to interpret it in accordance with sound principles of law and it is not open to the Judge who made the decree to interpret it in a sense which would render it contrary to law.

In interpreting a decree against a Hindu widow for mesne profits of a property, the frame of the original suit for recovery of possession of that property can and should be gone into. C. KIRANBALA DEBI *v.* KALI CHARAN SINGHA **587**

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——— WIDOW—*Widow's estate—Custom—Burden of proof—Widow whether can challenge alienation by husband—Agreement declaring rights of parties, whether compulsorily registrable.*

Both under Hindu Law and agricultural custom a widow is entitled to a life-interest in her husband's estate and, therefore, the burden of proving a special custom to the contrary is on those who assert it.

A widow is not competent to challenge any disposition of property by her husband.

A document executed by several brothers which declares the rights and interests of the brothers in estates of large value and also that their widows shall not inherit a life-estate but shall receive only a maintenance allowance, is an agreement *inter vivos* and is inadmissible in evidence without registration. P. MOTI SINGH *v. Musammat* JAMNA DEVI, 8 P. R. 1916 **522**

———*Estate—Decree against widow, when binds estate—Test.*

Where a suit against a female heir is founded upon a purely personal debt or contract of her own, the decree can only be against her own personal property and a sale in execution of such a decree can only convey her own interest in the property.

But in order that a decree may operate against the estate, the suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her.

The test is not merely whether the female heir could have been sued, but whether she was in fact sued, in a representative capacity. If the reversioners be joined as parties, the fact would afford clear indication that the creditor intends to make the inheritance liable and not to restrict his remedy to the qualified interest of the female heir. But it is not essential that the reversioners should be joined; the frame of the suit, the judgment and decree may show that the proceeding is not against the female heir personally but against her as the representative of the estate of the last full owner. C. PUNIT NARAYAN SINGH *v.* RAJKUMARI GODABARI KOERI, 22 C. L. J. 400 **580**

———*House of husband re-built by widow—Widow's absolute property—Alienation, widow's absolute power of.*

Where a Hindu widow re-built, after her husband's death, a house belonging to him out of her own money, and subsequently sold it off:

*Held*, that, in the absence of anything to show that the widow intended the house after its being re-built to be treated as a portion of her husband's estate, it ought to be taken as her absolute property which she could sell. O. RAM DAYAL *v.* SUMER SINGH, 2 O. L. J. 466 **356**

——— , *partial alienation by—Consent of reversioners, value of—Alienation, whether binding upon estate—Surrender of life-estate, when operative.*

Where a Hindu widow alienates part only of the estate of her deceased husband, the consent of the next reversioner is never anything more than evidence that the alienation was justified by necessity and was a proper alienation in law, but the alienation is not conclusively validated and made binding upon the estate by reason only of such consent.

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Per *Seshagiri Aiyar, J.*—The theory of surrender is that the widow retires from the management of the property and lets in the persons who are entitled to succeed her after her death. This theory becomes inoperative if the transfer is made to only one of the persons who are entitled to enjoy the property. M. MALLA SURIAH *v.* SURAN NAIDU, 3 L. W. 278; 19 M. L. T. 239 **993**

—— WIDOW—*Property acquired with income of husband's estate, nature of—Test—Intention.*

The real test to determine whether the property acquired by a widow with the income of her husband's estate is her absolute property or forms an accretion to the estate, is to ascertain the intention of the widow.

Where, therefore, a widow, in her capacity as such, brought a suit for pre-emption of the land in dispute and having obtained a decree therefor paid the pre-emption price from the income of her husband's estate:

*Held*, that the mode of acquisition pointed to the conclusion that she did not mean to sever the land from the main estate and that, therefore, it became an accretion to her husband's property. U. P. B. R. SARJU PRASAD *v.* KHUSHAL CHAUDHRI **832**

——, sale by—Mitakshara—Pre-emption, right of, if arises **225**

——, Will by, legality of—Reversioner, affirmation by, when validates Will by Hindu widow **209**

—— WILL, *construction of—Doctrine of dependent relative revocation—Intention—Widow—Adoption.*

An alternative inconsistent disposition which is not valid or effectual in itself does not revoke an earlier disposition of the same property.

If by his Will a testator gives property to *A* and by a codicil gives the same property to *B*, and if in the event it turns out that *B* cannot take, it has to be ascertained from the language of the testator, as found in his testamentary documents, whether he intended that the gift to *A* should be displaced altogether or that it should be displaced only in favour of *B*, and (if *B* cannot take) the gift to *A* should remain.

A Hindu, who was the sole surviving co-parcener of his divided share of ancestral property, made a Will appointing his wife and his daughter to be executrixes and giving *inter alia* authority to his widow to adopt a certain son of his daughter in case of his own death before completing the adoption, and in the event of the death of that son to adopt another son of the same daughter. The testator completed the adoption and thereafter executed another Will which contained no words of revocation of the previous Will and was wholly silent as to adoption. Both the testator and the adoptee died. On a suit of the reversionary heir of the adoptee the second Will was declared null and void and inoperative according to Hindu Law. The widow made another adoption in accordance with the first Will. On a suit to set aside the adoption it was contended that the former document was not a Will and that if it was a Will it was revoked by the second document and the widow had no power to adopt:

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*Held*, (1) that the first document was a Will, inasmuch as it contained an appointment of executors and it was executed by a testator who at its date could dispose of the property of which he purported to dispose;

(2) that the power to adopt in the earlier instrument was unaffected by anything in the later and that the widow had the power to adopt. P. C. VENCATANARAYANA PILLAI *v.* SUBBAMMAL, 20 C. W. N. 234; 3 L. W. 177; 19 M. L. T. 147; 14 A. L. J. 178; (1916) M. W. N. 97; 23 C. L. J. 366 **373**

—— —WILL, *construction of—Intention, if gathered from habits of life and circumstances—Intention to confer estate as adopted son, effect of, when not adopted—Gift.*

Per *Coutts Trotter, J.*—A testamentary disposition should be construed according to its terms, and a particular intention should not be ascribed to the testator, unless there are words in the document which give that effect; habits of life and the circumstances surrounding the transaction only cannot determine what that intention was.

A joint enjoyment of a property with the testator during his life-time cannot be construed as a gift in favour of one after his death.

*Srinivasa Aiyangar, J.*—Where the tenor of a testamentary disposition clearly indicates that the testator intended that a particular person should succeed to his property as his adopted son, and in that character only, the disposition cannot take effect as a gift *in præsenti* when unregistered or as a legacy in his favour when he was not in fact the adopted son, nor can he take as a *persona designata* under the Will when there is nothing in the instrument referring to him *individually* except as an adopted son. M. THIRUGNANAPAL *v.* PONNAMMAI MODATHI **569**

HINDU WIDOWS' REMARRIAGE ACT (XV OF 1856) S. 2 **801**

—— S. 2, *applicability of*—Grihast Goshains—Karao *marriage—Unchastity after inheritance, effect of.*

If a widow can validly re-marry according to the custom of her caste, her re-marriage does not deprive her of her right to the estate of her deceased husband.

If a widow becomes unchaste after inheriting the property of her husband, she does not by reason of such unchastity forfeit the interests which have become vested in her by right of inheritance. A. RAM DEI *v.* KISHEN DEI **338**

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INAM—*Grant conditioned on performance of certain duties by* inamdars—*Grant, whether constitutes public trust—Lease by certain* inamdars *of property, whether void as a whole.*

An *inam* granted to several people on condition of their performing certain duties for the benefit of the public does not create a public charity.

Where, therefore, an *inam* was granted to the plaintiff and several others on condition of their providing water for the use of travellers passing through that place and certain of the *inamdars* leased the whole of the *inam* lands without the consent or knowledge of the plaintiff who sued for a declaration that the lease as a whole was void and

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that he along with such *inamdars* who were not parties to the lease was entitled to possession of the property:

*Held*, that the lease was not void as a whole, but it was not binding on the plaintiff's own share of the lands. M. KUPPARAZU VENKATASUBBIAH *v.* MURUGULA SHAIK SILAR SAHIB, 3 L. W. 157; 19 M. L. T. 144 947

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INJUNCTION. *See* CIVIL PROCEDURE CODE, O. XXI, R. 32.

——— *Co-sharers—Wrongful user by one co-sharer of joint property—Necessity of proving substantial injury.*

In a suit for injunction against a co-sharer for wrongful use of a joint land, it is not necessary to prove that the plaintiff is suffering or is likely to suffer substantial injury by such user. A. GHASITU *v.* SODHAN SINGH 690

INSANITY. *See* PENAL CODE, S. 84.

INSOLVENT—*Sale in execution of decree before order of adjudication, effect of—Order of adjudication, effect of.*

Some creditors of a judgment-debtor applied for his adjudication as an insolvent. Subsequent to this application some property of the judgment-debtor was sold in execution of a decree for money held by another creditor. The sale-proceeds were realized by the Court executing the decree before the order of adjudication was passed, but the sale was not confirmed till sometime later:

*Held*, that the Receiver of the estate of the insolvent was not entitled to claim payment of the sale-proceeds for rateable distribution among the creditors of the insolvent.

*Held*, further, that, if the title of the insolvent to the property sold had determined by order of adjudication, it was of no consequence whether the money was paid to the creditor by set-off or was lying in Court awaiting confirmation of the sale. O. ACHAMBHIT LAL *v.* CHHANGA MAL, 18 O. C. 268 429

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INSURANCE, *life—Refusal by insurer to accept premiums, effect of—Court Fees Act (VII of 1870, s. 5—Additional Court-fees, levy of, after decision of case, whether allowable.*

Once the insurer refuses to accept premiums, the insured is not bound to go on tendering successive premiums in order to save the right to recover the amount insured; he can sue for damages at that time or refuse to treat the contract as at an end, as the insurer's refusal to accept premium is a continuing refusal.

The provisions of the Court Fees Act relating to the levy of additional fees apply only to cases which are pending and cannot be enforced in cases which have been finally decided. L. B. SHANGHAI LIFE INSURANCE CO., LD. *v.* MRS. HELEN CONSTANCE BROWN 534

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——— *Debtor and creditor—Debtor unable to pay on account of creditor's act, effect of—Interest for such period, if recoverable—Penal interest, relief against—Court, power of.*

If a creditor, by his own act, puts it out of the power of the debtor to make payment, no interest is recoverable for the period during which the debtor was thus prevented from paying the creditor.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be of a penal character, that is, so unconscionable and extravagant that no Court should allow it. C. GOPESWAR SAHA *v.* JADAB CHANDRA, 22 C. L. J. 352; 20 C. W. N. 689 537

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In the case of a usufructuary mortgage in which the mortgagee obtains possession at a date later than the date of document, the rule of *damdupat* does not apply to the interest recoverable during the interval between the date of document and date of obtaining possession. N. PANDUJI *v.* PANDUJI, 12 N. L. R. 1 231

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———*Revenue Court—Document, validity of, question as to—Finding, when final—Civil Court, jurisdiction of.*

The Revenue Courts, for the purpose of deciding questions of tenancy, should decide whether or not a document can be acted upon as void or voidable, and subject to appeal, such a finding is final unless the Revenue Court specially reserves authority of the Civil Court. U. P. B. R. NATHWA *v.* JAGDISH NARAIN 905

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———*Transfer of proceedings which are without jurisdiction, if valid—Mesne profits exceeding pecuniary jurisdiction of Court decreeing suit, application for—Decreeing Court, jurisdiction of—Remedy.*

Proceedings in a Court which are without jurisdiction are not proceedings which can be transferred by a superior Court either under the old Code of Civil Procedure or the new.

A Munsif, whose pecuniary jurisdiction was limited to Rs. 2,000, decreed a suit for recovery of possession of an immoveable property with mesne profits. The value of the suit with mesne profits claimed up to the date of the institution of the suit amounted to a gross valuation of Rs. 1,200, but the mesne profits *pendente lite* and thereafter up to the date of delivery exceeded his pecuniary jurisdiction:

*Held*, that the Munsif's decree for possession and mesne profits antecedent to suit must stand but as regards the assessment of mesne profits from the institution of the suit to the date of delivery of possession, the Munsif had no jurisdiction and that such an application for mesne profits filed in the Munsif's Court should be returned for presentation to the proper Court. C. HIRAMATI PASSYA *v.* ANNADA PRASAD GHOSH 788

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——— OF CIVIL AND REVENUE COURTS—*Joint possession of under-proprietary holding—Mesne profits in respect of* khudkasht—*Under-proprietors, suit between.*

Where the parties are under-proprietors holding specific shares in a certain area within the *mahal*, a suit between them for joint possession or for mesne profits in respect of *khudkasht* land wrongfully withheld, is not excluded from the jurisdiction of a Civil Court.

Therefore, a suit for joint possession and damages against a mortgagee, who retains possession over the mortgaged property in spite of redemption, although he be a co-sharer of the mortgagor in under-proprietary rights forming the subject-matter of the mortgage, is cognizable by a Civil Court. O. SRI RAM *v.* PARGASH, 2 O. L. J. 625 732

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KABULIAT. *See* LANDLORD AND TENANT.

KARAR. *See* MALABAR LAW.

LAMBARDAR. *See* NORTHERN INDIA CANAL AND DRAINAGE ACT, S. 47.

LAND ACQUISITION ACT (I OF 1894), Ss. 18, 31 (2)—Reference—Party to reference not pressing his claim to compensation before Special Judge, if debarred from claiming it in civil suit 922

——— S. 31 (2) 922

LAND REVENUE, *assessment of, when barred—Assam Land and Revenue Regulation* (*I of* 1886), *s.* 28 *proviso, cl.* (4)—*Bengal Land Revenue Assessment (Resumed Lands) Regulation* (*II of* 1819), *ss.* 21, 23 —*Bengal Land Revenue Assessment (Resumed Lands) Regulation* (*III of* 1828), *s.* 10—*Regulation II of* 1805, *s.* 2 (2)—*Limitation, if bar to Government's right to assess revenue—Statute, when retrospective—Evidence Act* (*I of* 1872), *s.* 65—*Public documents, secondary evidence of—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 149.

Per *Curiam.*—Clause 4 of the proviso to section 28 of the Assam Land and Revenue Regulation, I of 1886, does not authorise assessment of revenue on a property, otherwise assessable under section 28, which has been held by the owner for more than 60 years without payment of revenue, unless it is shown that the owner had a right to hold it revenue free and that right has been lost within 60 years.

Per *D. Chatterjee, J.*—The mere fact that the plaintiff in a suit against the Secretary of State for India in Council for a declaration of his revenue-free title to a *mahal* produced and proved the *thakbast* proceeding of 1861, in which the *mahal* was described by the Thak Authorities as a resumed *mahal*, does not operate as an admission on the part of the plaintiff of Government's title to assess revenue in 1861.

The Government's right to assess revenue on a property assessable to revenue becomes barred by limitation after it has been held without assessment and payment of revenue for sixty years.

Where at the time of the Permanent Settlement in 1793 the Government had to abstain from making a settlement of land revenue on a certain land on its owner claiming a *lakheraj* title:

*Held*, that the cause of action arose in 1793 and no revenue having been assessed within 60 years the Government's right to assess revenue was barred by limitation.

A claim of Government to assess revenue becomes barred by limitation where, after a decision of the Board of Revenue in a resumption proceeding that the property is assessable, the owner continues to hold it without payment of revenue for 60 years.

The right of Government to assess revenue may be barred by the operation of the Law of Limitation.

A Statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing

Per *Beachcroft, J.*—A certified copy is not the only admissible secondary evidence of the contents of a public document; when the original of the public document has been destroyed or lost, any secondary evidence of its contents becomes admissible.

The effect of proviso 4 to section 28 of the Assam Land and Revenue Regulation 1 of 1886 is to save a land from assessment if the owner can prove 60 years' possession without payment of revenue, unless Government can prove that at some time within 60 years there was a cessation of the assessee's right to so hold it

LAND REVENUE—concld.

The words "held revenue free" in the proviso 4 to section 28 of the Assam Land and Revenue Regulation I of 1886 mean "held without the payment of revenue", and not "held revenue free" as of right.

*Quære.*—Whether the right of Government to assess land revenue can never be barred? C. ANANDA KUMAR *v.* SECRETARY OF STATE, 20 C. W. N. 576 **774**

LANDLORD AND TENANT—Attornment by tenants to strangers, effect of—Landlord, if dispossessed without dispossession of tenants **202**

——Ejectment, suit for—Transferee of tenant's rights, if necessary party **791**

——Grounds for redemption of rent **809**

——*Hajat*—Landlord's right to claim full rent after allowing *hajat* for some years—Non-occupancy *raiyat*—Agreement to pay full rent stipulated in lease after getting *hajat* for some years, if valid—Evidence of subsequent agreement or of conduct to vary rent stipulated in registered lease, admissibility of **251**

——*Landlord receiving reduced rent, whether precluded from getting rent stipulated for in lease*—Hajat—*Bengal Tenancy Act* (*VIII of* 1885), *s.* 29, *contravention of—Agreement to pay full rent reserved in* kabuliat *on expiry of its term, during which large portion of rent to be kept in* hajat, *effect of—Evidence that rent was never realised at rate stipulated for in lease, value of—Instalments for payment of rent numerous, whether contrary to usage—Agreement to accept reduced rent, consideration for—Evidence that stipulated instalments were never enforced, value of—Bengal Rent Act* (*X of* 1859), *s.* 21.

The mere fact that a landlord accepted rent at a lower rate than that stipulated for in the *kabuliat* for some time, does not bind him to accept rent at that rate in future.

The question, whether an agreement by an occupancy *raiyat* to pay the full rent stipulated for in a *kabuliat* on the expiry of its term, where during the term a large portion of that rent was to be kept in suspense (*hajat*), contravenes the provisions of section 29 of the Bengal Tenancy Act, does not arise in a case in which the term of the *kabuliat* expired before the passing of the Act.

Any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to prove such variation.

An agreement is nonetheless oral because it is to be inferred from the conduct of the parties.

Where leases are not registered oral evidence is admissible to prove any variation of the terms.

*Quære.*—Whether an agreement made by a landlord, on the expiry of the term of a *kabuliat*, to accept rent at a lower rate than that reserved in the *kabuliat* is unenforceable for want of consideration?

The fact of payment and acceptance of rent at a reduced rate ever since the expiry of a lease (which reserved a higher rent) may be adduced as evidence to show that the parties never intended tha

LANDLORD AND TENANT—contd.

the stipulation to pay the full rent was to be acted upon or in the alternative that there had been a waiver.

The question of usage (as to the payment of rent in numerous instalments) arises only where there is no written agreement between the landlord and tenant under section 21 of Act X of 1859. C. MANINDRA CHANDRA NANDI *v.* DURGA SUNDARI DASYA, 20 C. W. N. 680 **185**

——— Lease for indefinite period, if requires registration—Adverse possession by tenant—Non-payment of rent, whether establishes adverse possession **35**

——— *Lease—Trespasser—Adverse possession—Reversioner, whether can sue for declaration of title—Cause of action—Decree for "formal" possession—Civil Procedure Code (Act V of 1908), O. XXI, r. 36.*

Where during the currency of a lease the defendants took possession of the suit lands not only adversely to the tenant, but also claiming adversely to the reversionary rights of the plaintiff landlord:

*Held*, (1) that inasmuch as the plaintiff's right of reversion was affected by such adverse occupation, he had a cause of action against the trespassers even during the currency of the lease;

(2) that he was entitled to a decree declaring his title to the lands and giving him "formal" possession thereof by the proclamation of his reversionary right. M. TIRUVENGADA KONAN *v.* VENKATACHALA KONAN, 30 M. L. J. 258 **198**

——— *Madras Rent Recovery Act (VIII of 1865)*—Kanganam *or* kulavettu, *nature of—Tenant, liability of.*

A tenant is not bound to pay anything for *kanganam* or *kulavettu* in reference to *samudayam* lands inasmuch as they are in the nature of voluntary payments. M. CHIDAMBARAM CHETTY *v.* AYYAVU, 29 M. L. J. 746 **919**

——— *Non-transferable occupancy holding—Transfer of portion—Transferee's right, when* raiyat *refuses to pay rent for transferred portion—Landlord, rights of.*

When a tenant of a non-transferable occupancy holding, after having transferred a portion of his holding, refuses to pay rent for that portion and tenders to the landlord the proportionate rent due in respect of the remainder of the holding, it is open to the landlord to decline to accept an apportionment of the rent and recognise any division of the holding and hold the tenant liable for the entire rent.

In such a case a landlord is at liberty, if he so chooses, to accept from the tenant the amount of rent tendered by him for the land he still holds without prejudice to his rights as against the transferee in respect of the transferred portion.

As between such a transferee and the landlord the latter is *prima facie* entitled to *khas* possession of the land transferred. C. KUNYA KESORI PAL *v.* BAMA SUNDARI DASYA **781**

——— *Relationship of landlord and tenant*—Khatian, *entry in—Adverse possession—Presumption.*

In a suit for declaration of title and assessment of rent to the land in suit the plaintiff relied on

LANDLORD AND TENANT—contd.

an entry in a *khatian* for the purpose of establishing the relationship of landlord and tenant. The defendant set up title by adverse possession. It was found that the defendant was in possession even prior to the entry:

*Held*, that inasmuch as no rent was ever paid the inference was that not only there was no relationship of landlord and tenant between the parties but that the defendant was in adverse possession. C. BIRENDRA KISHORE *v.* NABIN CHANDRA, 22 C. L. J. 306 **851**

——— *Remission—Claim for remission of "savi"—Custom or contract not proved—Claim, whether can be legally enforced.*

In the absence of a custom or a contract to the contrary, the obligation to grant remissions is purely moral, and not legal, and cannot be enforced by a suit. M. RAMAKRISHNA RAYANINGARU *v.* RANGACHARIAR, 3 L. W. 300 **737**

——— *Rent, payment of—Days of grace—Forfeiture on non-payment—Court, power of, to relieve against forfeiture.*

As between landlord and tenant a Civil Court has a discretionary jurisdiction to relieve against forfeiture of tenancy in all proper cases, whether days of grace are allowed or not. M. NARAYANA *v.* KASHAPPAYA **526**

——— *Tenants, unrecorded, if represented by recorded tenants—Rent, suit for, against recorded tenant, effect of, on unrecorded tenants—Symbolical possession, when affects persons not parties to suit or execution proceedings—Suit for possession by execution purchaser of holding—Limitation.*

Three brothers, defendants Nos. 1, 2 and 3, inherited a non-transferable occupancy holding jointly and sold a portion of it to defendants Nos. 12 and 13 and settled a sub-tenant, defendant No. 6, on another portion. But the name of defendant No. 7 alone was recorded in the *sherista* of the landlord, who in execution of a decree obtained in a suit for rent against defendant No. 1 alone purchased the holding himself and settled with the plaintiff. The latter within 12 years from the date of symbolical possession, but more than 12 years from the date of the execution-sale, instituted a suit against all the defendants for possession of the holding:

*Held*, that the suit was not barred as against defendants Nos. 2 and 3, for they having elected to be represented in their relations to the landlord by their brother, defendant No. 1, were parties to the suit in the name of their brother and could not be heard to say that they were strangers to the suit; and that, therefore, against them the symbolical possession gave start to a fresh period of limitation;

that as defendants Nos. 6, 12 and 13 were strangers to the suit, the delivery of symbolical possession did not affect their possession, and that the suit as against them was barred by limitation;

that defendants Nos. 12 and 13 being unrecognised purchasers of a portion of the holding, were bound by the result of the rent suit and were liable to be turned out by a separate suit brought for the purpose within 12 years from the date of the execution sale. C. SADULLA MRIDHA *v.* JOYNABUNNESSA BIBI **703**

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———*Tenant-in-common, whether can sue for his share—Penal provisions, construction of—Lease providing for re-entry on breach of covenants—Forfeiture once incurred, effect of—Muhammadan Law—Intestate—Succession.*

The rights possessed by the members of a Muhammadan family in an intestate's estate are those of tenants-in-common.

A tenant-in-common is, in the Madras Presidency, entitled to sue for his share of the property demised, when a forfeiture has been incurred.

Penal provisions providing for re-entry on failure to perform the conditions of a lease should be strictly construed without favour to either side.

In a mining lease the interests of the Government also are in jeopardy and therefore a forfeiture once incurred cannot be relieved against.

Where the plaintiff and the defendants owning undivided shares in the property in dispute jointly gave a mining lease, which made the rent due thereunder payable in certain proportions individually to them all and provided for re-entry in case of the lessee's failure to perform the conditions, and the plaintiff, on the breach of certain covenants, sued for a declaration that the lease had terminated and for possession of his share:

*Held*, that the suit was maintainable. M. AHMAD SAHIB SHUTTARI *v.* MAGNESITE SYNDICATE, LTD. **512**

LEASE. *See* LANDLORD AND TENANT; MORTGAGE.

———*Contract for one year—Tenant holding over—Contract, tacit renovation of—Tenant, if trespasser—Tenancy, determination of.*

If there is a lease for a year and by consent of both parties the tenant continues in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement which was to hold for a year.

Where, therefore, a contract of lease is for one year certain and provides for payment of rent annually and for its termination on demand without specifying any particular date for making such demand, the tenant holding over is not a mere trespasser but a tenant from year to year whose tenancy must be determined by demand made before the new term commences. M. BEVI UMMA *v.* THEKKINIEDATH ALLATH SHAMU MENON, 3 L. W. 189; 19 M. L. T. 128; (1916) M. W. N. 192 **709**

——— for definite period—Female tenant in her own right—Death of tenant—Lease, effect on **713**

— , permanent and at fixed rate—*Raiyat*, rights of—Sub-lease, if permitted—Sub-lessees, right of, to apply under section 710 (3) **503**

——— Permission to build—Lease not executed—Dispossession—Suit for possession—Injunction—License—Licensee, position of—Easements Act (V of 1882), sections 52 to 64 **346**

——— providing for re-entry on breach of covenants—Forfeiture once incurred, effect of—Muhammadan Law—Intestate—Succession **512**

LEGAL NECESSITY. *See* RELIGIOUS TRUST.

———Daughter's daughter's or son's marriage by widow **121**

LEGAL PRACTITIONERS ACT (XVIII OF 1879), Ss. 13, CL. (*b*), 14—*Professional misconduct of Pleader—Act done as suitor—Error of law, effect of—Reference, legality of—Bench and Bar amity between, necessity of—Anonymous communications to Court, impropriety of.*

A Pleader practising in a Munsif's Court and his cousin had an execution case before the Munsif, which being unjustifiably struck off, a notice signed by the cousin and written out by the Pleader was given to the Munsif threatening him under erroneous legal advice with a suit for damages. On the report of the Munsif, the District Judge asked the Pleader to apologize, which he refused to do. A reference was then made against him under section 14 of the Legal Practitioners Act:

*Held*, that the reference was incompetent, not being one warranted by clause (*b*) of section 13 of Act XVIII of 1879, inasmuch as what was done by the Pleader was done in the capacity of a suitor in respect of his supposed rights as a suitor and of an imaginary injury done to him as a suitor and it had no connection whatever with his professional character or anything done by him professionally.

*Held*, also, that the error committed by the Pleader was an error of law which could not be treated as professional misconduct.

Necessity of amity and mutual understanding between the Bench and the Bar noted.

Anonymous communications to a Court against a party to a pending case commented upon. C. *In re* PURNA CHANDRA, 20 C. W. N. 278; 23 C. L. J. 237; 17 CR. L. J. 65 **657**

———Ss. 13 (f), 14—"*Other reasonable cause*," *meaning of—Scope of inquiry under s.* 14.

Section 13, clause (*f*), of the Legal Practitioners Act, 1879, is not confined to cases of misconduct *ejusdem generis*, as those referred to in the preceding clauses, but includes other cases of misconduct as well.

Section 14 of the Act covers all clauses of section 13 and a subordinate Court is not precluded from taking proceedings against a legal practitioner for conduct alleged to come within clause (*f*) of section 13. M. DISTRICT JUDGE OF KISTNA *v.* HANUMANULU, 16 M. L. T. 549; (1915) M. W. N. 1050; 17 CR. L. J. 38 **326**

———S. 14 **326, 657**

LEGAL REPRESENTATIVE. *See* CIVIL PROCEDURE CODE, S. 2 (11).

LETTERS PATENT (BOM.), CL. 12 **918**

——— (CAL.), CL. 15 **468**

——— (MAD.), CL. 12—*Discretion, exercise of, by High Court on Original Side—High Court, interference by—Jurisdiction—Property situated in different jurisdictions—Leave to bring suit for partition refused—Separate suits, if maintainable—Order refusing leave to amend plaint, if appealable.*

A High Court on appeal would not interfere with the exercise of its discretion on the Original Side in refusing leave to sue for partition of properties situated in different jurisdictions.

An order refusing leave to amend a plaint is in the nature of an interlocutory order and is not appealable as a judgment.

LETTERS PATENT, (MAD.)—concld.

Where immoveable property is situated in different jurisdictions, a separate suit lies in each jurisdiction for the partition of the property there situated.

Per *Seshagiri Aiyar, J.*—A plaint presented on the granting of a provisional leave loses vitality the moment the leave is withdrawn. Therefore, an order refusing leave to amend such a plaint on the withdrawal of the leave is infructuous and is not appealable. M. MAHLINGAM *v.* NATESA AIYAR, 3 L. W. 107; (1916) M. W. N. 146 **423**

——— CL. 15 **873**

——— CL. 36 **330**

LIBEL—*Writer of newspaper article, how far protected—Fair comment—Animadversion on conduct of public men, when justifiable—Well-founded criticisim, meaning of.*

In the course of public discussions on matters of public interest proceeding in the press from day to day, it is too much to expect that a writer in each article should set out all the facts upon which his comment is based, including admitted facts which are within the knowledge of every one interested in the question.

Where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a Jury shall say that the criticisim was not only honest but also well-founded, an action is not maintainable.

The statement that criticisim must be well-founded means no more than that a fair-minded man might upon those facts *bona fide* hold that opinion.

Where, therefore, at a time when a Railway strike was impending, an article appeared in the defendant's newspaper imputing selfish motives to the plaintiff and accusing him of having fomented the strike and prevented a conference for the amicable settlement of the dispute, on a suit being brought to recover damages for libel:

*Held*, that the article was intended as a comment on facts which were common knowledge and the writer was well-warranted in forming and expressing the opinion that the plaintiff had endeavoured to stop the conference and to foment the strike. M. MADRAS TIMES PRINTING AND PUBLISHING CO, LTD. *v.* ROGERS, 3 L. W. 67; 30 M. L. J. 294; (1916) M. W. N. 267 **408**

LICENSE—Permission to build—Lease not executed—Dispossession—Licensee—Remedy **346**

LIMITATION—Agriculturist, bond executed by—Suit for recovery on bond **495**

——— Landlord and tenant—Settlement proceeding, right claimed at—Hostile right **856**

——— Review—Delay in filing petition—Duty of applicant to account for delay **1000**

——— Sale in execution set aside—Part of decree barred, if realisable **6 9**

——— Suit for possession by execution purchaser of holding **703**

——— Tenant dispossessed by a co-sharer landlord—Suit for recovery **510**

LIMITATION ACT (IX OF 1908), S. 5 **380, 630, 829 975**

——— S. 5—*Appeal filed out of time under advice of Pleader—Pleader misled by change in law—Sufficient cause.*

It is not an inflexible rule of law that in no case can the circumstance that a litigant has, under the erroneous advice of Counsel or Pleader, presented an appeal out of time be deemed a sufficient cause within the meaning of section 5 of the Limitation Act. The true rule is whether, under the special circumstances of each case, the appellant acted under an honest, though mistaken, belief formed with due care and attention or there was any negligence or inaction or want of *bona fides* on the part of the appellant.

Where, therefore, an appellant filed an appeal in the Court of a District Judge after the specified period of 30 days under the advice of a legal practitioner, who was misled by a change in the law of limitation relating to appeals:

*Held*, that there was sufficient cause within the meaning of section 5 for not filing the appeal within the prescribed period of limitation. P. AZIM ULLAH *v.* GOKAL CHAND, 37 P. W. R. 1916 **640**

——— S. 5—Extension of period of limitation—Decision of first Appellate Court on technical point set aside in second appeal—Merits, trial on—Second Appellate Court, election of **380**

——— S 14 **497, 616**

——— S. 19—*Acknowledgment of liability by implication, essentials of—Evidence Act (I of 1872), s. 35—Revenue records, admissibility in evidence of.*

An acknowledgment of liability under section 19 of the Limitation Act may be by implication, but the implication must be a necessary implication, so that the acknowledgment is clear and unequivocal.

An objection that a person should be joined as a party to a suit does not necessarily imply an admission of an existing liability to that person.

Though Revenue records are not evidence of title for they are kept for fiscal purposes, yet when the facts recorded are facts which it is the duty of the Revenue Officer to record, then his record is evidence of those facts under section 35 of the Evidence Act. S. BIBI SAHIBZADI *v.* MIR MOHAMAD, 9 S. L. R 143 **548**

——— Ss. 19, 14—*Recital of past events, whether acknowledgment—Exclusion of time—Proof, necessary.*

Recitals of past events cannot be construed as acknowledgments of existing liability

Where, therefore, in a previous suit between the parties, the defendants in their written statements merely recited that they had received a certain amount as earnest money and then said that the said amount had been more than re-paid by delivery of goods:

*Held*, that there was no such acknowledgment of liability on the part of the defendants as to extend the time under section 19 of the Limitation Act.

LIMITATION ACT—contd.

A person who claims an exclusion of time during which a former proceeding was pending must prove two things, *first*, that he had prosecuted the former proceeding with due diligence and, *secondly*, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature.

Where, therefore, each of the two plaintiffs in a suit came into Court originally to sue separately in respect of a contract which gave them a joint but not a several right and their error was pointed out to them and they were given every opportunity of rectifying it; but they elected to proceed with their suits as then framed, and by the time they were dismissed on the ground of non-joinder the period of limitation had expired:

*Held*, that the plaintiffs had not exhibited that degree of diligence which alone could entitle them to the benefit of section 14 of the Act. P. KALU *v.* MEHRU MAL, 33 P. W. R. 1916; 41 P. R. 1916 **497**

——S. 21, *scope of*—*"Joint contractor", meaning of—Test for determining effect of acknowledgment by third party—Decree-holder, right of—Exemption, grant of.*

The proviso in section 21 of the Limitation Act is not exhaustive of the persons for whose benefit the protection is intended. The test in each case is whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is to be arrested. In cases where the liability is several, it should be clearly established that the persons to be bound allowed themselves to be represented by the person who made the part-payment.

The word "joint contractor" in section 21 of the Limitation Act applies also to a surety; and, therefore, an acknowledgment by the principal debtor does not save limitation against the surety.

Ordinarily a decree-holder is entitled to have all his remedies against the judgment-debtor and exceptional circumstances should be proved in order to grant any exemption from the general liability. An order, therefore, directing the payment of a decretal amount by instalments extending over four years should be supported by very strong circumstances. M. KOTHANDARAMAN CHETTY *v.* SHUNMUGAM CHETTY **608**

——S 22—*Suit against wrong defendant—Right person made defendant after period of limitation, effect of—Clerical mistake—Misdescription of defendant—Amendment.*

In a suit for the correction of a certain entry in the Record of Rights the defendant was described as Mr. P. J. Forbes but sometime after the period of limitation for the suit had expired on the petition of the plaintiff, alleging that the defendant had been misdescribed in the plaint and that the defendant was really a lady named Miss. P. J. Forbes, the lady was made a defendant. She contested the suit and it was dismissed as barred by limitation against the lady:

*Held*, that the suit was not barred by limitation inasmuch as the mistake in the name of the defendant was but a clerical one and the case was merely of misdescription having regard to the fact that the

LIMITATION ACT—contd.

party that was meant to be the defendant in the suit was the person whose name had been recorded in the Record of Rights. C. JOGENDRA NARAIN ROY *v.* FORBES **872**

——S. 28, SCH. I, *scope of—Sale, cancellation of—Previous suit by defendant dismissed as time-barred—Subsequent suit, whether barred by* res judicata.

The first Schedule to the Limitation Act only provides periods of limitation within which suits must be brought. It does not provide any period for defences.

The plaintiff bought a house sold by a Receiver in order to clear off certain debts and got possession of it with the exception of 2 *kothris*. The defendant sued for the cancellation of the sale but the suit was dismissed as time-barred. The plaintiff, then, sued to get possession of the *kothris*:

*Held*, (1) that the decision in the previous suit could not be regarded as *res judicata* and the defendant was not precluded from impeaching the sale;

(2) that the defence was not time-barred under Schedule I to the Limitation Act, nor under section 28, as the defendant had been in possession of the subject-matter of the suit. P. GOKAL CHAND *v.* NIADAR MAL, 1 P. R. 1916 **485**

——S. 31 **95**

——SCH. I, ART. 12 **391**

——ART. 36 **901**

——ART. 44 **242**

——ART. 49 **901**

——ART. 60—*"Money deposited," meaning of—Servant allowing his salary to accumulate along with sum paid by him prior to entering service—Total amount, nature of—Banker and customer—Debtor and creditor.*

The plaintiff, prior to entering the service of the defendant firm, gave a certain amount of money to the firm and then allowed his salary to accumulate and remain with the firm under an agreement that both sums should be credited with interest at the current rate and should be payable on demand. The plaintiff occasionally drew against it whenever he required money. On a suit for sums due:

*Held*, that both sums were "money deposited" within the meaning of Article 60 of the Limitation Act and not "money lent" under Article 59 and that the period of limitation commenced to run from the date of demand.

Money in the hands of a trader who is not a banker will be "a deposit" in circumstances such as would make it money of a customer where the depositee was a banker.

The true relation between a banker and his customer is that of debtor and creditor, but a customer who pays moneys to his banker under terms that he is not to use it or who authorises his banker to collect money due to him on the like terms constitutes a fiduciary relationship between himself and the banker and is entitled to recover the amount from the general assets of the banker if the banker has committed a breach of trust, on the principle that all other payments must be

LIMITATION ACT—(1908)—contd.

assumed to have been made out of the money in the banker's hands to which no fiduciary character attached. M. SUBRAMANIAN CHETTIAR *v.* KADIRESAN CHETTIAR, 3 L. W. 168; 30 M. L. J. 245, 19 M. L. T. 129; (1916) M. W. N. 186 965

—— SCH. I, ARTS. 62, 120—*Suit by co-sharer for recovery of his share of profits—Accounts necessary—Previous suit for profits of certain year withdrawn—Subsequent suit for entire profits, whether barred—Civil Procedure Code (Act V of 1908), O. II, r. 2.*

Where the plaintiff, who was entitled to a particular share in a certain *jagir*, sued the manager thereof to recover his share of the profits after an account being taken of what was received by the defendant and what he lawfully spent:

*Held*, that Article 62 of the Limitation Act had no application as it could not be said that the money which might be found due to the plaintiff was received at any particular point of time, and that the suit was governed by Article 120.

Where plaintiff sued to recover the profits of a certain year, but the plaint was returned to him for presentation to the proper Court because the valuation exceeded the limits of the pecuniary jurisdiction of the Court in which the suit was originally brought, and the plaintiff never afterwards represented the plaint, but subsequently sued for his share of the entire profits:

*Held*, that the first suit having been practically withdrawn must be treated as if it was never filed, and that Order II, rule 2, Civil Procedure Code, did not operate as a bar to the present suit. M. SUBBA ROW *v.* RAMA ROW, 3 L. W. 192; 19 M. L. T. 134; (1916) M. W. N. 188; 30 M. L. J. 341 899

—— ARTS. 62, 97—*Vendor and purchaser—Contract to sell—Suit for specific performance of contract—Return of purchase-money.*

A contract to sell a village was made on the 27th of April 1908. A portion of the consideration was paid as earnest money at once and the balance was paid on the 18th of June 1908. The sale was not completed. The plaintiff sued for specific performance with an alternative claim for the return of the purchase-money in April 1913:

*Held*, that the suit was barred by limitation. A. FATAMATUS SUGHRA BEGAM *v.* MARIAMUNNISA BEGAM 49

—— ARTS. 66, 67, 80—*Unregistered bonds, how governed—Bond providing for re-payment on happening of certain contingency, suit on—Starting point of limitation.*

Article 67 of the Limitation Act has to be read with Article 66 and both these Articles apply to unregistered bonds. Neither of these can properly be applied to a bond which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is payable on a future date upon a certain contingency happening.

Where, therefore, a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously:

*Held*, that since according to the true construction of the bond the money due on it could not be demanded by the plaintiff before the money due on the mortgage-deeds was paid to him, the starting point for limitation was the date of such payment and that Article 80 of Schedule I of the Limitation Act governed the case. P. KIRPA RAM *v.* CHURN, 30 P. W. R. (1916) 575

—— SCH. I, ART. 67 575

—— ARTS. 73, 80—*Suit on promissory note payable on demand—Collateral agreement postponing time for payment, whether valid—Time, when begins to run.*

An agreement in writing executed along with a promissory note postponing the time for payment is a valid and enforceable agreement.

Where, therefore, in a suit on a promissory note payable at demand it appeared that the drawer gave an agreement in writing fixing ten months' time for payment from the date of the pro-note:

*Held*, (1) that time began to run from the expiry of the period fixed in the agreement and that the suit was governed by Article 80 of the Limitation Act;

(2) that such an agreement was operative under sections 62 and 63 of the Contract Act and was recognised by the Legislature in Article 73 of the Limitation Act. M. ANNAMMALAI CHETTY *v.* VELAYUDU NADAR, 3 L. W. 38; 19 M. L. T. 62; 30 M. L. J. 51; (1916) M. W. N. 93 869

—— ART. 80 575, 869

—— ART. 91 242, 930

—— ART. 93—*'Attempt' to enforce a forged instrument', meaning of—Application by a widow for succession certificate as heir to her deceased husband—Claim as legatee not set up—Application, whether an attempt.*

A person can be said to "attempt to enforce a forged instrument against the plaintiff" within the meaning of Article 93 of Schedule I of the Limitation Act, only when he institutes proceedings in which the genuineness of the document is directly put in issue and to which the person against whom it is sought to be enforced is a direct and necessary party.

An attempt to register a document cannot be treated as an attempt to enforce it against other persons' rights.

A widow applied for a succession certificate, basing her right to collect the debts due to her deceased husband expressly on the ground that she was his widow and as such entitled to the certificate under the Hindu Law and only incidentally mentioned a Will of her deceased husband, but did not base her right upon her position as a legatee. In a suit by the reversioners of the husband to declare the Will forged:

*Held*, that the mention of the Will in the petition was not an attempt within the meaning of Article 93, Schedule I to the Limitation Act, 1908. M. VUDATHU KAMALANABHAN *v.* VUDATHU SATTIRAZU 99

—— ART. 97 49

—— ART. 97—*Contract of sale—Dispossession of vendee—Suit to recover purchase-money, maintainability of.*

Where in pursuance of a contract of sale, the vendee was put in possession of the property sold

LIMITATION ACT—(1908)—contd.

and on being subsequently dispossessed sued to recover damages for the loss sustained:

*Held*, that inasmuch as possession had been given under the contract of sale, the sale was not void *ab initio* and the plaintiff was entitled to recover his purchase-money in a suit under Article 97 of the Limitation Act. M. MEENAKSHI *v.* KRISHNA ROYAR, 19 M. L. T. 163 176

—— SCH. I, ART. 105—Creditor having debtor's funds for payment to himself—Limitation 729

—— ART. 106 427, 853

—— ART. 109 102

—— ART. 113 536, 573

—— ART. 116—*Suit for possession under a contract of lease, nature of—Claim for mesne profits, whether affects suit.*

A suit for possession under a contract of lease and for mesne profits is substantially one for damages for breach of contract and is governed by Article 116 of the Limitation Act. M. KODIALBAIL RYMOND *v.* KODIALBAIL DEVU SHETTY 245

—— ART. 120 899

—— ART. 120—*Award, suit on, limitation for—Award not signed by parties, if binding.*

A suit based on an award is governed by Article 120, and not Article 113 or 115, of Schedule I of the Limitation Act.

An award even in the absence of the signatures of the parties, is binding on all who had agreed to make reference to arbitration. P. HARBHAJ MAL *v.* DIWAN CHAND, 102 P. R. 1915 88

—— ARTS. 120, 109—*Suit by co-sharer for share of produce in joint holding—Punjab Tenancy Act (XVI of 1887), s. 77 (3) (k)—Trusts Act (II of 1882), s. 90—Co-sharer, exclusive possession by, effect of.*

A suit by a co-sharer in a holding under section 77 (3) (*k*) of the Punjab Tenancy Act for a share of the produce of the joint holding, is governed by Article 120 of the First Schedule to the Limitation Act.

The relation of a co-sharer who obtains exclusive possession to a fellow-sharer who is not in possession, is, by section 90 of the Indian Trusts Act, declared to be a fiduciary one and the receipt by the trustee in such circumstances of profits for which he is liable as trustee to render an account, cannot be said to be a wrongful receiving within the meaning of Article 109 of the Limitation Act. P. KHADIM HUSSAIN KHAN *v.* MURAD BIBI, 5 P. R. 1915 REV. 102

—— ART. 120—*Suit by a tenant-in-common for share of the family property—Debts due to family collected by one co-sharer—Plaint, amendment of—Civil Procedure Code (Act V of 1908), O. VI, r. 17.*

In suits for partition, administration and the like suits which do not necessarily arise out of any wrongful act on the part of the defendant, the right to sue accrues day by day so long as the right to the suit property exists.

A Muhammadan having died intestate his two daughters brought a suit in July 1911 against their step-brothers for partition of the family properties.

LIMITATION ACT—(1908)—contd.

The lower Appellate Court allowed the plaint to be amended by claiming also a share in certain sums received by the defendants from the mortgage-debtor of their father in 1904 and awarded such share:

*Held*, (1) that the amendment was rightly allowed, and that the defendants having already set up the plea that they spent much more than the plaintiffs' share in these amounts for the plaintiffs themselves, no further opportunity could be given them for adducing fresh evidence;

(2) that the plaintiffs being entitled to the property as tenants-in-common with the defendants, their claim to a share in the amount received by the defendants on account of debts due to the family was not barred by limitation. M. SARAKHI ABDUL RAHIMAN *v.* MUHAIDIN PATHUMMAL BIVI, 30 M. L. J. 104; 19 M. L. T. 88 83

—— SCH. I, ART. 123 1002

—— ART. 132 901

—— ART. 132—*Mortgage-deed giving mortgagee option to sue or not to sue on default in payment of interest—Period of limitation, starting point of.*

Where a mortgage-deed gave the mortgagee a right to enforce payment on default in payment of interest, and also gave him the option of not enforcing payment on such date:

*Held*, that the date from which the period of limitation began to run was the date of the first default, notwithstanding any stipulation in the deed giving the mortgagee the option of not enforcing payment on such date. O. TULSHI RAM *v.* MUHAMMAD HADI, 551

—— ART. 134, *applicability of.*

Article 134, Schedule I, of the Limitation Act has no effect where a mortgagee transfers his rights as such, but has effect only where he purports to transfer proprietary rights. O. MIRZA YAR ALI BEG *v.* DANISH ALI, 2 O. L. J. 483 314

—— ART. 134—*Mortgage by conditional sale—Transfer by mortgagee—Redemption—Notice.*

The plaintiff mortgaged his properties by conditional sale to one *T*, who, after the expiry of the time fixed for payment, sold them to one *V*, who purchased them with the knowledge that *T* was only a mortgagee. *V* then sold the properties to the defendant. It was found that the defendant had purchased them without knowledge that *T* was only a mortgagee. The plaintiff sued the defendant for redemption. The Court found that the plaintiff had notice of the defendant's purchase within three years of suit:

*Held*, that the plaintiff was entitled to redeem.

Article 134 of the Indian Limitation Act, 1877, has not been materially altered by the substitution in the Act of 1908 of the words "transferred by" for the words "purchased from." M. THOLASINGA MUDALI *v.* NAGALINGA CHETTY, 3 L. W. 19; (1916) M. W. N. 28 265

—— ART. 135 341

—— ART. 136 353

—— ART. 139—Suit by landlord against tenant holding over—Limitation 55

LIMITATION ACT—(1908)—concld.

——— SCH. I, ART. 140—Usufructuary mortgagee of *mokarariдar*, rights of—Death of *mokarariдar*, effect of 827

——— ART. 141 127

——— ART. 144 242, 353, 568

——— ARTS. 144, 91—*Suit for possession and cancellation of document—Limitation.*

The plaintiff sued for possession of a property basing his title under a grant executed in his favour. In the plaint he also prayed for the cancellation of a document executed by his grantor in favour of the defendant subsequent to his own:

*Held*, that the suit was not one for cancellation and was governed by Article 144 and not by Article 91 of the Limitation Act. A. BAGESHRA *v.* SHEO NATH, 14 A. L. J. 464 930

——— ART. 148 353

——— ART. 149 774

——— ART. 180, *applicability of—Application for possession by decree-holder-purchaser—Limitation.*

An application for possession by a decree-holder-purchaser is not an application to execute the decree, and is governed by Article 180 of Schedule I of the Limitation Act, 1908. M. RAMASWAMI AIYAR *v.* ABDUL AZIZ SAIB, 3 L. W. 191; 19 M. L. T. 164 993

——— ART. 181 1005

——— ART. 182 39

——— ART. 182—*Execution petition—Return for amendment—No re-presentation—Step-in-aid.*

An execution petition which has been returned by a Court for amendment but not re-presented, is an application which will give a fresh starting point for limitation. M. GOPISETTI NARAYANASAMI NAIDU GARU v. MUTHYALA VENKATRATNAM, 2 L. W. 1207 816

——— ART. 182, CL. (4) 744

——— ART. 183—*Revivor without notice to some judgment-debtors, effect of.*

For the purposes of Article 183 of the Limitation Act, 1908, where an order of revivor is made without notice to one of the judgment-debtors, the order has no effect as against him or his property and, therefore, an application for execution against such a judgment-debtor brought 12 years after the date of the decree is barred by limitation. M. JAMES RUSSEL MCLAREN v. VEERIAH NAIDU, 38 M. 1102 1003

LOWER BURMA TOWNS AND VILLAGE LANDS ACT (IV OF 1898), Ss. 24, 25, 26 630

MADRAS ABKARI ACT (I OF 1886), Ss. 56, 64—*Depôt-writer actual offender, liability of.*

Section 56 of the Abkari Act when read with section 64 makes also a depôt-writer (not a licensee under the Act), if an actual offender, liable for an offence under the former section. M. *In re* M. MUTHAYA, 17 Cr. L. J. 2 130

——— S. 64 130

MADRAS DEPUTY COLLECTORS ACT (VII OF 1914) 986

MADRAS ESTATES LAND ACT (I OF 1908), Ss. 3, 40—*Grant of village prior to Settlement for subsistence—Grant, whether constitutes an "estate"—Onus—Suit by ryots for commutation.*

In order to determine whether a village granted as *inam* to a *Brahmin* by the *zemindar* before the Permanent Settlement subject to the payment of a *jodi* constitutes an estate within the meaning of the Madras Estates Land Act the question of onus depends upon the circumstances of each case.

Where in a suit for commutation of rent in kind into money rent by the *ryots* in occupation of an *inam* village, it appeared that the *ryots* had been in possession of their holdings at more or less fixed rates for years and there were no relinquishments:

*Held*, (1) that the burden of proving that the grantee was the owner of the *kudivaram* lay on the defendant landlord.

(2) that in the absence of evidence the village must be deemed to be an estate under section 3 (2)(*d*) of the Madras Estates Land Act;

(3) that the plaintiffs were entitled to the commutation asked for. B. R. MAD. RADHA KRISHNADASS GOSWAMI *v.* BIKARI BEHARA 229

——— —Ss. 3, (2) (d), 8—*Estate—Grantee owning* kudivaram*—Village, if estate—Occupancy rights, absence of, in tenants—Presumption of* kudivaram *being in landlord, if justifiable—Exception to s. 8, scope of.*

A village will not cease to be an 'estate' within the meaning of clause (2) (*d*) of section 3 of Madras Estates Land Act, 1908, merely because the grantee owned the *kudivaram* in certain lands included therein. To remove a village from the definition, it is necessary that the grantee should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation.

Though the fact that the tenants had no occupancy rights in the suit lands may give rise to a presumption that the landlord owned the *kudivaram* in those lands, that is insufficient to remove the case from the definition in section 3 (*z*) (*d*) of the Madras Estates Land Act.

The exception to section 8 of the Madras Estates Land Act, I of 1908, does not apply to cases where at any time before the passing of the Act, the *kudivaram* was held by a person who subsequently became, as *inamdar*, possessed of the land revenue. It has reference only to cases in which a person who is already *inamdar* acquires the *kudivaram* right. M. VARADARAJA APPA RAO *v.* KATNANI KURUVANNA, 3 L. W. 196; 30 M. L. J. 249; 19 M. L. T. 159 722

——— Ss. 3 (11) (a), 61—*Rent, meaning of—Madras Local Board Act (V of 1894) s. 73—Local cess, claim for—Interest on arrears of such cess.*

Section 3 (11) (*a*) of the Madras Estates Land Act refers only to money recoverable from a *ryot* by the land-holder and does not include the "local cess" claimable by him from an intermediate landholder under section 73 of the Madras Local Boards Act. No interest can, therefore, be claimed on the arrears of such local cess under section 61 of the Madras Estates Land Act. M. GOPISETTI NARAYANASWAMI NAYUDU GARU *v.* PANNALA RAMANANDAN, 3 L. W. 32 433

——— —S. 3 (16) 594

MADRAS ESTATES LAND ACT—contd.

—— S. 4., CL. (3)—*Commutation of rent—Rate, determination of.*

In determining the rate of commutation of rent a Court is not justified in accepting the list of prices prepared by the Collector without further proof that these were prices actually prevailing in that locality during the year in question. M. SIJAVI RAJAH SAIB *v.* COURT OF THE SUBORDINATE JUDGE OF TANJORE **493**

—— S. 8 **722**

—— S. 38—*Landlord and tenant—Grounds for reduction of rent.*

A tenant is not entitled under section 38 of the Madras Estates Land Act to a reduction of rent in cases where it cannot be shown that the failure to supply water has taken place while the rent was as high as the present figure. M. NALLAYA KOUNDER *v.* SADAYA KOUNDAR, (1915) M. W. N. 791 **809**

—— S. 40 **229**

—— Ss. 55, 3 (16)—*Land not classed as* ryoti—*Suit for* pattah, *who can bring.*

A suit for a *pattah* under section 55 of the Act will lie only at the instance of a *ryot* in respect of that land alone which is classed as "*ryoti*", and not in respect of any land which is excluded from the definition of that term by section 3 (16) (*b*). M. RAMASWAMI NAICKER *v.* SEENIMAKAYYA VELUCHAMI **594**

—— S. 61 **433**

—— Ss. 74, 75—*Nature of proceedings—Finding of Collector as to payment of rent, whether has effect of decree—Subsequent suit for determination of rent, whether barred*—Res judicata.

The proceedings under sections 74 and 75 of the Madras Estates Land Act are more or less of a summary character. There is nothing in section 75 to show that the finding of the Collector on the question, whether the rent was payable by division or appraisement, would have the effect of a decree and operate as *res judicata* so as to bar a subsequent suit for the determination of that question. M. TALAGAPU TAYUDU *v.* ZAMINDAR OF TARLA **706**

—— S. 75 **706**

—— Ss. 112, 117, 205—*Notice of intention to sell smaller extent of land—Ambiguity in sale proclamation, effect of—Sale, legality of—Civil Procedure Code (Act V of* 1908), *s.* 151.

A sale proclamation issued under section 117 of the Madras Estates Land Act (I of 1908) must closely follow the notice of intention to sell served on the defaulter under section 112 of the Act.

Where the sale proclamation represents a certain piece of land as lying within certain boundaries which cover a larger extent of land than that specified in the notice of intention to sell given under section 112 of the Act, and where the sale is also of crops on the land not included either in the notice of intention to sell under section 112 or in the proclamation of sale under section 117 and the land is sold for a very inadequate price:

MADRAS ESTATES LAND ACT—concld.

*Held*, that under section 205 of the Madras Estates Land Act the sale was liable to be set aside as illegal. M. VEDACHALLA DHIKAHIDAR *v.* VANKATHU SUBBARAYA **967**

—— S. 117 **967**

—— Ss. 131, 215—*Revenue Officer, power of, to revise order of predecessor-in-office—Deposit under section* 131, *if includes deposit in Sub-Treasury—Application for deposit, form of—Notice—Sale, setting aside of—Jurisdiction.*

A Deputy Collector has no jurisdiction to cancel orders passed by his predecessor-in-office. The proper procedure is to ask the District Collector to revise them.

A deposit in a Sub-Treasury is a deposit with the Collector within the meaning of section 131 of the Madras Estates Land Act; and for the purpose of effecting it, the presentation of a *challan* containing purpose and particulars of the deposit is a sufficient application.

An order setting aside a sale is one passed without jurisdiction when passed without notice to the auction-purchaser. M. SUNDARARAJA AIYANGAR *v.* ASIRI NAIDU **891**

—— Ss. 186, 204—*Certificate, grant of—Deputy Collector, power of—Jurisdiction—Madras Regulation VII of* 1828—*Madras Deputy Collectors Act* (*VII of* 1914).

A Deputy Collector has jurisdiction to make the grant of a certificate required by section 186 of the Madras Estates Land Act to support an application to the District Judge for compulsory sale of land by the *ryot* to the land-holder.

*Quære.*—Whether a Court is bound to receive evidence tendered on the question of reasonableness and sufficiency of the purpose of an acquisition. M. MEENAKSHI AMMAL *v.* MR. R. G. ORR, 3 L. W. 227 **986**

—— S. 204 **986**

—— S. 205 **967**

—— S. 205—*Decision of Revenue Court—Revision to High Court, if competent—Jurisdiction, conflict of—Civil Procedure Code (Act V of* 1908), *s.* 115—*Charter Act*, 24 *&* 25 *Vic.*, *c.* 104, *s.* 15—Ex parte, *decree, setting aside of, without notice—Review—Revision.*

In a suit brought under the Madras Estates Land Act, a Sub-Collector passed an *ex parte* decree but later on he set aside the said decree without notice to the plaintiff. An application to review this order was made but after hearing both sides the Sub-Collector confirmed his previous order:

*Held*, that the Sub-Collector acted at first irregularly in setting aside the *ex parte* decree without notice to the plaintiff but that as he confirmed his order on review after hearing both sides there was nothing in the circumstances of the case to warrant interference by the High Court in revision.

*Quære.*—Whether section 205 of the Madras Estates Land Act, 1908, bars the power of the High Court to entertain a revision petition against the order of a Sub-Collector exercising jurisdiction in a suit under that Act? M. RAMASWAMI NAICKER *v.* SUBBARAYULU NAICKER, 3 L. W. 158 **567**

—— S. 215 **891**

MADRAS IRRIGATION CESS ACT (VII OF 1865) **270**

MADRAS LAND ENCROACHMENTS ACT (III OF 1905), Ss. 5, 6, 7, 14—*Notice under s. 7, effect of—Cause of action.*

A mere notice under section 7 of the Madras Land Encroachments Act 1905, calling on the person in occupation to show cause why he should not be proceeded against under section 5 or section 6 of the Act, does not give rise to a cause of action. M. SECRETARY OF STATE *v.* ILLIKKAL ASSAN, 3 L. W. 228; 30 M. L. J. 255; 19 M. L. T. 157; (1916) M. W. N. 167 **755**

——— Ss. 6, 7, 14 **755**

MADRAS LOCAL BOARDS ACT (V OF 1894), S. 73 **433**

MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), Ss. 4, 15—"*Proprietor*", *meaning of—General powers of management given to Receiver, effect of—Receiver, whether can appoint* karnams.

The powers of a Receiver appointed by a Civil Court under Order XL, rule 1, of the Civil Procedure Code are entirely conditioned by the terms of his appointment, subject to any subsequent modification by the Court under which he holds the appointment.

Where an appointment order confers on a Receiver general powers of management authorising him to do such acts as may be necessary for the efficient administration of the property subject to the control of the Court, he has all the powers of a proprietor within the meaning of section 4 of Act II of 1894 and is entitled to nominate persons to *karnamships* under section 15 of the Act. M. SECRETARY OF STATE *v.* KOMARAGIRI JANARDHANA RAO, 30 M. L. J. 456 **207**

——— S. 15 **207**

MADRAS REGULATION VII of 1828 **986**

MADRAS RENT RECOVERY ACT (VIII OF 1865), **919**

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 42—*Assignment of Government revenue—Assignee, whether has first charge on land—Suit to recover* jodi, *nature of—Small Cause Court, jurisdiction of.*

Per *Wallis, C. J.*—Where Government transfers the right to collect the *jodi* to a *zemindar* or *mittahdar* in consideration of his undertaking to pay a fixed *peshkush* and includes it in the assets of the *mittah* when calculating the *peshkush* payable thereon, the *zemindar* or *mittahdar* has no charge upon them and a suit by him to recover *jodi* from the *inamdar* is a suit for rent and nothing more and so cognizable by a Court of Small Causes in the Madras Presidency.

Per *Seshagiri Aiyar, J.*—It cannot be said that under no circumstances will an assignee of Government revenue possess the same remedies which the Government have for the realization of their revenue, but it is essential for the right to arise in favour of the assignee that the assigned revenue should retain its distinctive character of Government assessment, and where such *jodi* is included in the assets of the *mittah* when fixing the *peshkush* thereon, it is merely income due to the *mittahdar* and not Government assessment.

The priority given to Crown debts may also arise in favour of a mere assignee of Government revenue. M. SUBBARAYA GOUNDAN *v.* RANGANADHA MUDALIAR, (1916) M. W. N. 216; 3 L. W. 273; 30 M. L. J. 387 **971**

MADRAS VILLAGE COURTS ACT (I OF 1889), S. 73—*District Munsif, power of, to review judgment set aside by mistake—Review—Inherent power—Civil Procedure Code (Act V of 1908), s. 115.*

Every Court has an inherent power to review its judgment by setting aside orders passed either under a mistake of the Judge or obtained by a fraud upon the Court.

A District Munsif can, therefore, review a judgment which he, acting under section 73 of the Village Courts Act, set aside by mistake, though that Act provides for no such review.

*Quære*—Whether the Code of Civil Procedure applies to applications made under section 73 of the Village Courts Act? M. PARAMASIVAM PILLAI *v.* PERIYANAYAGATHAMMAL **527**

MAHANT. *See* RELIGIOUS TRUST.

MAINTENANCE. *See* CRIMINAL PROCEDURE CODE, S. 488; HINDU LAW.

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT I OF 1900), S. 5—*Payment into Court by landlord of amount due for improvements, whether valid tender—Contract Act (IX of 1872), s. 38—Transfer of Property Act (IV of 1882), s. 83—Tenant remaining in possession afterwards—Right of landlord to claim mesne profits.*

When a landlord has tendered that which a Court has subsequently found to be the true amount due and owing in respect of the improvements effected by a tenant, if the tenant chooses to hold over after that date, he can do so only at his peril and on condition of paying the mesne profits on the land.

Per *Seshagiri Aiyar, J.*—The value of improvements effected by a tenant cannot be brought under the expression "amount due on the mortgage" in section 83 of the Transfer of Property Act and, therefore, the section does not enable a tender to be made by a landlord for the value of improvements but such a tender is a valid tender under section 38 of the Contract Act. M. CHAMI *v.* ANA PATTAR, 3 L. W. 246; (1916) M. W. N. 160 **861**

MALABAR LAW—Anubhavam *grant—Grant in favour of children*—Anubhavam *right on specified rent—Construction.*

The term "*anubhavam*" when used with reference to a grant of land confers a permanent tenure.

Where, therefore, a deed of grant in favour of the children of a certain man recited that "as before you shall, in future also, hold the properties" on *anubhavam* right on a specified rent:

*Held*, that the document, construed as a whole, showed that the parties intended the tenure to be permanent and that the subsequent reference to a portion of rent as *anubhavam* meant a fixed allowance to be taken by the grantee in perpetuity out of the rent notwithstanding that the gross rent might be varied from time to time upon a customary renewal of the demise. M. KRISHNA IYER *v.* MURINGA MALAYIL **982**

——— *Gift—Donor following Marumakkattayam Law—Intention of donor—No indication of character of estate conferred—Donees, whether take absolutely.*

Per *Kumaraswami Sastri, J.*—In construing a deed of gift the Courts have to see the intention of the donor as evidenced either by the deed or by the surrounding circumstances at the time.

MALABAR LAW—contd.

Where a Marumakkattayam donor gives properties to children of the same mother or to a member of a *tavazhi* without any express indication that an absolute alienable estate is granted, the presumption is that the donor intends to confer only an estate with all the incidents of *tarwad* property.

The mere fact that a donor states that he has a right to sell the property and that the donees should have all his rights, does not confer upon the donees any higher estate. Express words that the donees were to take the property as tenants-in-common and not under ordinary Marumakkattayam Law are necessary.

Where there are expressions indicating that the donees take an absolute heritable and alienable estate, there is no reason to treat the clauses as repugnant and unenforceable simply because the gift is to the donee and his or her children or heirs.

Where, therefore, an uncle following the Marumakkattayam Law made a gift of certain property to his nieces, children of the same mother, and there was nothing in the deed to indicate that an absolute alienable estate was intended to be conferred:

*Held*, that the property was intended to be given as *putravakasam* property.

Per *Coutts Trotter, J.*—(dissenting)—That inasmuch as the deed contained an assignment by the donor of all his rights in full, it conferred an absolute estate on the donees without the incidents of *tarwad* property. M. KUYYALTIL KUNDAN KUITY *v.* VAYALPATH PARKUM **107**

——— *Power of* tarwad *to limit* karnavan's *powers —Family* karar, *binding nature of—Abstention of one member, effect of*—Karar, *whether revocable—Power of* karnavan *to create* melcharth.

It is in the power of a *tarwad* to limit the ordinary powers of a *karnavan* by means of a family *karar*, which the *karnavan* is not entitled of his own authority to set aside.

Where a *karnavan* is a consenting party to a family *karar*, he is bound by its terms unless the other contracting parties are willing to release him from his obligations or he can show that the *karar* is no longer beneficial to the interests of the *tarwad*.

Abstention for personal reasons of one member of the family cannot affect the binding character of the *karar* on those who are parties to it.

A family *karar* among members of a *tarwad* restricting the ordinary powers of a *karnavan* with a view to settle family disputes or to provide against mismanagement is not merely a delegation of the powers of the *karnavan* to other members of the family revocable at the will of the *karnavan*.

A *karnavan* with powers of *melcharth* thus limited has no power to grant a *melcharth* without the concurrence of other members of the *tarwad*. M. PANGI ACHAN *v.* BHESMAN ACHAN **501**

——— *Will conferring express powers of alienation —Presumption*—Tavazhi—*Manager in possession as* kanomdar *owning equity of redemption—Discharge Burden of proof—Marumakkattayam Law.*

A testator in Malabar giving property to his wife and children who are governed by the Marumakkattayam Law is presumed to give it to them as a *tavazhi* to be held with the incidents of *tarwad* property, and not to the donees individually as tenants-in-common. But this presumption is based on the principle of construing the terms of a Will in the light of surrounding circumstances and must not be used for the purpose of controlling and modifying the express words of a Will.

Where, therefore, a testator governed by the Marumakkattayam Law devised to his son properties which he had obtained exclusively for himself from his *tarwad* and gave the son absolute rights of alienation:

*Held*, that on a true construction of the Will the son took an absolute estate and the mere fact of his being the manager of the *tavazhi* did not raise a presumption that the gift was for the benefit of the *tavazhi*.

Where the manager of a family is in possession as *kanomdar* and is himself the owner of the equity of redemption, and where he pleads that he has discharged his liability to the family by payment to two of its members, there is a heavy burden on him to prove satisfactorily that he did, as a matter of fact make the payment.

As manager he is bound to deal with the money for the benefit of the family and to account for the application of the money. M. PARU AMMA *v.* ITTICHERI AMMA **459**

MANAGER. *See* HINDU LAW.

MARINE INSURANCE—*"Covering note", how far contract for sea insurance—Damage—Insurers, liability of—Loss of goods on return journey—Trading custom.*

A "covering note" issued by Insurance Agents is not a contract for sea insurance, but only evidence of an agreement to issue a policy for the adventure specified therein on condition that the agreed premium is paid in cash before the departure of the vessel from the harbour.

Such a note, even if stamped subsequently, cannot be treated as a policy so as to create liability on the insurers.

The correct procedure for the owner of the goods to pursue when goods covered by a "covering note" have been lost, is to at once pay the Insurance Agents the premium and demand a policy.

Where goods were insured "from Karachi to Mombassa", including craft risks, and were carried in a native craft from the jetty to the ship in the stream and a portion of the cargo, being shut out by the steamer, was brought back to the wharf by the same craft and lay therein alongside the wharf awaiting re-shipment by another available steamer and was damaged owing to the craft springing a leak:

*Held*, that Insurance Company could not be held liable, as this return journey was not included in the voyage from "Karachi to Mombassa"

There is no local trading custom in Karachi that after loss of goods on the return journey the shipper can, by paying a special premium, demand a policy covering such journey. S. LATIFALI FADDOO ALIDINA *v.* ROYAL EXCHANGE CORPORATION, 9 S. L. R. 116 **540**

MARRIAGE. *See* BUDDHIST LAW; HINDU WIDOWS' REMARRIAGE ACT.

MARSHALLING OF SECURITIES. *See* MORTGAGE.

MARUMAKKATTAYAM LAW. *See* MALABAR LAW.

MEMONS—*Cutchi Memons—Emigration to East Africa—Succession—Custom—Muhammadan Law—Prinicple.*

The Memons who have emigrated from Cutch in India to Mombasa in East Africa are governed in point of succession by Muhammadan Law rather than by custom

*Semble.*—At Mombasa in East Africa the succession to Muhammadans is in general governed by Muhammadan Law, although it is open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country and being themselves Muhammadans, settle among Muhammadans, the presumption that they have accepted the law of the people whom they have joined is one that should be much more readily made. In such a case all that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments.

In case of emigration of Memons from Cutch in India to East Africa the analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. P. C. ABDURAHIM HAJI *v.* HALIMABAI, 30 M. L. J. 227; 20 C. W. N. 362; (1916) M. W. N. 176 414

MERGER. *See* MORTGAGE.

MESNE PROFITS, claim for—Suit for possession and for mesne profits under contract of lease, nature of 215

MINOR. *See* CONTRACT ACT, s. 11.

MINOR, compromise by. *See* CIVIL PROCEDURE CODE, O. XXXII, R. 7

———Estoppel—Contract by minor, if binding by means of estoppel—Contract Act (IX of 1872), s. 11 388

———Limitation, running of—Alienation by managing member and mother as guardian of minor for necessity, validity of—Interests of minor—Court, duty of 802

———, major defendant described in plaint as, effect of—Guardian *ad litem*—Representation, if proper—Notice not served upon minor prior to appointment of guardian *ad litem*, effect of—Proceedings, subsequent, validity of—Decree, if binding on minor 380

———, *statement of, against her interest, effect of—Will—Revenue Court.*

Where a guardian has been appointed for a minor for purposes of litigation, any admission made by the minor against her interests is waste paper.

Where a testator wills away his property and the Will is proved *prima facie* by the Sub-Registrar's endorsement and possession is doubtful, a Revenue Court will give effect to the Will. U. P. B. R. PARBATI *v.* DHARAMRAJI 368

MINOR—concld.

———Suit for partition—Consent decree passed on appeal by father of minor parties—Leave of Court not obtained—Minor, whether, entitled to avoid decree 881

MINOR CO-PARCENER. *See* HINDU LAW.

MINOR CHILD, presumption as to the religion of—Duty of guardian—Marriage of Christian minor with *Chamar*, whether valid—Christian Marriage Act (XV of 1872), s. 4—Right to be appointed guardian 897

MISCHIEF. *See* PENAL CODE, s. 430.

MORTGAGE. *See* DECREE; TRANSFER OF PROPERTY ACT, s. 59.

——— *Cause of action—Limitation Act (IX of 1908), s. 31—Regulation XVII of 1806, cl. 8.*

A mortgage executed in 1866 for six years contained a provision that the property mortgaged should not be transferred so long as any principal or interest remained unpaid and that if it was transferred or if the money due to the mortgagees was not paid, the latter without waiting for the expiry of the six years might bring a suit to recover principal and interest and might also get possession by completion of sale. A part of the property was transferred in 1867:

*Held*, that the cause of action arose in 1867 and a suit brought in 1910 to enforce the right was barred by limitation. A. BANSGOPAL *v.* SHEO RAM SINGH, 14 A. L. J. 1; 38 A. 97 95

———by conditional sale—Transfer by mortgagee—Redemption—Notice 265

——— *Consideration-money, only portion of, payment of, effect of—Usufructuary mortgagee, right of—Default of puisne mortgagee in redeeming prior mortgages, effect of—Possession, suit for, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 135—Possession, right of.*

Where a mortgagor receives only a portion of the consideration-money, the mortgage holds good to the extent of that portion.

A usufructuary mortgagee with whom money is left for the redemption of certain prior mortgages to enable him to obtain possession of the mortgaged property cannot, after making default in paying that money, be allowed to sue the mortgagor for the possession of that property when the latter pays the money due to the prior mortgagees and obtains possession.

Under Article 135, Schedule I, of the Limitation Act, it is immaterial whether possession of the property mortgaged is held at the time of the mortgage by the mortgagor or by a prior mortgagee, and as between the mortgagor and the mortgagee entitled to possession the former's right to possession ceases when he makes a fresh mortgage. O. *Musammat* HUSAINI *v.* RAM CHARAN, 2 O. L. J. 488; 18 O. C. 280 341

———Contribution—Mortgagor relieving his co-mortgagors of burden, if entitled to contribution—Muhammadan Law—Minor, *de facto* guardian of—Mortgage by such guardian, when binding on minor 177

MORTGAGE—contd.

———Covenant that mortgagor not to redeem previous mortgage without paying subsequent advances, if valid and enforceable—Charge—Mortgaged property not described in deed of further charge, effect of—Subsequent advances tacked on to previous mortgage—Clog or fetter on equity of redemption 740

———by Hindu widow—Subsequent surrender by widow of her estate in favour of reversioners, whether affects rights of mortgagee—Writer of document, whether can be treated as attestor—Transfer of Property Act (IV of 1882), s. 59 813

——— Interest—Rule of *damdupat*—Usufructuary mortgage—Mortgagee obtaining possession at a date later than the date of document—Rule, whether applicable 231

——— Mortgage-decree passed before the new Code—Final decree, whether necessary before execution—Application for execution within 12 years of decree 39

———Mortgagee entitled to profits—Right to possession on non-payment—Suit for profits—Subsequent suit for possession, maintainability of 719

——— Mortgage-money, tender of, not made—Interest, whether can be charged 97

——— Mortgage-suit, whether can be instituted for part only of the mortgage-money 179

———of occupancy holding before operation of Agra Tenancy Act, 1901—Possession and dispossession after operation of Act—Suit for possession by mortgagee, if maintainable—Party in possession, position of 593

———*Payment of mortgage-debt to one of several co-mortgagees—Debt, whether discharged—Contract Act (IX of 1872, s. 45.*

Payment of a mortgage-debt to one of several co-mortgagees operates as a discharge of the entire mortgage-debt. M. PONNUSAMY PILLAI *v.* THYAGARJA PILLAI, 3 L. W. 22 173

———of trust property—Consent of settlor—Consideration—Charge, validity of—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Minor—Compromise of suit—Consent of Court, necessity of—Practice—Mortgage without consent, validity of 258

———REDEMPTION — Custom — Succession — Village proprietary body, rights of—Village, nature of 768

———, *effect of—Sale by mortgagee of his rights, whether extinguishes mortgage—Transfer of mortgage—Purchaser, rights of.*

When a mortgage is redeemed by the mortgagor or by some one having a right under section 91 of the Transfer of Property Act to redeem, the original contract is completed and all the mortgagee's rights created under it cease. The mortgage is also extinguished when the mortgagor's rights are invaded and some one having no right to redeem redeems in opposition to the wishes of the mortgagor.

A contract of mortgage does not cease to exist merely by the mortgagee selling his rights to another. The mortgage is only transferred and the purchaser can exercise the mortgagee's rights. U. B. MA HLA YIN *v.* MI HMAN, U. B. R. (1915) II, 89 506

——— REDEMPTION, *fixed period for—Interest after that date, whether chargeable—Rate.*

In the absence of a covenant that interest shall cease to run after the expiry of the period fixed for redemption, the mortgagee is entitled to interest at the rate specified in the deed for the entire period during which the mortgage-money remains unpaid. P. MOTA SINGH *v.* BISHEN SINGH, 5 P. R. 1916; 23 P. W. R. 19 6 821

——— *Integrity of mortgage—Misdescription and mutual mistake—Oral evidence, admissibility of—Evidence Act (I of 1872), s. 94.*

One *H* mortgaged on the 27th of March 1864, a 9½-*biswa* share in Paniyala along with shares in two other villages. On the 3rd of April 1864, he mortgaged five more *biswas* of the same village along with other property. On the 6th of February 1873, he executed a mortgage for Rs. 15,000 and out of the consideration for that mortgage he declared that Rs. 3,500 was to be a further charge on the property comprised in the first mortgage. In the description of property thus charged Halla Nagla was mentioned instead of Paniyala. The plaintiff acquired the rights of the mortgagor in Paniyala and sued for redemption. The defendants-mortgagees had purchased a portion of the mortgaged properties:

*Held*, that this was a case of misdescription and mutual mistake and that, therefore, section 94 of the Evidence Act did not preclude the mortgagee from showing that Paniyala was intended to be included in the mortgage of 1873.

*Held*, further, that as the integrity of the mortgages had been severed the plaintiff could redeem Paniyala by payment of the proportionate liability of that village under the three mortgages. A. MAHABIR PRASAD *v.* MUHAMMAD MASHIYATULLAH, 14 A. L. J. 15; 38 A. 103 174

——— *Mortgagee and purchaser of portion of equity of redemption, arrangement between, how far binding on mortgagor—Mortgage, extinguishment of—Merger—Mesne profits with interest thereon—Limitation Act (IX of 1908), Sch. I, Art. 105—Creditor having debtor's funds for payment to himself—Limitation.*

A usufructuary mortgage was made of two properties *a* and *b*. The mortgagor sold his equity of redemption in respect of *a* to *P*, leaving with him a portion of the consideration money to discharge the mortgage-debt. Instead of discharging the debt *P* sold his rights in the equity of redemption purchased by him to the mortgagee, leaving with the latter a portion of the consideration-money, less than what had been left by the mortgagor with *P* himself, to be credited towards the mortgage-debt. Subsequently the mortgagor brought a suit against the mortgagee for redemption of *b*, contending that the entire mortgage-debt having been left with *P*, whose rights had been purchased by the mortgagee, she was entitled to possession of *b* without any payment and to claim from the mortgagee the surplus profits of *b* with interest thereon from the date of the mortgagee's purchase of the equity

of redemption. The mortgagee contended that only so much as had been left with him by *P* could be credited towards the mortgage-debt, and that the mortgagor was not entitled to claim any surplus profits or any interest thereon:

*Held*, that the arrangement between the mortgagee and *P*, so far as the leaving of the consideration-money to be credited towards the mortgage-debt was concerned, was not binding on the mortgagor.

*Held*, also, that the mortgage became extinguished when the mortgagor's right merged in the mortgagee with a liability to satisfy the entire mortgage-debt.

*Held*, further, that the mortgagor was entitled to possession and surplus profits together with interest thereon.

*Held*, lastly, that the limitation applicable for the recovery of the said profits and interest was that provided by Article 105, Schedule I, of the Limitation Act.

No question of limitation arises where a creditor has funds belonging to the debtor at his disposal charged with an obligation to pay himself out of that fund. O. ABUL HASAN KHAN *v.* JAGWANTA, 2 O. L J. 620 **729**

——— SALE—Construction of document—Surrounding circumstances **192**

———in contravention of section 99, Transfer of Property Act not avoided—Mortgagor's right to redeem, whether subsists **611**

———*in execution of prior mortgagee's decree against mortgagor alone—Purchaser of mortgaged property, position of—Suit by puisne mortgagee against both mortgagor and prior mortgagee—Puisne mortgagee, right of, to bring equity of redemption to sale—Auction-sale of mortgaged property pending another suit regarding same, effect of.*

A purchaser of property sold in execution of a decree obtained by the prior mortgagee against the mortgagor alone, and during the pendency of a suit for sale of the same property instituted by the puisne mortgagee against both the mortgagor and the prior mortgagee, cannot be permitted to say that as he was not a party to that suit, the puisne mortgagee cannot bring the equity of redemption to sale in execution of the decree obtained by him for sale of the property subject to the rights of the prior mortgagee. O. KUNDAN LAL *v.* WAJID HUSSAIN, 2 O. L. J. 480 **359**

——— Payment of consideration, whether necessary to pass title—Registration of sale-deed, effect of—Intention of parties—Suit for redemption—Mortgagee, possession of **961**

———, SIMPLE — *Mortgagor, if can create tenancies—Possessory suit by purchaser under mortgage-decree—Lease, effect on—Lease-holder, whether can be obliged to redeem.*

A simple mortgage does not, as a matter of conveyancing, arrest the mortgagor's power of leasing in the ordinary course of management. Therefore, so long as nothing takes place which impairs the value or impedes the operation of the mortgage, the mortgagor is quite within his powers in creating a temporary lease.



In a suit for possession by a purchaser under a mortgage-decree against a lease-holder in possession who was not a party to the mortgage suit, it appeared that the leases under which the defendant held the lands in suit were created for 50 years and the plaintiff bought with notice of the leases and the person under whom he claimed had recognized the leases in the most unequivocal manner, and it was not shown that the mortgage was impaired in value or impeded in operation by the leases:

*Held*, that the leases could not be treated by the plaintiff as inoperative and the lessee was under no obligation to redeem. C. BAL MAKUND RUIVA *v.* MATI LAL BURMAN, 20 C. W. N. 350 **195**

———, SIMPLE — *Mortgagor, whether entitled to use and enjoyment of mortgaged property—Plants growing on mortgaged property cut and removed—Mortgagee's suit to enforce security, whether maintainable—Proper cause of action—Limitation Act (IX of 1908), Sch. I, Arts. 36, 49, 132.*

In India, a mortgage transaction is merely a security for the re-payment of the debt and in the case of a simple mortgage the mortgagor, both before and after default of payment of mortgage-money, is and continues to be the owner of the property entitled to possession and to the use and enjoyment of the property as an absolute owner.

Where, therefore, the manager of an undivided family mortgaged the family properties to the plaintiff on the 26th October 1900, and in October 1905, certain trees growing on the properties were cut and carried away by third parties, and the mortgagee sued on 26th July 1909, to enforce his mortgage security:

*Held*, (1) that this was not a suit to enforce payment of money charged on immoveable property within the meaning of Article 132 of the Limitation Act, for if that were the case, the plaintiff mortgagee would be entitled to claim payment out of the portion of the security or its value in the hands of third parties irrespective of the sufficiency or insufficiency of the remainder of the security in the hands of the mortgagor;

(2) that the only cause of action which the plaintiff had was for damages for the depreciation of the security, the measure of damages being the amount by which the security was rendered insufficient, and the plaintiff in such an action would have to prove that the security was, as a matter of fact, rendered insufficient;

(3) that the proper Article of the Limitation Act applicable to the case would be either Article 36 or 49, but that whichever applied, the suit was time-barred as it was not brought till nearly 4 years after the date of the cutting and appropriation. M[illegible] SURAPUDI MUNIAPPA *v.* NOOKALA SESHAYYA, 3 L. W[illegible] 341 **901**

——— SUIT *by a co-mortgagee—Decree—Sale—Purchase by decree-holder—Other mortgagees, right of—Purchase-money—Equity.*

One of the several mortgagees brought a suit on the basis of the mortgage making the other mortgagees *pro forma* defendants and obtained a decree in his own name. Subsequently the property was put to

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ale in execution of the decree and was purchased by the decree-holder alone:

*Held*, that the equitable right of the other mortgagees attached to the purchase-money and not to the property purchased. A. GANESHI LAL *v.* JAGAN NATH 171

——SUIT for recovery of mortgage-money—Decree allowing defendant-mortgagor to obtain possession on payment not executed—Subsequent suit by mortgagor for redemption—*Res judicata* 30

—— for redemption—Mortgage sued on found to be invalid—Plaintiff, whether can fall back on earlier mortgage—Amendment of plaint, when can be allowed 624

——*Title paramount to mortgaged property pleaded—Costs against defendant contesting mortgage suit on title paramount, order for, setting aside of.*

A defendant contesting a mortgage suit on the claim of a title paramount to the mortgaged property cannot in appeal, after the suit has been decreed with order of costs against him, ask for setting aside the order on the ground that the suit as against him should have been dismissed. C. BASDEO NARAIN *v.* BACHAN CHOWDHURANI 358

MORTGAGE DECREE—*Marshalling of securities, question as to, not raised and decided—Execution proceedings—Joinder of parties, plea as to, non-maintainability of.*

Where in a mortgage suit the question as to the right of having the securities marshalled was not raised and decided, the representatives of the party who could have raised that question and got it decided, cannot urge their joinder as parties to the execution proceedings, if they are not so joined, for the purpose of raising that question and getting it decided at that stage. O. RAZA HUSAIN *v.* AMAR CHAND PAL, 2 O. L. J. 593 715

MORTGAGE-DEED, effect of, from what date—Suit on unregistered mortgage-deed—Attachment of mortgaged properties, after execution but before registration of mortgage-deed, effect of—Priority 431

—— giving mortgagee option to sue or not to sue on default in payment of interest—Period of limitation, starting point of 551

MUHAMMADAN LAW—DIVORCE—Kabinnama, *condition in, that wife could divorce husband if he does not reside in her father's house, legality of—Restitution of conjugal rights, claim for, by husband having other wives, maintainability.*

The condition in a *kabinnama* that the husband should live with the wife in her father's dwelling house and on the breach of this condition she would be entitled to divorce him is void under the Muhammadan Law.

Where in an appeal against the dismissal of a suit by the plaintiff for restitution of conjugal rights, on the grounds that the plaintiff had not paid the prompt dower and that the defendant (the wife) could not be compelled to live in the plaintiff's house with the other co-wives, it was represented to the Appellate Court that the plaintiff had deposited the amount of the prompt dower in the lower Court and that he had set apart a separate hut within his compound for the residence of the defendant:

*Held*, that under the circumstances there was no reason why the plaintiff should not be given a decree for restitution of conjugal rights. C. IMAM ALI PATWARI *v.* SRIMATI ARFATUNNESSA 707

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—— —— GIFT, *invalidity of a portion of, effect of, on other separable portions—Gift in lieu of dower*—Hiba-bil-ewaz, *essentials of—Consideration—Oudh Estates Act* (*I of* 1869), *ss.* 8, 10, 15—*Presumption of primogeniture, applicability of, to alienees from* taluqdar—Waqf *of profits only, validity of*—Wasiat—*Shia Law.*

If a gift in regard to a portion of a property is invalid, its invalidity would not affect another and separable portion of it

A gift made in lieu of dower is a *hiba-bil-ewaz*, for the validity of which delivery of possession is not essential. The consideration of a *hiba-bil-ewaz* may or may not be adequate; it is enough for such a gift that some *ewaz* or consideration should be given and there should be an intention to divest oneself *in præsenti* of all interest in the property.

The presumption raised by sections 8 and 10 of Act I of 1869 does not apply to property which has been alienated by a *taluqdar* in his lifetime, nor has it any concern with the alienee or the family of such an alienee.

The Muhammadan Law does not recognise a *waqf* of the profits of the land apart from the land itself. But where the intention is, though the disposition, *prima facie*, appear to convey an immediate interest, not to give it operation during the lifetime of the testator, the disposition will take effect as a *wasiat*. Such a bequest under the Shia Law may take effect in favour of some of the heirs without the consent of the other heirs, if it does not affect more than one-third of the estate, or if it exceeds one-third, it is made for the performance of such religious duties as are incumbent upon the testator. O. QASAM ALI KHAN *v.* AHMAD SHAH, 2 O. L. J. 758 516

——GUARDIAN—Minor, *de facto* guardian of—Mortgage by such guardian, when binding on minor 177

——PRE-EMPTION—*Khandesh District—Equity, justice and good conscience.*

There is no custom of pre-emption recognized in the District of Khandesh, nor can the right of pre-emption according to Muhammadan Law be enforced there solely as a matter of justice, equity and good conscience. B. MAHOMED BEG *v.* NARAYAN MEGHAJI PATIL, 18 BOM. L. R. 81 933

—— right, exercise of—Clog on transfer—Introduction in Burma—Equity and justice—Burma Laws Act (XIII of 1898), s. 13 488

——Talab muasabat—*Mention of price, if necessary — Jurisdiction — Appeal — Suit valued at less than Rs.* 5,000—*Decree above Rs.* 5,000.

In the performance of the ceremony of *talab muasabat* what is necessary is an expression by the pre-emptor in clear and explicit terms that he demands to make the purchase and it is not necessary that he should, at the time of the performance of the ceremony, make any mention of the price.

Under the Muhammadan Law a pre-emptor does

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not lose his right of pre-emption by failing to state, while making the immediate demand for pre-emption, that he is willing to pay the price named in the sale-deed or such a sum as a Court may award.

The pendency of a proceeding for the partition of a joint estate does not bar the claim of a co-sharer to pre-empt.

Where in a suit for pre-emption the plaintiff honestly valued his suit at Rs. 4,500 but the Subordinate Judge who tried the suit found the value to be Rs. 7,000 and an appeal was preferred to the District Judge:

*Held*, that the appeal to the District Judge was not incompetent, especially as no objection on this ground was taken before the District Judge nor in the memorandum of appeal to the High Court. C. NURI MIAN *v.* AMBICA SINGH **893**

——SUCCESSION—Intestate **512**

—— Memons—Cutchi Memons—Emigration to East Africa—Custom—Principle **413**

——*Suit for a share in property left by a deceased Muhammadan—Limitation, when inheritance becomes divisible—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 123.

Under the Muhammadan Law there is no such thing as joint family property.

If the members of a Muhammadan family succeed to property on the death of a relation each of them takes a share of each item of the property; and the Article of the Limitation Act which would apply to a suit for a share would be Article 123, which deals with a suit for a distributive share of an intestate. In the case where one of the heirs has retained part of the inheritance in his possession, the suit must be brought within twelve years at the latest, after the debts of the intestate have been paid and the inheritance has become divisible among the heirs. M. MOHIDEEN BEE *v.* MEER SAHEB, 38 M. 1099 **1002**

—— WAKF—*House property, lease of—Sanction of* Kazi, *necessity of—Earnest money paid for lease of* wakf *house property, recovery of, if* mutwalli *does not give good title*—Factum valet, *doctrine of—Money advanced as partial guarantee for performance of contract, if can be recovered.*

A person who with full knowledge enters into a bargain for the lease of a *wakf* house property with a *mutwalli*, is equitably entitled to insist upon the *mutwalli* doing all that is necessary to give him a good title.

A sanction of a *kazi* is necessary to validate a lease of *wakf* house property for more than a year.

*Semble*:—When such a lease has been made improperly and many years afterwards it is impugned before a Court, the lease may be held valid on the doctrine of *factum valet* and on the principle that a Court should not disturb the arrangement made in the ordinary course of management of an estate for the benefit of the beneficiaries.

A *mutwalli*, to whom money is advanced by a person as earnest money for getting a lease of the *wakf* property, cannot seek to retain the money unless he is willing to give a good title by going to a *kazi* and getting sanction for the transfer.

A party to a contract advancing money to the other party by way of a partial guarantee for performance cannot recover the money if there has been default on his part and no default on the part of the other. C. GOLAM MUHAMMAD *v.* AKHOY KUMAR LAHA **205**

—— WAKF, *private and public*—Mutwalli—*Sole surviving descendant of founder, right of, to office—Religious endowment, succession to—Regulation IV of* 1793, *s.* 15—Qadi, *functions of, who can exercise—Civil Procedure Code* (*Act V of* 1908), *s.* 92—*District Judge, whether* qadi—*Subordinate Judge, powers of*—Mutwalli *appointed under s.* 92—*Suit to be declared* mutwalli *in Subordinate Judge's Court, maintainability of.*

A descendant of the founder of a *wakf* has a preferential claim to the office of *mutwalli*, but he does not become *mutwalli* by right of inheritance, he has to be appointed such by the *qadi*, who may supersede him if he is not qualified.

No right of inheritance attaches to a religious endowment. It is by appointment that one officer succeeds to another appointment either by the original appropriator or by his successor or executor or by the superintendent for the time being, or failing all these, by the Ruling Power.

The appointment of a *mutwalli* to a *wakf* is a matter regarding religious usages and institutions within the meaning of section 15 of Regulation IV of 1793 and must be determined with regard to the provisions of the Muhammadan Law on the subject.

A Subordinate Judge, who has not been expressly authorised by the Government to exercise functions in connection with the administration of *wakfs*, is not competent to act in that behalf.

In respect of *wakfs* created for public purposes of a religious nature, a District Judge may be assumed to have been authorised, by virtue of section 92 of the Civil Procedure Code of 1908, to discharge the functions of a *qadi*.

Per *Mookerjee, J.*—In respect of private *wakfs* even a District Judge has no authority to exercise the functions of a *qadi*, the Local Government should authorize either District Judges or Subordinate Judges or even judicial officers of a lower grade to exercise the functions of a *qadi*.

On the allegation that a certain *wakf* was a private one, the plaintiff instituted a suit for declaration of her title as *mutwalli* and for an injunction to restrain the defendants, one of whom had been appointed *mutwalli* by a District Judge in a suit under section 539, Civil Procedure Code of 1882 (to which, the plaintiff was not a party) from interfering with her possession of the endowed properties. The Subordinate Judge who tried the suit, found that the *wakf* constituted a public trust, but he decreed the suit holding that the plaintiff as the sole surviving descendant of the founder had a superior claim to the office of *mutwalli*. On an appeal by the defendants, the District Judge held that the *wakf* was a public one, but dismissed the plaintiff's suit on the ground that so long as the decree in the suit under section 539 remained in force, no relief could be awarded to the plaintiff:

*Held*, that the plaintiff's suit was rightly dismissed inasmuch as the Subordinate Judge had no authority to appoint the plaintiff as *mutwalli* in

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supersession of the order made in the suit under section 539, Civil Procedure Code of 1882.

*Held*, further, that as the *wakf* was declared to be a public trust, the plaintiff's remedy was to proceed under section 92, Civil Procedure Code, 1908, and get herself appointed *mutwalli* on the ground that as the sole surviving descendant of the founder at the time of the death of the last *mutwalli*, she had the preferential right to the office. C. ATIMANNESSA BIBI v. ABDUL SOBHAN, 20 C. W. N. 113; 22 C. L. J. 577 **21**

——— WAKF—Mutwalli, *whether can create permanent encumbrance—Right of successor to challenge such encumbrance—Erection of buildings on* waqf *property—Suit for ejectment—Defendant, whether entitled to compensation.*

A *mutwalli* has no right to create a permanent encumbrance on *waqf* property.

Anything in the nature of a permanent alienation of, or encumbrance upon, *waqf* property created by a *mutwalli* is not binding upon his successors, if it is challenged within 12 years from the date of the successor's appointment.

Where a document executed by the *mutwalli* of a mosque stated that the office of *charkhban* had been filled by a certain person and the word "*alalduam*" occurred in the closing passage of the document:

*Held* (1) that inasmuch as the words following the word "*alalduam*" related to the duties of the grantee and not to his privileges, this could not be taken as intended to create a permanent and for all time irrevocable alienation of rights in *waqf* property;

(2) that there was nothing to show that the post was to be held in the incumbent's family for ever and that the *charkhban* was liable to dismissal like any other servant of the mosque.

Where in a suit by the *mutwalli* for possession of certain shops belonging to the mosque by the ejectment of the defendants, it appeared that the defendants had erected certain shops on a site belonging to the mosque and the *mutwalli* had allowed them to stand unchallenged for a long time:

*Held*, that under the circumstances the defendants were in equity entitled to claim the value of the buildings. P. FAZL ILAHI v. ZAFAR ALI, 36 P. W. R. 1916 **558**

——— WIDOW—Muhammadan widow in possession of deceased husband's estate—Dower-debt, less than actually due, claimed in Court—Claim decreed—Decree satisfied from portion of property—Possession, suit for, by deceased's heirs—Widow's right to retain property for balance of dower-debt, if sustainable **362**

MURDER. *See* PENAL CODE, s. 302.

MUSSALMAN WAKF VALIDATING ACT (VI OF 1913), S. 3, *operation of—Retrospective effect—Previous decision in another capacity, if conclusive in subsequent suit*—Res judicata.

The operation of the Mussalman Wakf Validating Act of 1913 is not retrospective.

A previous adjudication of a High Court as to the invalidity of a *wakf* between the same parties but suing in an another capacity is conclusive, though not on the ground of *res judicata*, in a subsequent

MUSSALMAN WAKF VALIDATING ACT—concld.

suit respecting the same property, and is not affected by the provisions of the Mussalman Wakf Validating Act subsequently passed. C. MUHAMMAD BUKTH v. AJMON RAJA, 19 C. W. N. 967; 43 C. 158 **701**

MUTWALLI. *See* CIVIL PROCEDURE CODE, s. 92; MUHAMMADAN LAW.

NECESSITY. *See* HINDU LAW.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 9—*Holder in due course—Promissory note, suit on—Endorsement in plaintiff's name, absence of—Suit, maintainability of.*

A person cannot sue upon a promissory note which has not been endorsed to him. M. ULAGAPPA CHETTY v. RAMANATHAN CHETTY, 3 L. W. 171 **821**

——— Ss. 13, 64—Negotiability, how far essential to make an instrument promissory note—Promissory note, maker of, liability of, when not purporting to sign in a representative character—Presentment, when necessary—Holder, right of, to fall back on original consideration—Construction of document—Intention of parties **582**

——— S. 64 **582**

——— S. 80, *scope of—Promissory note silent as to interest—Collateral written agreement as to interest made contemporaneously, effect of—Rate of interest chargeable.*

Section 80 of the Negotiable Instruments Act embodies a purely enabling provision for dealing with cases in which there is no contract in fact or capable of legal proof with regard to interest.

Where, therefore, contemporaneously with the execution of a promissory note a collateral written agreement as to interest is made, the two documents represent in fact a single transaction and the holder is entitled to charge interest at the rate agreed upon. N. RANGAPPA v. BISMILLA KHAN, 12 N. L. R. 9 **238**

NON-TRANSFERABLE OCCUPANCY HOLDING, abandonment of. *See* BENGAL TENANCY ACT, s. 87.

NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII OF 1873), S. 47—Lambardar, *payment of canal dues by—Collection of canal dues*—Muafidar, *status of*—'*Subordinate* zemindar,' *meaning of—Interest on canal dues, if allowable.*

A *lambardar* who first pays the canal dues to the Government out of his pocket, is entitled subsequently to collect the same from the subordinate *zemindars* under section 47 of the Canal Act.

A *muafidar* is a subordinate *zemindar* under section 47 of the Act.

A *lambardar* is entitled to recover interest on arrears of canal dues which he has paid to the Government. A. RAM KISHUN DAS v. MAHESHWAR PRASAD **556**

N.-W. P. RENT ACT (XII OF 1881) **767**

——— S. 8 **771**

——— S. 35 **386**

——— S. 203 **573**

NOTICE. *See* BENGAL VILLAGE CHAUKIDARI ACT; CIVIL PROCEDURE CODE (1882), S. 424; CIVIL PROCEDURE CODE (1908), S. 80; MORTGAGE; VENDOR AND PURCHASER.

OATH, agreement by father to be bound by, if binding on sons **996**

OATHS ACT (X OF 1873), Ss. 8, 9, 10—*Attorney of a party, power of.*

A special attorney of a party to a suit, who has full power to conduct the case as he deems fit and in particular has power to compromise or withdraw it, can take steps contemplated by sections 8, 9, 10 of Act X of 1873. A. WASI-UL-ZAMAN KHAN *v.* FAIZA BIBI, 14 A. L. J. 38; 38 A. 131 **348**

——— Ss. 9, 10 **348**

——— S. 10 **346**

OBJECTIONS—Execution—Decree—Suit, maintainability of—Transfer of Property Act (IV of 1882), Ss. 88, 89—Mortgage **354**

OCCUPANCY AND FIXED RATE HOLDING, sale of, by one deed—Contract, validity of **913**

OCCUPANCY HOLDING, acquisition of **595**

——— *non-transferable, transfer of—Co-sharer landlord recognising transfer of his share of non-transferable occupancy holding, effect of—Co-sharers, other, right of.*

One co-sharer landlord can recognise a transfer of a non-transferable occupancy holding in respect of his own share, although such a recognition is not in any way binding upon the other co-sharers and may not as such prevent the other co-sharers from effecting a sub-division of the holding. C. MOHAMED ALI *v.* JNANADA SUNDARI **577**

———, *non-transferable, transfer of, if operative against a co-sharer landlord purchasing it subsequently in execution of a money-decree.*

The transfer of a non-transferable occupancy-holding made by a *raiyat* is operative against a subsequent purchaser of the same in execution of a money-decree against the *raiyat* and even when such purchaser happens to be a co-sharer landlord. C. DEO SARAN LAL *v.* BELESWAR MANDAL **1003**

OCCUPANCY RIGHT. *See* AGRA TENANCY ACT, S. 11.

OUDH CIVIL DIGEST, VOL. I, CHAP. VII, PARA. 272, R. III **748**

OUDH ESTATES ACT (I OF 1869), Ss. 8, 10, 15 **516**

OUDH LAWS ACT (XVIII OF 1876) **424**

——— S. 9, *Ch. II—Sale by Hindu widow of her estate in proprietary share without legal necessity, interpretation of—Hindu Law—Mitakshara—Pre emption, right of, if arises.*

A sale made without legal necessity by a Hindu widow, governed by the Mitakshara Law, of her estate as a Hindu widow in a proprietary share is not a sale of a full proprietary estate, nor is it a sale of a proprietary tenure or a share of a proprietary tenure within the meaning of section 9, and no right of pre-emption under Chapter II of Act XVIII of 1876 arises on the occasion of such a sale. O. RAMPAL SINGH *v.* GANESHA **225**

OUDH RENT ACT (XXII OF 1886), S. 33—*Enhancement of rent, suit for—Land held by way of* kabzadari *at low rent—Nature of tenure.*

In a suit between the parties, it was held by a Settlement Officer that the respondents were entitled to hold the land in question by way of *kabzadari* at the former low rent of Rs. 29 and odd:

*Held*, that these rights were not rights of occupancy under section 5 of the Rent Act and that the rent was liable to enhancement under section 33 of the Rent Act. U. P. B. R. BUNYAD HUSAIN *v.* RAM SAHAI SINGH **415**

OUDH RENT ACT—1886—concld.

——— S. 107—*Rent-free land—Grove, plantation of—Resumption—Period for which land remains under grove, if excluded.*

When a man, originally a rent-free grantee, plants a grove in the land, the period under which the land remains under grove is not to be excluded from the fifty years' period in section 107*H* of the Oudh Rent Act. U. P. B. R. ABU JAFAR *v.* Sat NARAIN GOSHAIN, 2 O. L. J. 610 **769**

PARDANASHIN LADY, *deed executed by—Document coming from lender or from borrower, effect of—Document drawn up and executed under her instructions—Document explanation of, if necessary—Second appeal—Finding of fact—Deductions from fact, if made—High Court, jurisdiction of*—Am-mukhtearnamah *authorizing appearance in registration office interpretation of.*

In the case of a deed executed by a *pardanashin* lady when the document comes from the side of the lender, it must be read over and explained to the executant, if the executant be an illiterate one; but when the document comes from the side of the borrower, it is amply sufficient to warrant the conclusion that the lady fully understood the document.

A *pardanashin* lady took a loan from another *pardanashin* lady and instructed her own men to draw a mortgage-deed and got it duly registered through her *mukhtear* and husband acting under an *am-mukhtearnamah*:

*Held*, that under the circumstances it was not necessary that the document should have been explained after it had been drafted, provided that the draft in fact corresponded with what the lady understood before it was made.

In a second appeal a High Court is empowered to make deductions from facts without disturbing the findings arrived at by a lower Court.

An *am-mukhtearnamah* authorizing a person to appear at the Registration Office authorizes the person to appear before the Registrar for the purposes of the Registration Act. C. BHUBAN MOHINI DASI *v.* GAJALAKSHMI DEBI, 19 C. W. N. 1330 **119**

PARTITION. *See* HINDU LAW; U. P. LAND REVENUE ACT, Ss. 109 (2), 112, 133 (3).

———*Deed of partition turning joint tenants into tenants-in-common, whether compulsorily registrable—Deed dealing with moveables and immoveables, admissibility of, to prove partition of moveables—Intention of parties—Contract, part of, unenforceable—Contract, validity of.*

A deed of partition between two members of a joint Hindu family, which has the effect of causing the immoveable properties held by the co-parceners as joint tenants thenceforward to be held by them as tenants-in common, cannot affect such immoveable properties or be received as evidence of any transaction affecting it unless it is registered.

In order to make a deed of partition which deals also with moveables admissible to prove a partition of the moveables only, it should clearly appear

PARTITION—concld.

that it was the intention of the parties to partition the moveables apart from the immoveables.

When there is an entire contract and part of it cannot be enforced, the whole goes, though it is otherwise when an instrument contains two or more distinct contracts which are severable. M. POTHI NAICKEN *v.* NAGAMA NAICKER, 19 M. L. T. 50; 30 M. L. J. 62; 3 L. W. 115; (1916) M. W. N. 79 486

——— proceedings—Suit to set aside partition in Civil Court, maintainability of 167

PARTNERSHIP—*Joint Hindu family—Manager—Member of firm—Family, if also member—Death of manager, effect of—Suit for dissolution—Limitation Act (IX of* 1908), *Sch. I, Art.* 106.

Where the Manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm. The partnership terminates on his death though the family continues to exist and a suit for dissolution of partnership brought more than three years after his death is barred by limitation. M. RAMANATHAN CHETTY *v.* YEGAPPA CHETTY, 19 M L. T. 66; 30 M. L. J. 243; (1916) M. W. N. 81 427

——— *Property bought with money belonging to firm, nature of—Partnership at will, how dissolved—Intention—Suit for dissolution of partnership and rendition of accounts—Limitation Act (IX of* 1908), *Sch. I, Art.* 106.

In the case of a partnership at will, the intention to dissolve may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern.

A suit for the dissolution of partnership not entered into for a fixed term and for rendition of accounts was filed in July 1913. It appeared, however, that the business of the firm began to fail in *Sambat* 1963 (1906 A. D.) and was closed in 1966, the only work done subsequently consisted of realising assets, paying debts due to the creditors and recovering rents from tenants in occupancy of the immoveable property belonging to the partnership:

*Held*, that as the partnership came to an end long before three years prior to the date of institution of the suit for dissolution of partnership, the suit did not lie and that the prayer for the rendition of the accounts of a dissolved partnership could not be granted in view of the lapse of the period prescribed by Article 106 of the Limitation Act.

Lands or houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property, unless it be proved that from time to time portions of the partnership assets were, by mutual agreement, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners. P. AMIR CHAND *v.* JAWAHIR MAL, 49 P. W. R. 1916 853

PENAL PROVISIONS, construction of 512

PENAL CODE (ACT XLV OF 1860), S. 84—*Insanity—Criminal liability, exemption from—Test.*

Under section 84 of the Indian Penal Code it is not every mental derangement that exempts an accused person from criminal responsibility for his acts, but that derangement must be shown to be one which impairs the cognitive faculties of the accused, *i.e.*, the faculty of understanding the nature of his act in its bearing on the victim or in relation to himself, *i.e.*, his own responsibility for it. S. DHANI BUX *v.* EMPEROR, 9 S. L. R. 171; 17 CR. L. J. 671 671

PENAL CODE—1860—contd.

——— S. 141 137, 684

——— S. 147 137, 227, 684

——— Ss. 148, 149 137

——— S. 182 651

——— Ss. 186, 224—*Running away to avoid arrest under warrant of Civil Court, whether offence.*

A mere running away of a person not charged with any offence, whom an official of a Civil Court tries to arrest under a warrant of that Court, does not amount to obstructing a public servant in the discharge of his functions within the meaning of section 186, Indian Penal Code, nor does it come within section 224, Indian Penal Code. M. PERRU MUHAMMAD LEBBAI *v.* SWAMINATHA PILLAI, 17 CR. L. J. 71 663

——— S. 193 328

——— S. 193—*Perjury, prosecution for, maintainability of—Statement charged not literally false, effect of.*

To support a prosecution for giving false evidence it must be shown that the false statement charged against the accused is literally false. There must be a statement of fact which is false. It is no offence if the fact stated is true but some circumstance is suppressed, with the result that a wrong inference may be deduced. S. RATANSI DAYA *v.* EMPEROR, 9 S. L. R. 170; 17 CR. L. J. 96 688

——— Ss. 201, 302—*Principal, if convicted as accessory after the fact—Mere suspicion, if bar to conviction—Murder, evidence of, causing to disappear—Alternative indictments, propriety of.*

A principal cannot be convicted as an accessory after the fact.

Where it is impossible to say definitely, however strongly it might be suspected, that an accused was guilty of murder, mere suspicion is no bar to a conviction under section 201.

But if in a case of murder it be accepted as a proved fact that the accused before the Court disposed of a dead body and if the acceptance of that fact completes the chain of circumstantial evidence which proves beyond doubt that the accused were actual principals present at the murder and taking part in the murder, they cannot be convicted of the minor offence of causing evidence of the murder to disappear, even though by an error of the Judge or by a misconception of the position by the Public Prosecutor the charge of murder is subsequently withdrawn.

Per *Chapman, J.*—It is unsatisfactory to have an alternative indictment, one count charging the accused as principal and the other as accessory after the fact. C. SUMANTA DHUPI *v.* EMPEROR, 20 C. W. N. 166; 17 CR. L. J. 4; 23 C. L. J. 333 132

——— S. 224 663

——— S. 225-*B*—"*Arrest*," *meaning of—Arrest, how effected.*

An arrest is a restraint of the liberty of the person

PENAL CODE—1860—contd.

and unless there is submission actual contact is necessary to effect it. There must be touch or confinement or else acquiescence. Mere words cannot constitute an arrest. S. ALUDOMAL v. EMPEROR, 9 S. L. R. 141; 17 CR. L. J. 87 679

—— S. 299, *Expl.* 3—*Culpable homicide of newly born child—Human being, what necessary to constitute—English Law—Complete emergence, if necessary—Proof that child was living after complete or partial emergence, necessity of.*

Under the English Law complete emergence is necessary to constitute the child a human being but under section 299, Explanation 3, of the Indian Penal Code, though the causing of the death of a child in the mother's womb is not homicide, it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Even under section 299, Explanation 3, of the Penal Code, however, it must be shown not only that the child breathed and was, therefore, a living being (for it is possible that the child breathed while still entirely in its mother's womb) but that such breathing necessarily took place after it had wholly or partially emerged from its mother. P. BUDHO *v.* EMPEROR, 29 P. R. 1915 CR.; 17 CR. L. J. 20 148

—— S. 300, *Excep.* 2—*Proclaimed offender murdering Police Official trying to arrest him—Publication of proclamation not proved—Criminal Procedure Code (Act V of* 1898), *s.* 87 (3)—*Failure to file statement, effect of.*

A proclaimed offender was tried for murdering a Police Officer trying to arrest him. The prosecution failed either to file the statement referred to in clause 3, section 87, of the Criminal Procedure Code or to adduce any other evidence of publication:

*Held* that the accused was entitled to the benefit of Exception 2 to section 300, Indian Penal Code, and was guilty of culpable homicide not amounting to murder. M. *In re* KAYAMBU TEVAN, 17 CR. L. J. 78 670

—— S. 300, Excep. 4 641

—— S. 302 132

—— S. 302—*Murder—Guilt to be established beyond doubt—Murder by poisoning—Proof—Conviction.*

In a murder case a Court has to be satisfied not of the probabilities but of the certainty beyond any reasonable doubt that the accused is guilty.

In a case of murder by poisoning with arsenic it was not shown that the accused had arsenic in her possession or that she gave anything to eat to the deceased:

*Held*, that the conviction for murder could not be maintained. A. ANANDI *v.* EMPEROR, 17 CR. L. J. 102 838

—— S. 323 847

—— S. 324 137

—— S. 325 227

—— S. 326 137

PENAL CODE—1860—contd.

—— Ss. 366, 498—*Conviction for adultery—Deposition—Complaint.*

An accused person was tried under section 366 of the Penal Code at the instance of the Police. During the course of the trial the husband was examined and from his deposition it appeared that he wanted the conviction of the accused as he had committed adultery with his wife.

*Held*, that the deposition of the husband was a complaint on which the accused could be convicted under section 498 of the Penal Code. A. BHAWANI DUTT *v.* EMPEROR, 14 A. L. J. 233; 17 CR. L. J. 72 664

—— Ss. 379, 403, 411—*Criminal misappropriation—Camel found in possession of accused 7 months after it was lost—Reasonable explanation of getting it—Offence, if committed—Principle—Criminal Procedure Code (Act V of* 1898), *s.* 439—*Revision—Burden of proof—Prosecutor, duty of.*

Where a man is found in possession of a camel about seven months after it strayed away and there is no other evidence against him but that of possession he ought not to be called to account for it, particularly when he gives a reasonable explanation of how he got hold of it.

Where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it (and who is known to be a real person), it is incumbent on the prosecutor to show that the account is false; but if the account given by that man is unreasonable or improbable on the face of it, it is his duty to establish the truth of his story. P. MANGAYA SHAH *v.* EMPEROR 41 P. W. R. 1915 CR.; 17 CR. L. J. 68 660

—— S. 379—*Crops sown and cut down by accused—Theft—Criminal Procedure Code (Act V of* 1898), *s.* 145.

Where an order under section 145 of the Code of Criminal Procedure was made in favour of the complainant, but as a matter of fact the crops had been sown by the accused:

*Held*, that the crops being the property of the accused, the cutting down of these crops by them could not constitute the offence of theft. A. SARJU v. EMPEROR 17 CR. L. J. 75 667

—— S. 379—*Theft of crops—Land, actual possession of, by complainant necessary—Order directing complainant to be put in possession, whether sufficient.*

An accused was convicted for having stolen crops growing on a certain land alleged to be the property of the complainant. In a previous case between the parties concerning the same land, an order directing that the complainant be put in possession of the land was passed but it was never executed:

*Held*, that before conviction it must be found who was actually in possession of the land on the date of the offence and that because there was that order in the previous case it could not be presumed as a matter of law that the complainant continued to be in possession and sowed the crops. M. *In re* KOTA APPADU, 17 CR. L. J. 81 673

—— S. 380 131

—— S. 399 833, 843

—— S. 402 843

PENAL CODE—1860—contd.

——— Ss. 402, 399, *scope of—Determination to commit dacoity, if essential—Assembly for concerting plans, whether within the section—Approver's testimony, value of—Appeal from acquittal—Interference, when justified—Criminal Procedure Code (Act V of 1898), s. 417.*

Where in a trial for dacoity it was found that the accused had met together in order to discuss the possibility of committing a dacoity and had considered various suggestions with regard to looting several places but there was no evidence that the accused persons had assembled for the purpose of committing a dacoity or had made preparations for committing that offence:

*Held*, that they were not guilty of any offence under section 399 or section 402, Indian Penal Code.

The question of the value to be attached to the statements of an accomplice or approver must be decided in every case upon the particular and peculiar circumstances of that case.

In an appeal from an order of acquittal a High Court will not interfere merely because it is based at most on a doubtful weighing of facts.

*Quære.*—Whether section 402 of the Penal Code postulates a determination to commit a dacoity, and an assemblage of five or more persons for the purpose of concerting plans for a dacoity yet remote or contingent is not within the meaning of the section? P. BACHINTA *v.* EMPEOR, 7 P. W. R. 1916 CR.; 17 CR. L. J. 97 **833**

——— Ss. 403, 411 **660**

——— S. 411—*Receiving stolen property—Proof—"Believe," meaning of.*

In a charge under section 411 of the Penal Code it is not sufficient for the prosecution to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether the same had been honestly acquired. The word "believe" is a very much stronger word than "suspect", and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. A. MUHAMMAD IBRAHIM *v.* EMPEROR, 17 CR. L. J. 25 **153**

——— S. 430 **137**

———S. 454 **131**

———Ss. 463, 464—*Forgery—Signing of certificates by purchaser of revolvers in false name and address, whether amounts to forgery—"Fraudulently".*

The signing by a purchaser of revolvers and ammunition of certificates, required for the identification of the purchaser, in a false name and with a false address, amounts to forgery, as the act though not dishonest is fraudulent. C. CAUSLEY *v.* EMPEROR, 20 C. W. N. 326; 17 CR. L. J. 69 **661**

——— S. 464 **661**

——— Ss. 467, 471—*Conviction both for forging document and for using it as genuine, whether illegal—Entries in account books proved to be in handwriting of deceased person—Books not proved to be kept in regular course of business—Objection as to admissibility, when to be taken.*

PENAL CODE—1860—concld.

When a person is convicted under section 467, Indian Penal Code, for having forged a promissory note, a further conviction and sentence under section 471 for using that note as genuine is not illegal in the course of the same trial.

Where entries in certain books of account are proved to be in the handwriting of a person since deceased, any objection to their admissibility on the ground that they were not proved to have been kept in the regular course of business, ought to be taken at the time of the trial. M. *In re* MADU CHINNAGI REDDI, 17 CR. L. J. 73 **665**

——— S. 471 **665**

——— S. 498 **664**

PERJURY. *See* PENAL CODE, S. 193.

PLAINT, AMENDMENT OF. *See* AMENDMENT.

———Relief not claimed, when allowed **437**

PLEADING—Second appeal — Position taken in plaint **740**

POWER OF ATTORNEY, construction of **419**

PRACTICE—*Appeal—Order directing plaint to be presented to Revenue Court set aside—Remand—Jurisdiction.*

An Appellate Court, setting aside on appeal an order of a Civil Court directing the plaint in a rent suit to be presented to a Revenue Court, should not remand the suit for fresh disposal after restoring it to file but leave the parties to take such steps as they choose to adopt or take such proceedings as they think proper in the Court of first instance. M. THOPPUKATTU RAMAYA GOUNDEN *v.* SADAGOPACHARIAR, (1915) M. W. N. 784 **759**

———Application for transfer—Applicant, right of, to be heard first **613**

——Arguments from analogy, when to be made **437**

——Document relied upon in possession of third party—Plaintiff, whether may produce it in course of trial—Refusal to take a particular oath, effect of—Procedure **619**

——Execution application, statement as to payment in, if can be relied on **590**

——Minor—Compromise of suit—Consent of Court, necessity of **258**

———*Point at issue to be appropriately decided by Civil Court—Criminal case, stay of—Jurisdiction.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court.

A Court of Justice has inherent jurisdiction to stay proceedings in a case pending before it and section 344, Criminal Procedure Code, empowers the Court to adjourn an inquiry or trial for any reasonable cause. P. PARS RAM *v.* JALAL DIN, 17 CR. L. J. 7; 4 P. W. R. 1916 CR. **135**

——— Principal and agent—Money-lending business—Chetty firm—Power-of-attorney, construction of—Principal pledging credit, power of—Principal, liability of **414**

———*Remand of appeal, whether whole appeal is re-opened—High Court's power of remand—Permanent tenancy, presumption of—Tenancy under shebaits—Presumption—"Bharatia" tenant—Appellate Court's decision on ordinary meaning of a word, finality of—Second appeal.*

PRACTICE—concld.

A remand made by an Appellate Court without retaining the appeal on its own file necessarily re-opens the whole case and the lower Court of Appeal to which the case is remanded is bound to hear the appeal upon the judgment of the Court of first instance.

A High Court in the exercise of its powers of supervision under the Charter can assume, in certain cases, an authority to limit the scope of certain appeals remanded to the lower Courts without keeping them on its own file. But in such a case, it is absolutely essential that the High Court should lay down clearly that it did intend to limit the scope of the appeal to certain specified questions.

In the absence of any limitation, the whole appeal on remand becomes open for decision by the lower Appellate Court.

No presumption of a grant of permanent tenancy can arise, if at the point of ancient time where the origin of the tenancy is lost in obscurity, it was held under *shebaits* whose origin is also lost in obscurity and the tenants were described as *bharatia* tenants.

A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal. C. KARTICK CHANDRA DAS *v.* SATYA SREE GHOSAL, 20 C. W. N. 584 **240**

——— Written statement by accused persons, filing of **137**

PRE-EMPTION. *See* MUHAMMADAN LAW.

——— *Oudh Laws Act (XVIII of* 1876)—*Pre-emption, right of, if heritable—Personal right—Ownership of land—Inheriting property, effect of, on right of pre-emption.*

The right of pre-emption created by the Oudh Laws Act is a personal right in the owner incident on the ownership of land and is heritable.

A person who had no right of pre-emption at the date of sale but who inherited the property, by reason of the ownership of which the right of pre-emption arose, from a person who had such a right, can claim pre-emption. O. RAGHUNANDAN *v.* JAGESHAR SINGH, 18 O. C. 256; 2 O. L. J. 595 **424**

———, *right of, exercise of—Muhammadan Law—Clog on transfer—Introduction in Burma Equity and justice—Burma Laws Act (XIII of* 1898)*, s.* 13.

The exercise of the right of pre-emption in conformity with the Muhammadan Law is generally adverse to public interest and the administration of justice and equity does not require its introduction in Burma.

The right of pre-emption under the Muhammadan Law must be exercised with the utmost promptitude. L. B. MI AMINA *v.* KARAM ALI, 8 BUR. L. T. 239 **488**

——— Sale by Hindu widow—Right of pre-emption, if arises **225**

——— SUIT—Plaintiffs proprietors at time of sale and at date of suit - Suit, whether maintainable—Punjab Pre-emption Act (II of 1905), s. 11, proviso **605**

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 69—*Reference, contents of.*

A reference under section 69 of the Presidency Small Cause Courts Act to a High Court should state the facts found by the Full Bench of the Small Cause Court as a body with a succinct statement of the point of law on which they individually differ on those facts, and not their individual opinion on the view of the facts taken by each Judge himself. M. RAMASWAMI IYER *v.* MADRAS TIMES PR. PUB. CO. LTD., (1915) M. W. N. 785 **610**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) **3**

——— Ss. 46, 56—*Fraudulent preference—Intention of insolvent—Natural and probable consequence of payment "Creditor," meaning of—Payment made "in ordinary course of business," whether can be preferential—Accommodation acceptor, liability of.*

It is the duty of a Court to find out whether the intention to give preference to any one of the creditors was the substantial or dominant intention acting on an insolvent's mind when he made a payment.

When the natural and probable consequence of a payment is the preference of a particular creditor among numerous creditors, and when the policy of the Presidency Towns Insolvency Act is that the debtor's assets should be equally distributed among all creditors as much as possible, the payment by an insolvent debtor which has the natural effect of preferring a creditor must be deemed to have been made with the view and intention to prefer that creditor, whatever other views the insolvent may also have had in making that payment and whether those other views were more dominant or less dominant, more substantial or less substantial, than the view to give a preference. If there was legal duress in consequence of which that payment was made, then the view to prefer may be negatived. But a payment made to prefer a creditor, even though made in the ordinary course of business, is a preferential payment within the meaning of the Act.

In order to avoid a transaction as a fraudulent preference it is essential that the relation of debtor and creditor should exist between the parties to the transaction.

The terms "creditor" and "debtor" imply an existing obligation to be performed by one party towards the other. The person who on the happening of certain contingencies, which may or may not happen, will become entitled to enforce an obligation then created against another person, cannot be called a creditor.

A surety or an accommodation acceptor is a contingent creditor entitled to prove under section 46 (1 of the Presidency Towns Insolvency Act, but he is not a creditor who can be fraudulently preferred under section 56.

One *N* drew 8 *hundis* upon *V* on the 12th January 1911 for Rs. 8,000 payable on the 13th and 25th March 1911. *V* accepted these *hundis* to accommodate the drawer and the *hundis* were discounted in the Bank of Madras. In order to put *V* in possession of funds to meet his

PRESIDENCY TOWNS INSOLVENCY ACT—1909—concld.

liabilities as acceptor, *N* drew 16 *hundis* for Rs. 21,682 in favour of *V* between the 11th and 13th March and another in favour of his daughter *P* for Rs. 5,000 on the 11th March. On the 20th of March *N* was adjudicated an insolvent and the Official Assignee sued for a declaration that *N* was guilty of fraudulent preferences in drawing these *hundis* and for directing the said *V* to pay to the Official Assignee the sum of Rs. 10,500 realised on foot of 7 of the 16 *hundis* or in the alternative that *V* should be directed to pay Rs. 5,500 and *P*, the insolvent's daughter, be directed to pay the balance:

*Held*, (1) that there was a fraudulent preference of *P* by the insolvent within the meaning of section 56 (*a*) of the Presidency Towns Insolvency Act, and she ought to be directed to repay the sum paid to her;

(2) that inasmuch as *V* paid Rs. 5,500 into the Bank of Madras out of the monies realised by him in order to discharge himself of his liability to the Bank as acceptor, this sum could not be said to have been paid by *N* to *V* as if he was *N*'s creditor, but in order to put *V* in funds to discharge the liability undertaken for the benefit of *N* and in order to prevent the contingency of *V* becoming in future the creditor of *N* and, therefore, no question of fraudulent preference arose in this case. M. NALAM VISWANATHAM *v.* OFFICIAL ASSIGNEE OF MADRAS **795**

S. 56 **795**

PRESUMPTION. *See* BUDDHIST LAW; EVIDENCE ACT, s. 114; MADRAS ESTATES LAND ACT, s. 3, cl. 2 (*d*); OUDH ESTATES ACT, ss. 8 and 10; TRANSFER OF PROPERTY ACT, s. 06

——— *Benami* transaction **365**

——— Carrier—Wilful neglect **551**

——— Cultivation for a number of previous and subsequent years Cultivation in intervening years, no proof of **765**

——— Endorsement on promissory note—Consideration **233**

——— Joint family—Father, suit by—Oath, agreement to be bound by, if binding on sons **996**

——— Joint Hindu family—Property acquired by one member, when separate property **12**

——— Landlord and tenant—No payment of rent—Adverse possession **851**

——— Object or motive of party Grant of land burdened with certain service **437**

——— Permanent tenancy, presumption of—Tenancy under *shebaits*—"*Bharata*" tenant **240**

——— Possession of stolen property **160**

——— Property acquired from income of ancestral property—Ancestral property **315**

——— Will conferring express powers of alienation—Marumukattayam Law *Tarwazhi* **459**

———*Zamindar's* title in and possession over jungles, groves or tanks in village, or scattered trees in *dead*—Presumption as to *zemindar's* title in possession **370**

PRIMOGENITURE, presumption of, applicability of, to aliences from *taluqdars* **516**

PRINCIPAL AND AGENT—*Agent borrowing without authority—Principal, liability of.*

Where a principal has been benefited by the money borrowed by an unauthorised agent from the plaintiff, either by the principal having received the money directly or by its having been spent in meeting his legal liabilities, the principal is equitable bound to return to the plaintiff the said money to the extent that he has derived benefit therefrom. M. SUPPAYYA PATTAR *v* DAWOOD HAJI AHMAD, (1915) M. W. N. 761 **763**

——— *Money-lending business—Chetty firm—Power-of-attorney, construction of—Principal pledging credit, power of—Principal, liability of—Practice.*

The defendant who carried on the business of banker and money-lender in Rangoon appointed one *R* as his attorney for the general management of his said business and empowered him "to transact, conduct, and manage all and every or any of the affairs, concerns, matters and things" in which the defendant was "in any wise interested and concerned and for that purpose to use or sign" his name and "to borrow money from any Bank or Banks, firm or firms, person or persons, either with or without pledge of securities for moneys advanced to various persons." *R* pledged the firm's credit with the plaintiff bank to enable one *E* to have a cash credit account opened in his name. *E* drew considerable sums of money on the cash credit account thus opened and thereafter became insolvent and his assets vested in the Official Assignee. The plaintiff Bank sued the defendant for the amount due from *E*. The defendant denied *R*'s authority to enter into the transaction so as to bind his firm:

*Held*, that the agent's authority to enter into transactions of the nature in dispute was to be found in the power-of-attorney itself by necessary implication from the nature of the business with the general management of which the agent was entrusted, inasmuch as without such authority it was hardly possible to carry on the business of a money-lender and financier.

*Held*, also, that the mere fact that the principal did not receive any benefit did not rid him of his liability.

Among Chetty money-lending firms it is the practice for an agent to pledge the credit of his principal to secure an advance to a borrower P C. BANK OF BENGAL *v.* RAMANATHAN CHETTY, 30 M. L. J. 232; 20 C. W. N. 329; 3 L. W. 2 0; 19 M. L. T. 176; (1916) M. W. N. 150; 14 A. L. J. 217; 23 C. L. J. 348 **419**

PROBATE AND ADMINISTRATION ACT (V OF 1881), S. 98, *scope of—Executors and administrators accounts required to be filed by—Court, power of, to inquire into—Legatee, right of, to inspection of accounts—Remedy, where inspection denied or result unsatisfactory Executor, when becomes trustee.*

Section 98 of the Probate and Administration Act does not warrant an order requiring a series of yearly accounts. It contemplates only one initial inventory and one final account after the completion of the administration.

PROBATE AND ADMINISTRATION ACT—1881—concld.

Under the Probate and Administration Act a Court is not bound to inquire into the correctness of the accounts filed by executors and administrators under section 98, and its sole duty in respect to such accounts is to satisfy itself that the accounts filed *prima facie* satisfy the requirements of the section.

A legatee or a person interested in administration has a right to inspect the accounts of the executors.

If a legatee is denied inspection or is not satisfied with the result of his inspection, he may file an administration suit and ask for administration by the Court.

*Obiter dictum.*—An executor dismisses the character of executor and becomes a trustee when generally speaking, the funeral and testamentary expenses and the debts are discharged, the legacies are paid and sums are set apart for investment in the trust created by the Will. S. HEMANDAS RAMRAKHIOMAL v. CHELLARAM DHALLOOMAL, 9 S. L. R. 134 **554**

PROCEDURE. *See* EXECUTION; PRACTICE; REMAND.

——Charge **656**

—— Sanction to prosecute **157**

——Summons—Collector's refusal to serve, whether ground for dismissing suit—Defendant residing in Aminidivi Island—Method of service **820**

——Trial by assessors—Summoning of assessors for particular date—Selection on another date, legality of—Trial, validity of **145**

PROFESSIONAL MISCONDUCT. *See* LEGAL PRACTITIONERS ACT, S. 13, CL. (*b*).

PROMISSORY NOTE *executed by managing member—Renewal after executant ceases to be manager—Acknowledgment by such executant, whether binds others—Hindu Law—Joint family—Manager.*

A managing member of a joint Hindu family who executed a promissory-note on behalf of himself and his brothers has no authority to renew it after he ceases to be the manager of the family and an acknowledgment by him will not bind the other members of the family so as to save limitation against them. N. DHANYA v. TANYA, 12 N. L. R. 47 **998**

—— *failure of consideration of—Endorsement of promissory note by payee after maturity, effect of.*

The payee of a promissory note, the consideration of which has failed, cannot, by endorsing it after maturity, give any rights to the endorsee as against the maker or his representatives. O. AIJAZ HUSAIN v. MUHAMMAD SAJJAD, 18 O. C. 272 **432**

PROOF—Receiving stolen property **153**

PROSECUTION, duty of **151**

PROVINCIAL INSOLVENCY ACT (III OF 1907), Ss. 13 (2), 47—Interim *Receiver, when to be appointed—Cancellation of order in favour of a party without notice, if illegal—Execution sale in other Courts, whether can be stayed—Civil Procedure Code (Act V of 1908), s. 151.*

The discretion given under section 13, clause (2), of the Provincial Insolvency Act to the Insolvency Court to appoint an *ad interim* Receiver should ordinarily be exercised only in cases where the property of the alleged absconding insolvent has to be preserved from destruction or disappearance, and not in order to vest in an *ad interim* Receiver the properties attached by other Courts in execution.

An order passed in favour of a party should not be vacated without notice to that party.

Neither section 47 of the Provincial Insolvency Act nor section 151 of the Civil Procedure Code gives a Court power to stay an execution sale going on in another Court. M. BASHYAM REEDI v. SOMASUNDARAM CHETTI, 3 L. W. 250 **897**

—— Ss. 16, 27 (6)—*Composition with creditors, if allowed, before adjudication—Discretion of Court, exercise of.*

Although sections 16 and 27 of the Provincial Insolvency Act provide for composition both before or after adjudication, yet composition before adjudication is rendered impossible as there is no provision for proof of debts until after adjudication.

In sanctioning a composition a Court has a discretion under section 27 (6) of the Provincial Insolvency Act in exercise whereof it is its duty to see that the composition is reasonable and calculated to benefit the general body of creditors, and is not against commercial morality. S. FLEMING SHAW & Co. v. SADIRAM JAMNADAS, 9 S. L. R. 181 **565**

—— S. 27 (6) **565**

——S. 44—*Power of Court to set aside or vary its own orders.*

No Court has an inherent power to set aside an order which has been properly made by it unless such power is expressly given by Statute.

There is no provision in the Provincial Insolvency Act enabling the Court to set aside or vary any order made by it under its insolvency jurisdiction S. *In re* HENRY ROBERT SMITH, 9 S. L. R. 132 **575**

—— S. 47 **897**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), Ss 25, 27—*Order in execution passed by Small Cause Court, whether appealable—Revision—*Batta *memorandum, whether a step-in-aid of execution.*

An appeal against an order in execution passed by a Small Cause Court is barred by section 27 of the Provincial Small Cause Courts Act but under section 25 of the Act a revision petition lies to a High Court against such an order.

A *batta* memorandum which mentions that it is paid for notice to issue to the judgment-debtor under section 248 of the old Civil Procedure Code, is an application to take a step-in-aid of execution and saves limitation. M. ALAGAMUTHU PILLAI v. DEVASAGAYA FERNANDEZ, 3 L. W. 34; 19 M. L. T. 146; (1916) M. W. N. 78 **484**

—— S. 25—*Suit for recovery of money—Document purporting to be receipt for amount, genuineness of, doubted—Revision.*

Where in a suit for recovery of money, the defendant put forward a document which purported to be a receipt for the amount, but the genuineness of which was doubted by the Small Cause Court:

*Held*, there was no error of law or procedure which justified the exercise of the revisional jurisdiction under section 25 of the Provincial Small Cause Courts Act. P. HUKAM SINGH v. MAKHAN LAL **793**

—— S. 27 **484**

PROVINCIAL SMALL CAUSE COURTS ACT—1887—concld.

——— SCH. II, ART. 13, scope of—Suit for dues against trespasser—Appeal, second, maintainability of 998

———, SCH. II, ART. 35, CL. (l)—*Suit to recover damages for causing pollution—Jurisdiction.*

A suit to recover damages for having caused pollution to the plaintiff and his consequent excommunication is one to recover compensation for injury to the person within the meaning of Article 35, clause (*l*), of the Second Schedule to the Provincial Small Cause Courts Act and is not triable by a Small Cause Court. N. NAMA *v.* GOPALYA, 12 N. L. R. 7 233

——SCH. II, ART. 38—"*Maintenance,*" *meaning of—Suit by guardian of person against guardian of property to recover money for minor's education—Jurisdiction.*

For the purpose of Article 38 of Schedule II of the Small Cause Courts Act, the word "maintenance" means any sum of money payable by a person under an obligation to support another, either by the general law to which he is subject or under a specific contract.

A suit by the guardian of the person of a minor against the guardian of his property to recover the amount payable under the order of the Court for the minor's education and maintenance is not a suit for maintenance within the meaning of Article 38 of Schedule II to the Provincial Small Cause Courts Act, and is cognizable by such Court. M. MANIKA NAIKER *v.* SWARNATHAMMAL 547

PUBLIC POLICY. *See* CONTRACT ACT, S. 23.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 21 (a), *object of—Declaratory decree, whether can be contrary to Act—Application by Deputy Commissioner—Procedure—Remand—Chief Court, power of.*

The intention of the Legislature in framing section 21 *a)* of the Punjab Land Alienation Act was merely to enable the correction of decrees which on the face of the record infringe the provisions of the Act.

A decree, even though it be only declaratory, which has the effect of conferring a legal title where no such title would otherwise exist, may well be contrary to the provisions of the Act.

Where the evidence on t e record is not sufficient for the disposal of an application made by a Deputy Commissioner under section 21 (*a*) of the Act, the Chief Court has power to order a remand for further inquiry. P. FEROZ DIN *v.* BASRI, 52 P. R. 1916 446

PUNJAB MUNICIPAL ACT (III OF 1911), SS. 114, 221—*Notice to demolish building or execute "sufficient" repairs—Absence of specification Illegality—Revision.*

A notice under section 114 of the Punjab Municipal Act must specify the portion of the building which in the opinion of the Committee is in a dangerous condition and should also mention the nature of the repairs required to be made.

Where, therefore, a Municipal Committee served a notice under section 114 of the Municipal Act on the petitioner mentioning the building and calling upon him to remove it or execute "sufficient" repairs to such portion of the building as was in a ruinous or dangerous condition and the petitioner was convicted for disobedience of such notice:

*Held*, (1) that the notice did not comply with the requirements of law;

(2) that the Chief Court could interfere on revision with the conviction which was bad in law. P. ABDUL AZIZ *v.* EMPEROR, 9 P. R. 1916 Cr; 11 P. W. R. 1916 Cr. 17 Cr. L. J. 105. 841

———S. 153 *House used as brothel—Magistrate, powers of—Order, proper.*

A Magistrate passed an order upon a charge under section 153 of the Punjab Municipal Act, 1911, to the effect that if the accused vacated the house by a certain date mentioned therein, well and good, otherwise, she would be fined Rs. 20:

*Held*, that the order of the Magistrate was bad as it contravened the provisions of section 153 of the Municipal Act. P. MUNICIPAL COMMITTEE OF LAHORE *v.* RADHI RANI, 17 CR. L. J. 46; 10 P. W. R. 1916 CR. 834

———S. 221 841

PUNJAB PRE-EMPTION ACT (II OF 1905), S. 11, PROVISO 605

——— S. 11, PROVISO—"*Recorded,*" *meaning of—Entry by* patwari *in mutation register, whether sufficient.*

The word "recorded" in the proviso to section 11 of the Punjab Pre-emption Act of 1905 means entered in the Record of Rights.

A person cannot be properly said to be entered in the Record of Rights as the owner of land if only his name has been entered in the register of mutations by the *patwari* and a report has been put up in his favour in the appropriate column of that register. P. JAGAT RAM *v* MEHR DIN, 9 P. R. 1916 528

PUNJAB TENANCY ACT (XVI OF 1887, S. 77 (3) (*k*) 102

RAILWAYS ACT (IX OF 1890), S. 72, CL. (2)—*Risk note in Form Y, signing of, proper way of—Risk Note not properly signed, effect of—Railway Company, liability of—"Signed," meaning of—Bailment, law of, derogation from, effect of.*

The signing of the name of a principal by his agent, who consigned the goods to a Railway without signing his own name as agent in a risk note in Form Y, is not a sufficient compliance with the provisions of section 72, clause (2), of the Indian Railways Act IX of 1890.

The word "signed" in law means the writing of the name of the person who signs it either by his own hand or by the hand of an agent, who must be disclosed and have authority.

The liability of a Railway Company cannot be escaped by reason of a risk note in Form Y signed not in accordance with the provisions of the law.

*Semble.*—In contracts (such as risk notes which derogate from the ordinary law of bailment, parties cannot be too careful to carry out the exact provisions of law. C. MOHABARSHA BANKAPUR *v.* SECRETARY OF STATE, 20 C. W. N. 685 393

S. 76, *applicability of—Railway, contract with, under risk note Form B— 'Wilful neglect,' meaning of—Loss—Presumption—Suit for compensation—Facts to be proved—Burden of proof.*

RAILWAYS ACT—1890—concld.

A person is said to be guilty of wilful neglect when he intentionally, and of set purpose, does something which ought either to be done in a different manner, or not at all, or omits to do something which ought to be done.

A loss is said to be due to wilful neglect when such neglect is either the sole effective cause of the loss or is so connected with it as to be materially contributing to it

When a plaintiff sues a Railway for compensation for loss of goods consigned under a risk note in Form B, he must allege and prove facts from which it can be fairly and reasonably inferred that the loss was due to *wilful neglect* on the part of the Railway.

Section 76 of the Railways Act does not apply to a case where goods have been carried under a special contract limiting the responsibility of the Railway, as in risk note, Form B.

*Semble.*—It cannot be presumed that a carrier has been guilty of wilful neglect from the bare fact that goods have been lost or damaged. S. FIRM OF DAULAT RAM *v.* SECRETARY OF STATE, 9 S. L. R. 177; 17 CR. L. J. 79. **551**

RECEIVER—*Interim* Receiver, when to be appointed Cancellation of order in favour of a party without notice, if illegal—Execution sale in other Courts, whether can be stayed **897**

——— General powers of management given to Receiver, effect of—Receiver, whether can appoint *karnams* **207**

———*Mortgagee in possession—Mortgagor becoming insolvent—Receiver, when appointed.*

Ordinarily the position of a mortgagee in possession should not be disturbed by the appointment of a Receiver, and further good grounds must be shown to justify a Court in interfering with such possession.

Where one of the mortgagors was managing the mill mortgaged by them on behalf of the mortgagee in accordance with the terms of an agreement and the mortgagors became insolvents:

*Held*, that inasmuch as the mortgagee was not in possession a Receiver might be appointed at the instance of the Official Receiver. M. KAKI VENKATARAJU *v.* OFFICIAL RECEIVER, (1915) M W. N. 864 **691**

REDEMPTION. *See* MORTGAGE.

REGISTRATION—Agreement declaring rights of parties, whether compulsorily registrable **522**

——— Deed of partition turning joint tenants into tenants-in-common, whether compulsorily registrable **486**

REGISTRATION ACT (III OF 1877), S. 17 (d)—*Lease for indefinite period, if requires registration—Adverse possession by tenant—Non-payment of rent, whether establishes adverse possession—Limitation Act (IX of 1908), Sch. I, Art. 139—Suit by landlord against tenant holding over—Limitation.*

It is only where a lease is a lease for more than a year or from year to year in express terms that it is compulsorily registrable, but where the lease is to last for an indefinite period and can be terminated by either party at the end any month, registration is not necessary.

REGISTRATION ACT—1877—contd.

Mere non-payment of rent by a tenant does not establish his adversity of possession, but each case must be decided on its own particular features.

Where rent was never paid at all by the tenant for nearly thirty years and no serious attempt was ever made to recover rent and where defendant denied on oath that he ever intended to pay rent or regarded himself as a lessee:

*Held*, that this was sufficient to establish adverse possession.

A tenancy on sufferance is not a tenancy contemplated by Article 139 of the Limitation Act and on the expiry of a tenancy for a fixed term, time begins to run against the landlord unless there is evidence that there was a novation and that tenancy for a fixed term was succeeded by a tenancy-at-will. P. UMAR BAKHSH *v.* BALDEO SINGH, 97 P. R. 1915 **35**

REGISTRATION ACT (XVI OF 1908), Ss. 17, 49—*Document merely referring to gift previously made, if requires registration—Adverse possession—Ownership parted.*

A document which merely refers to a gift previously made cannot be considered as "declaring the rights of parties" within the meaning of section 17 of the Registration Act and is not rendered inadmissible by the terms of section 49 of the Registration Act

Possession parted with the intention of conferring an absolute right in the occupant who manages the property on her own behalf, is not permissive but adverse as against the previous owner, especially when the conduct of the previous owner proves beyond doubt that he retained no interest in the property. M. JEEVARATHNAMMAL *v.* VARADA PILLAI, 3 L. W. 1; 19 M. L. T. 52; (1916) M. W. N. 17 **111**

———S. (17) (1) (b)—*Sale and re-sale—Immoveable property—Agreement creating right of redemption, if requires registration.*

Where the effect of an agreement set up is, to create a right of redemption of immoveable property worth over Rs. 100, whether absolutely or for a time, the writing falls within the meaning of section 17 (1) (*b*) of the Registration Act and, therefore, requires registration. L. B. MA THIN *v.* YASSIM **694**

——S. 17 (2), 50 (1)—*Unregistered contract of sale—Subsequent registered sale-deed—Priority—Burden of proof—Specific Relief Act (I of 1877), s. 27—Specific performance of contract.*

An unregistered contract of sale was executed on 24th December 1910 in favour of the plaintiff. Subsequently on the 26th of July 1912 the property was sold away to the defendants Nos. 3 and 4 under a registered sale-deed. In a suit for specific performance of contract:

*Held*, that the registered sale-deed had no preference over the unregistered contract for sale.

*Held*, further, that the onus lay upon the defendants Nos 3 and 4 to show that they had no notice of the contract for sale in favour of the plaintiff. A. NAUBAT RAI *v.* DHAUNKUL SINGH, 14 A. L. J. 111 **953**

——S. 17 (v) (2)—*Agreement to execute a deed of release in favour of lessor collateral to the lease—Admissibility in evidence—Evidence Act (I of 1872), s. 92—"Collateral," meaning of—Plaint not properly framed—Points at issue well known to parties—Court, whether can grant relief*

REGISTRATION ACT—(1908)—concld.

Where plaintiffs, in consideration of the defendants procuring them a loan, leased out to the defendants a considerable piece of property at a specially favourable rental, and the defendants, in their turn, executed on the same date a document whereby they agreed to surrender the property and execute a deed of release in favour of the lessors on the failure of the said consideration, and the loan not having been procured, the plaintiffs sued to compel defendants to execute a deed of release:

*Held*, (1) that the document executed by the defendants, though forming a part of the larger transaction of which the lease formed another part, was wholly independent of the lease or of any of its terms;

(2) that it was entirely collateral to the lease and was within the terms of sub-section *(v)*, clause (2), of section 17 of the Registration Act, and was, therefore, admissible in evidence without registration;

(3) that being only collateral to the lease, it was outside the operation of section 92 of the Evidence Act, whether regarded as itself the contract or as evidence of an oral agreement to the same effect.

One agreement is said to be "collateral" to another when it subserves in some part the same purpose as the other.

Where defendants are perfectly well aware of what is in issue between them and the plaintiffs, a Court will grant plaintiffs the relief to which they are in law entitled, even though the plaint does not properly frame the relief. M. PEDDA VENKATA JAGGANNADHA RAJU *v.* RADHAKRISHNAIAH, 30 M. L. J. 302; (1916) M. W. N. 129 **941**

——— Ss. 47, 50—*Mortgage-deed, effect of, from what date—Suit on unregistered mortgage-deed—Attachment of mortgaged properties, after execution but before registration of mortgage-deed, effect of—Priority.*

A mortgage-deed takes effect from the date of its execution, and not from the date of its registration, under section 47 of the Registration Act.

Where, therefore, between the dates of execution and registration of a mortgage-deed another unregistered mortgage is sued upon and the mortgaged properties attached, that mortgage does not acquire priority over the registered mortgage either by reason of the decree thereon or by an attachment order obtained in that suit. VEERAKUTTY KOUNDAN *v.* RAMASAMI ASARI **431**

——— S. 49 **111**

——— S. 50 **431**

——— S. 50 (1) **953**

REGULATION IV OF 1793, S. 15 **21**

——— II OF 1805, S. 2 (2) **774**

——— XVII OF 1806, Ss. 7, 8—*Foreclosure—Demand—Technicalities, complying with, proof of.*

In a suit for possession on a mortgage under Regulation XVII of 1806 a plaintiff should be given full opportunity of showing that he has complied with all the technicalities provided under the Regulation. P. GIAN CHAND *v.* CHANAN SHAH, 2 P. W. R. 1916; 39 P. L. R. 1916 **809**

——— S. 8 **95, 809**

REGULATION—concld.

——— IX OF 1816, S. 10—*Punishment of putting in stocks—Test for determining whether it is degrading to inflict the punishment*—Shanars.

In determining the question whether the punishment of putting in stocks shall be inflicted on any particular class of people, the test is whether that class would at the present day regard themselves degraded by the infliction of such punishment.

A sentence of putting in stocks is unwarranted by law in the case of *Shanars* who have improved in social status and regard being put in stocks as a degrading form of punishment. M. *In re* MADASAMY NADAN, 17 Cr. L. J. 4 **131**

——— VII OF 1817 **211**

RELIGIOUS ENDOWMENT, succession to—*Wakf*—Muhammadan Law **21**

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), Ss. 7, 12—*Temple Committee, powers of—Civil Court, jurisdiction of, to frame scheme—Interpretation of Statute - Subject, right—Regulation VII of 1817—Civil Procedure Code (Act V of 1908), s. 92.*

A Civil Court, while framing a scheme under section 92 of the Code of Civil Procedure for the management of a temple under the control of a Temple Committee, interposed between the trustees and the Temple Committee a body of persons called the Board of Control to supervise the work of the trustees:

*Held*, that the appointment of the Board of Control was an undue restriction of the powers of the Temple Committee and that the Civil Court had no jurisdiction to do it.

A Civil Court has jurisdiction to frame a scheme for the management of a temple controlled by a Temple Committee appointed under Act XX of 1863.

Per *Wallis, C. J.* - There is nothing in Act XX of 1863 empowering a Court to frame a scheme for the management of temple affairs.

It is the intention of the Legislature that the extensive powers conferred on the Board of Revenue under Regulation VII of 1817 should be exercised by a Temple Committee and a Court should be very slow to construe the Religious Endowments Act in such a manner as to impede the due exercise of those powers.

A Court cannot interfere with the statutory powers conferred upon the members of a Committee so as to deprive them of their statutory functions, although it might frame a scheme conditional on legislative sanction being obtained for it.

Per *Seshagiri Aiyar, J.*—Moffusil Courts are Courts both of law and equity and they exercise jurisdiction over religious and charitable institutions in the same way as Courts of Chancery do in England.

A Court has the power to administer a charitable or religious trust provided it does not unduly interfere with the visitor or the statutory body.

There is a general right possessed by a subject to ask a Court's assistance to set right abuses and to have a scheme framed independent of the Statute.

It is not intended in Regulation VII of 1817 to give larger powers to a Temple Committee than those possessed by the Board of Revenue and the Committee should not concern itself with the internal management of the institution.

RELIGIOUS ENDOWMENTS ACT—1863—concld.

Section 14 of Act XX of 1863 gives only a general remedy to the public. The right of suit under the Act has been purposely restricted because the general right of the subject under the Code of Civil Procedure was not intended to be interfered with. The remedies are cumulative and not exhaustive.

A Civil Court alone has power to frame a scheme and its jurisdiction is not taken away by the creation of Temple Committees. M. SITHARAM CHETTY *v.* SUBRAMANIA AIYER, 30 M. L. J. 29; 19 M. L. T. 25; 3 L. W. 43 **211**

——— S. 12 **211**

RELIGIOUS OFFICE—*Succession - Females, whether disqualified—Performance of religious duties by proxy —Custom excluding females*—Onus.

A female is not under Hindu Law or custom disqualified from succeeding to a hereditary religious office and getting such duties, as she may be disqualified by reason of her sex from performing, performed by proxy.

No special custom has to be pleaded to enable a female heir to succeed to a religious office; the onus is on those who deny that right to prove a custom excluding females. M. RAJESWARI AMMAL *v.* SUBRAMANIA ARCHAKAR, 30 M. L. J. 222 **975**

RELIGIOUS TRUST—Mahant, *whether can alienate trust property without authority—Legal necessity—Dispute* inter partes *adjudicated upon in earlier suit—Pecuniary value of subsequent suit beyond jurisdiction of Court trying previous suit—Finding, whether* res judicata—*Judgment, admissibility of.*

A trust was created by the *Nai* community for the maintenance of a *samadh* and a *shiwala* and other houses and shops were subsequently built in one enclosure so that the entire enclosure constituted one tenement. The *mahant* alienated certain shops. The plaintiffs, as representatives of the *Nai* community, sued for a declaration that the alienation, being without authority and without consideration and valid necessity, was void. It was found that succession to the entire property was from *guru* to *chela*:

*Held*, (1) that the trust was a religious trust, and that the property alienated being a part and parcel of the institution, the plaintiffs, as representatives of the author of the trust, were entitled to restrain the trustee from making an improper disposal thereof;

2) that the building of a house not being such a necessary purpose as would justify an alienation of trust property, the alienation was not binding on the plaintiffs.

Where the pecuniary value of a suit is beyond the jurisdiction of a Court which adjudicated upon the dispute between the same parties sometime before, any finding then arrived at cannot be treated as *res judicata* in the subsequent suit, though the judgment of that Court is admissible in evidence. P. HAR PARSHAD *v.* SADHU, 31 P. W. R. 1916 **504**

REMAND. *See* CIVIL PROCEDURE CODE, O. XLI, R. 23; PRACTICE.

——— Appellate Court, power of—Party, addition of—Amendment of plaint—Ejectment, suit for—Landlord and tenant—Transferee of tenant's rights, if necessary party **791**

REMAND—concld.

——— Declaratory decree, whether can be contrary to Act—Application by Deputy Commissioner—Procedure—Chief Court, power of **446**

——— Plaint, amendment of, in appeal—Appellate Court, power of **906**

RENT. *See* LANDLORD AND TENANT.

———, a first charge—Purchaser of tenure, liability of, to pay arrears of rent accruing before purchase —Contribution, suit for **200**

——— Instalments for payment of rent numerous, whether contrary to usage **185**

———, *right to collect—Limitation Act (IX of* 1908), *Sch. I, Art.* 140—*Usufructuary mortgagee of* mokararidar, *rights of—Death of* mokararidar, *effect of.*

The suit of the grantor of a *mokarari* for life to evict the *zerbharnadar* (usufructuary mortgagee) of the grantee after his death is not governed by Article 140 of the Limitation Act.

The right to collect rents of a property must be based not only on possession of the property but also upon title.

A *zerbharnadar* of a *mokararidar* for life, who holds over after the death of the *mokararidar*, is entitled to collect the rents that accrued due before a final notice to quit has been served upon him by the grantor of the *mokarari*. C. LALJI SAHU *v.* SHAMLAL **827**

———, *suit for—Title to receive rent set up in third person—Party, third person if necessary.*

When in suits for rent, the tenant defendants set up the title of a third person to the rent, such third person is no necessary party to the proceeding. C. RAMESHWAR PERSHAD SINGH *v.* NAUHKU MOA **553**

RES JUDICATA. *See* CIVIL PROCEDURE CODE, S. 11.

——— Previous decision in another capacity, if conclusive in subsequent suit **701**

——— Decree — Attachment—Objections—Limitation to contest order on objection—Party neglecting to contest within time, effect of **43**

——— Dispute *inter partes* adjudicated upon in earlier suit—Pecuniary value of subsequent suit beyond jurisdiction of Court trying previous suit —Finding, whether *res judicata*—Judgment, admissibility of **504**

——— Mutation—Arbitration—Award—Subsequent suit in Civil Court, maintainability of **761**

——— Objections in execution department, omissions in **754**

——— *Land Acquisition Act (I of* 1894), *ss.* 18, 31 (2)—*Reference—Party to reference, not pressing his claim to compensation before Special Judge, if debarred from claiming it in civil suit.*

A person, who having been made a party to a reference under the Land Acquisition Act had the opportunity and duty of litigating his claim before the Special Land Acquisition Judge but did not then press his claim to any part of the compensation, is not entitled to come again to the Civil Court and re-open the question. C. RANAJIT SINHA *v.* SAJJAD AHMAD **922**

——— Sale, cancellation of—Previous suit by defendant dismissed as time-barred—Subsequent suit, whether barred by *res judicata* **485**

——— *Sir*, entry of, in partition proceedings, if binds tenant who is no party **851**

RESTITUTION, application for. *See* CIVIL PROCEDURE CODE, S. 144.

RESTITUTION OF CONJUGAL RIGHTS. *See* MUHAMMADAN LAW.

RESUMPTION, piecemeal, if permissible—Grove—Trees, portion of grove becoming devoid of **368**

REVIEW. *See* CIVIL PROCEDURE CODE, O. XLVII, RR. 1 AND 2.

——— *Delay in filing petition—Duty of applicant to account for delay—Limitation.*

Where an application for review of a judgment delivered on the 26th July 1911 was presented on the 23rd January 1915 and the review was asked for on the ground that a subsequent Privy Council decision passed on the 19th June 1914 showed that the judgment sought to be reviewed was wrong:

*Held*, that even supposing that the fact that the Privy Council decision laid down the law differently was a good ground for review, the enormous delay in filing the application had to be accounted for, and the applicant not having done so, his application was time-barred. M. KASARAVENI RAMASWAMI *v.* BOMMADEVARA VENKATANARASIMHA, 3 L. W. 244; (1916) M. W. M. 277 **1000**

——— Inherent power **527**

——— Revision—*Ex parte* decree, setting aside of, without notice **567**

REVISION. *See* CRIMINAL PROCEDURE CODE (1882), S. 439; CIVIL PROCEDURE CODE (1908), O. XLVII, R. 7; PROVINCIAL SMALL CAUSE COURTS ACT, S. 25; U. P. LAND REVENUE ACT, S. 219.

——— against acquittal, by private party, whether competent **129**

——— Amendment—High Court, jurisdiction of **45**

——— Application to set aside sale, if to be in writing—Mere payment of money, if enough—Amendment, when allowed **45**

——— Grounds—Jurisdiction **250**

——— Punjab Municipal Act (III of 1911), ss. 114, 221—Notice to demolish building or execute "sufficient" repairs—Absence of specification—Illegality **841**

——, whether lies from refusal to review **86**

REVOCATION, doctrine of—Dependent relative—Intention **373**

RIOT. *See* PENAL CODE, S. 147.

SALE. *See* TRANSFER OF PROPERTY ACT, S. 54.

——— Mortgage—Construction of document—Surrounding circumstances **192**

——— Mortgage—Suit by a co-mortgagee—Decree—Purchase by decree-holder—Other mortgagees, right of—Purchase-money—Equity **171**

——— *Payment of consideration, whether necessary to pass title—Registration of sale-deed, effect of—Intention of parties—Suit for redemption—Mortgagee, possession of.*

Ordinarily upon the due execution and registration of a sale-deed the title in the property sold passes from the vendor to the vendee, unless it is proved that both the parties intended that the payment of price should be a condition precedent to the transfer of ownership.

Where, therefore, a sale-deed was properly executed and registered and the vendor recited in the deed and admitted before the Sub-Registrar that he had received the entire consideration but no part of the price was ever paid to him:

*Held*, that, despite the non-payment of consideration, the terms of the deed coupled with the acknowledgment before the Sub-Registrar showed that the vendor intended to divest and did indeed divest himself of the ownership which immediately vested in the vendee.

In order to prove to have acquired title by adverse possession a mortgagee cannot rely on 12 years' rule unless he proves a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. P. ABDUL AZIZ KHAN *v.* KALA SHAH, 50 P. W. R. 1916 **961**

——— of *zemindari*—Reservation by vendor of certain area as rent free—Vendee, right of, to get revenue assessed **10**

——— DEED, *suit to set aside—Sale of occupancy and fixed rate holding by one deed—Contract, validity of—Transfer, effect of—Contract for sale—Deed of transfer—Plaintiff, if can set up illegality of his own contract—Fraud, effect of—Contract Act (IX of 1872), ss. 23, 24—Agra Tenancy Act (II of 1901), s. 20—Transfer of Property Act (IV of 1882) ss. 58, 54—Infants Relief Act of 1874, 37 & 38 Vic. Ch. 62, s. 1.*

A transferor is not entitled to a decree declaring the transfer of a fixed rate holding void because the deed purported to transfer an occupancy holding (not transferable by law) as well as a fixed rate holding unless he would have been entitled to a decree for possession of the fixed rate holding if the transferee had obtained possession after the transfer.

A contract for sale is one thing and a deed of transfer another and a transfer is not void merely because the contract is unenforceable.

A plaintiff should not be allowed to set up the illegality of his own contract as a ground for defeating a valid transfer on the principle of *ex turpi causa non oritur actio.*

Where, therefore, the plaintiff sued to set aside a sale-deed executed by him both of a fixed rate holding and an occupancy holding on the ground of the illegality of the contract:

*Held*, that in the absence of fraud the plaintiff was not entitled to set aside the transfer of the fixed rate holding.

*Semble.*—An occupancy tenant who executes a transfer of his interest can, notwithstanding the transfer, recover the holding not because the contract is illegal, but because the interest is an interest which the transferor by the express words of the Agra Tenancy Act is not capable of passing A. BAJRANGI LAL *v.* GHURA RAI, 14 A. L. J. 270 **913**

SANCTION TO PROSECUTE. *See* CRIMINAL PROCEDURE CODE, S. 195.

SECONDARY EVIDENCE. *See* EVIDENCE ACT, S. 65 (c) **399**

SERVICE OF NOTICE by affixation — Agra Tenancy Act (II of 1901), ss. 59, 60—Non-deposit of decretal amount—Sufficient cause—Service, when insufficient 17

SET-OFF. *See* CIVIL PROCEDURE CODE, O. VIII, R. 6 80

SIND ENCUMBERED ESTATES ACT (BOM. ACT XX OF 1896), S. 38—*Manager, if a Revenue Officer—Finality of orders—Bombay Revenue Jurisdiction Act (Bom. Act X of 1876), s. 11—Limitation Act (IX of 1908), s. 34—Good faith, evidence of.*

The Sind Encumbered Estates Act does not confer finality on any of the orders made by the Manager of the Encumbered Estates.

The Manager, Encumbered Estates in Sind, is not a Revenue Officer as defined in the Revenue Jurisdiction Act (Bom. Act X of 1876).

There is no hard and fast rule as to what amounts to the good faith required by section 14 of the Limitation Act. It is a matter to be decided on the facts of each case. S. GEHIMAL *v.* MANAGER, IMCUMBERED ESTATES IN SIND, 9 S. L. R. 167 616

*Sir. See* AGRA TENANCY ACT, S. 10; U. P. LAND REVENUE ACT, S. 4.

SPECIFIC PERFORMANCE. *See* CONTRACT ACT, S. 55.

——— *Contract to sell lands—Decree fixing time for payment of purchase-money—Confirmation of decree by Appellate Court, effect of—Appellate Court, whether can extend time—Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 33.*

A Court which passes a decree for specific performance of a contract to sell lands has no power to extend the time fixed for payment of the purchase-money nor can an Appellate Court do so either under section 151 or under Order XLI, rule 33, Civil Procedure Code.

A confirmation by an Appellate Court of an original decree for specific performance does not extend the time fixed for payment in that decree. M. GOPALA AIYAR *v.* SANNASI, 3 L. W. 29; 19 M. L. T. 137 401

SPECIFIC RELIEF ACT (I OF 1877), S. 9—*Dispossession of tenant if dispossession of landlord—Suit for possession, maintainability of—Attornment by tenants to stranger, effect of—Landlord, if dispossessed without dispossession of tenants.*

The dispossession of a tenant by a trespasser is the dispossession of his landlord, and entitles the landlord to a relief under section 9, Specific Relief Act.

A mere attornment by a tenant in actual possession to another person coupled with a refusal to pay rent to the proprietor does not amount to the dispossession of the proprietor under section 9 of the Specific Relief Act.

*Semble*:—A proprietor may be dispossessed without dispossession of his tenants, but in such a case something more than an attornment to a third party is necessary, *e.g.*, by the forcible removal of a proprietor's rent-collectors by a third party and the introduction of his own collecting agency into the estate. O. NIHAL SINGH *v.* RAGAU RAJ BAHADUR SINGH, 18 O. C. 353 202

——— S. 27 953

SPECIFIC RELIEF ACT—1877—concld.

——— S. 27—*Contract to sell land—Prayer for possession, whether can be included in suit for specific performance—Vendor's mortgagee, whether can be impleaded.*

A claim for possession may be included in a claim for specific performance of a contract for the sale of immoveable property, but it is not open to the plaintiff to implead the vendor's mortgagee who is in possession under a usufructuary mortgage. M. BUGATA APPALA NAIDU *v.* CHENGALVALA JOGIRAJU, (1916) M. W. N. 77 237

——— Ss. 38, 41 804

——— S. 42 437

——— S. 42—*Declaratory decree, right to, without asking for available consequential relief—Symbolical possession.*

A *jagirdar* sued to obtain a declaration that he was the owner of the land in possession of the defendants whom he alleged to be his tenants. The defendants denied the tenancy:

*Held*, that the plaintiff was not entitled to a declaratory decree, inasmuch as he being entitled to further relief by way of symbolical possession had failed to ask for it. S. MIR HUSSEIN BUX *v.* KANDO, 9 S. L. R. 174 689

——— S. 42—*Plaintiff not in possession—Declaratory suit—Consequential relief—Failure to amend plaint, effect of.*

When a plaintiff does not sue for consequential relief on the ground that he is already in possession and he has an opportunity of amending his plaint and paying the additional Court-fees and adding a claim for the consequential relief when the issue is framed and he fails to do so, the suit should be dismissed if it is found that he was not in possession. L. B. MA SHWE YU *v.* MAUNG SAK KYUN 564

STAMP ACT (II OF 1899), Ss. 3, 19, 35—*Promissory note executed outside British India, necessity of stamping—Promissory note, admissibility of, in evidence—Negotiable Instruments Act (XXVI of 1881), ss. 13, 64—Negotiability, how far essential to make an instrument promissory note—Promissory note, maker of, liability of, when not purporting to sign in a representative character—Presentment, when necessary—Holder, right of, to fall back on original consideration—Construction of document—Intention of parties.*

A promissory note not executed in British India is not compulsorily stampable under the Stamp Act but is chargeable only when presented, paid or negotiated in British India.

A promissory note executed outside British India is admissible in evidence, even if unstamped.

*Semble*.—Judgments in English cases bearing on the definition of pro-note contained in the English Stamp Acts of 1870 and 1891 must be applied with discrimination in India, for that definition is wide enough to include almost every document that contains a promise to pay.

Neither in England nor in India is the definition of a pro-note limited to an instrument that is negotiable according to mercantile usage. An instrument may be a pro-note without being negotiable. The

STAMP ACT—1899—concld.

test is not mercantile usage, but the terms of the statutory definition.

Section 64 of the Negotiable Instruments Act makes presentment of a pro-note a necessary condition only when it is sought to make liable parties other than the maker.

When a pro-note is not given independently of the transaction of loan the plaintiff cannot fall back and sue on the original consideration. His suit must be based on the pro-note.

A maker of a pro-note who does not purport to have signed it in a representative capacity renders himself personally liable on the same.

Per *Boyd*, *A. J. C.*—Intention of parties is an element to be taken into account in considering what is the nature of a document. S. RAMSING *v.* PARUMAL, 9 S. L. R. 150 **582**

——S. 19 **582**

——S. 35 **582**

STATUTE, construction of. *See* CONSTRUCTION OF STATUTE.

SUCCESSION. *See* AGRA TENANCY ACT, S. 22; CUSTOM; HINDU LAW; MEMONS; RELIGIOUS OFFICE.

SUCCESSION CERTIFICATE ACT (VII OF 1889), S. 4 (1) (*a*)—*Money due from Insurance Company after death of insured person—Succession certificate, whether necessary*

Where the widow of an insured person applied for a succession certificate in order to recover money due from an Insurance Company:

*Held*, that the application was misconceived as the Company was not the debtor of the deceased in respect of the sum and the applicant was not entitled to this sum as part of the effects of the deceased within the meaning of section 4 (1) (*a*) of the Succession Certificate Act. M. SRINIVASA CHARIAR *v.* RANGANAYAKI AMMAL, 3 L. W. 466 **991**

SUIT for compensation—Facts to be proved—Burden of proof **551**

——— for declaration and possession—Limitation Act, 1908, Sch. I, Art. 141 **127**

——— for possession—Burden of proof—Possession within limitation—*Zemindar's* title in and possession over jungles, groves or tanks in village or scattered trees in *abadi*—Presumption as to *zemindar's* title and possession—Under-proprietary title, plea as to—Adverse possession **370**

———for possession—Mortgage—Consideration-money, only portion of, payment of, effect of—Usufructuary mortgagee, right of—Default of puisne mortgagee in redeeming prior mortgages, effect of—Possession, suit for, maintainability of—Limitation Act (IX of 1908), Sch. I, Art. 135—Possession, right of **341**

——— for profits. *See* AGRA TENANCY ACT, S. 164.

——— for recovery on bond—Agriculturist, bond executed by—Limitation **495**

——— to set aside sale—Decree against minor—Judgment-debtor attaining majority before execution—Proceedings in execution against guardian *ad litem*, validity of—Limitation Act (IX of 1908), Sch. I, Art. 12. **391**

SUMMONS, service of. *See* CIVIL PROCEDURE CODE, O. V, R. 17.

——— *Collector's refusal to serve, whether ground for dismissing suit—Defendant residing in Aminidivi Island—Method of service—Procedure.*

A refusal of a Collector to serve the summons is not a sufficient reason for dismissing a suit.

Where a defendant was at first residing in British India but at the time of the suit was residing in the Aminidivi Island:

*Held*, that the service should be effected by affixing the summons to his last known place of residence in British India and by registered post. M. ABDUL KADYA BEARI *v.* SHARYODE KUNHI AHMED **820**

SURETY. *See* CRIMINAL PROCEDURE CODE, S. 109.

SURRENDER *See* BENGAL TENANCY ACT, S. 86; HINDU LAW.

SURVIVORSHIP. *See* HINDU LAW.

TORT-FEASORS, joint—Survival of claim against one—Compensation, suit for, right of **18**

TRANSFER, application for. *See* CIVIL PROCEDURE CODE, S. 24.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 40 **938**

——— S. 41—*Wife selling husband's property during his absence—Wife entered as owner—Proper inquiry, effect of.*

Where during the absence of a person on pilgrimage, his wife sold his land which before his departure had been mortgaged by her with his consent and the purchaser before the purchase had on enquiries learnt that the wife's name was registered in the landlord's *sherista*:

*Held*, that the requirements of section 41 of the Transfer of Property Act were carried out and that the husband was entitled neither to recover possession nor to redeem the mortgage which had passed to the hands of the purchaser by reason of his having paid it off after the purchase. C. NIRAS PURBE *v.* TETRI PASIN, 20 C. W. N. 103 **82**

———S. 53—*Transfer with intent to defeat or delay creditors—Preference of one creditor over another, when valid—Bankruptcy, consideration of—Conveyance, when valid.*

In a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts.

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor.

Where a transfer was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, and where there was no question of bankruptcy of the debtor:

*Held*, that there was no ground for impeaching the transaction under section 53 of the Transfer of Property Act for the fact that a crediter was a loser

TRANSFER OF PROPERTY ACT—1882—contd.

by payment being made to a preferred creditor. P. C. MUSAHAR SAHU v. HAKIM LAL, 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406 **343**

——S. 54 **573; 913**

——S. 54—*Oral sale—Vendee in possession as lessee—Delivery of possession, how effected.*

There can be a valid sale by delivery of possession within the meaning of section 54 of the Transfer of Property Act even if the vendee is already in possession of the lands sold as a lessee, provided that the vendor by appropriate declarations or acts converts the possession of the vendee as lessee into one as purchaser. N. THAKURDAS v. SOBHACHAND, 12 N. L. R. 3 **233**

——S. 54—*Sale, non-registration of, effect of—Land worth more than Rs.* 100—*Contract to sell—Specific performance, suit for—Limitation Act (IX of* 1908), *Sch. I, Art.* 113.

A sale of land worth more than Rs. 100 without registration, as required by section 54 of the Transfer of Property Act, is in law a mere contract to sell and does not of itself create an interest in or charge on the land contracted to be sold.

A suit for the specific performance of such a contract is governed by Article 113 of the Limitation Act and can be brought within three years from the date of the purchaser's knowledge that the vendor refused to perform the contract, where no specific date is fixed for the performance.

The Limitation Act, being one in which rights are rendered ineffective if not abrogated, must be read strictly. L. B. MA SHWE ON v. MAUNG KYWET **536**

——Ss. 54, 118—*Unregistered deed of exchange—Acquiescence—Title, whether passes—Estoppel—Construction of Statute.*

Where the plaintiff and the defendant agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house sites, the agreement being reduced to writing though not registered, and the defendant having erected a wall on the land allotted to him, the plaintiff sued to recover the land:

*Held*, per *Chief Justice*, (*Seshagiri Aiyar, J.*, dissenting) (1) that the plaintiff, having acquiesced in the defendant's building the wall and having obtained a payment therefor, was estopped from claiming the land and could not recover it even though the original deed of exchange was unregistered and did not pass any title to the defendant;

(2) that if a man builds a house partly on his neighbour's lands and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it;

(3) that the rule of law laid down in *Kurri Veerareddi* v. *Kurri Bapireddi*, 29 M. 336; 16 M. L. J. 395; 1 M. L. T. 153 that where there is no legal title equity will not interfere to supplement it, does not involve the proposition that where there is no registered document no amount of acquiescence on the part of the transferor will bar his right to get back the property within the statutory period.

Per *Seshagiri Aiyar, J.*—(1) Where a Statute enjoins that title would pass only if certain formalities

TRANSFER OF PROPERTY ACT—1882—contd.

are complied with, conduct and action cannot be relied upon to supplement an inchoate title.

(2) The use of the word "only" in sections 54 and 118 of the Transfer of Property Act excludes the possibility of title being acquired by any other process than that laid down in these sections.

(3) The rule of estoppel is one of evidence and ought not to be allowed to prevail against a statutory right. M. RAMANATHAN CHETTY v. RAMASAMI CHETTY, (1915) M. W. N. 1043; 30 M. L. J. 1; 19 M. L. T. 114 **5**

——S. 55 (2)—*Sale of interest not larger than actually possessed—Eviction of vendee by superior landlord—Vendor, whether liable for breach of covenant for title.*

When the interest which a seller "*professed*" to transfer was not larger than what he actually possessed, he is not liable for any breach of covenant for title, if the vendee is evicted by the superior landlord. M. VATAKA CHATHILINGATH v. RAMASWAMY PATTAR **984**

——S. 58 **913**

——S. 59—*Mortgage executed by pardanashin lady—Attestation, when valid.*

A mortgage-deed was executed by a *pardanashin* lady. It was attested by two witnesses, one of whom was her husband who actually saw the signature being made, the other one was present in the same room with the lady just outside a screen and he knew her voice and heard her say "yes" when the document was explained to her:

*Held*, that under the circumstances the mortgage-deed was duly attested in accordance with law.

*Semble.*—The criterion in such cases is the presence of the witnesses at the time of the execution. C. RUKMINI KOERI v. NILMANI BANDYOPADHYAYA, 19 C. W. N. 1309 **170**

——S. 59—Writer of document, whether can be treated as attestator **813**

——S. 83 **861**

——S. 88 **354**

——S. 89 **354**

——S. 99—*Sale in contravention of the section not avoided—Mortgagor's right to redeem, whether subsists.*

A sale of mortgaged property in contravention of section 99 of the Transfer of Property Act is not void but merely voidable, and if it is not avoided by proceedings in execution prior to the confirmation of the sale, the right of the mortgagor and those who represent him to redeem is absolutely extinguished whether the purchaser at the sale be an outsider or the mortgagee bidding by leave of the Court.

Where in a suit for redemption of a certain mortgage executed by the plaintiffs in favour of the defendant, the plea was set up that there was no equity of redemption left in the plaintiffs by reason of the defendant having purchased it in execution of a decree which he had obtained against the mortgagors in a suit on a simple money bond, not arising out of the mortgage:

*Held*, that, inasmuch as the plaintiffs had taken no objection to the confirmation of the sale, the present suit for redemption did not lie. M ARJUNA REDDI v. VENKATACHALA ASARI, 19 M. L. T. 121 **611**

TRANSFER OF PROPERTY ACT—1882—concld.

——— S. 100, *applicability of—Charge—Mortgage—Security, when amounts to charge.*

Section 100 of the Transfer of Property Act does not enable a mortgage to be converted into a charge if it cannot operate as a mortgage by reason of non-compliance with the formalities prescribed by the law, such as that of registration prescribed by section 59 of the Transfer of Property Act; the case being otherwise, if the relation of mortgagor and mortgagee does not exist between the parties.

Case-law on the point reviewed. L. B. MA BON LON *v.* MAUNG PO LU **595**

——— Ss. 106, 107—*Lease for 3 years unregistered—Specific performance, suit for, maintainability of—Presumption.*

If a lease required to be registered under section 107 of the Transfer of Property Act is not so registered within proper time a suit for specific performance by registration is maintainable against the defaulting party.

The presumption under section 106 of the Transfer of Property Act does not arise if there is a contract to the contrary. B. PAZUNDAUNG BAZAR CO., LTD., *v.* GWAN CHWAN **692**

——— S. 107 **692**

——— S. 107—*Permission to build—Lease not executed—Dispossession—Suit for possession—Injunction—License—Licensee, position of—Easements Act (V of 1882), ss. 52 to 64.*

The father of the defendant gave the plaintiffs permission to build a *gola* or a market place on a certain plot of land on the latter agreeing to pay him annually ground-rent for the same. No lease was executed. The plaintiffs built the *gola*, but being subsequently dispossessed sued for possession and injunction:

*Held*, (1) that the plaintiffs could not claim as lessees inasmuch as no lease in law was executed in the manner laid down in section 107 of the Transfer of Property Act;

(2) that even if the plaintiffs were mere licensees whose license had been improperly revoked, their remedy lay in a suit for damages and not for possession.

A licensee is a person without any title and has no interest in the land. A. BASDEO RAI *v.* DWARKA RAM, 14 A. L. J. 137 **346**

——— S. 118 **5**

TRIAL. *See* JURY TRIAL.

——— by assessors—Summoning of assessors for particular date—Selection on another date, legality of—Procedure—Trial, if valid **145**

———, *de novo*, if cancels charge previously framed—Order subsequently passed in favour of accused, whether amounts to discharge or acquittal **129**

———Misappropriation of money entrusted to more than one person—Joint trial, whether legal—Separate trials for misappropriating different items of money during the same period, whether allowed **158**

———, regularity of—Charge, framing of, necessity of—Conviction, legality of **662**

TRUST. *See* WILL.

——— Cy pres *doctrine, Court's power to apply, extra territorium—Remedy.*

Where objects of a charity lie without the jurisdiction of a Court, the most the Court can do is to safeguard the funds intended to be applied to those charitable purposes where such funds lie within the Court's jurisdiction and thereafter leave the application of them to the intended objects of the testator's bounty to the Courts of the country within whose jurisdiction those objects are.

A Court has no jurisdiction to apply the *cy pres* doctrine *extra territorium*.

Where a Court has by its decree so applied the doctrine, a Court of concurrent jurisdiction is competent to vary the decree as passed and to direct application of the funds to the intended objects within the limits of the country where those objects are, and should there be no scope for those uses, to leave to the Courts of the same country on the *cy pres* doctrine to divert the funds to other like charitable uses. B. KANJI JETSHI *v.* ADVOCATE-GENERAL, 18 BOM. L. R. 60 **925**

———*Endowment to deity*—Shebaitship, *devolution of*—Shebait, *position of—Principles—Vested interest—Heir-at-law—Hereditary office—Hindu Law—Successive life-estates, if permitted in endowments*

The position of a *shebait* is analogous to that of a Hindu female (widow, daughter, or mother) in possession of the estate of the last full owner rather than to that of the holder of a life-estate.

When the founder of an endowment for a deity has given valid directions as to the devolution of the *shebaitship* upon the death of the last *shebait*, the office vests in persons who at the time constitute the heirs of the founder, provided the last *shebait* has not taken it absolutely; and when the office has so vested in them, upon the death of each member it passes by succession to his heir, subject to the principle that the rule that when a worship of a *thakoor* has been founded, the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution, cannot be applied so as to vest the *shebaitship* in persons who, according to the usages of the worship, cannot perform the rights of the office.

An heir-at-law, though in terms excluded from benefit under a Will, cannot be excluded from his general right of inheritance without a valid devise to some other person.

*Obiter dictum.*—The rule in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 1 I. A. Sup. 47 at p. 66; 9 B. L. R. 377; 18 W. R. 359; 2 Suth P. C. J. 692; 3 Sar. P. C. J. 85, is applicable to an hereditary office and endowment quite as much as to other immoveable property and the Hindu Law of inheritance does not permit the creation of successive life-estates in an endowment. C. KUNJAMANI DASI *v.* NIKUNJA BEHARY DAS, 22 C. L. J. 494; 20 C. W. N. 314 **823**

TRUSTS ACT (II OF 1882), S. 36—*Trust—Mortgage of trust property—Consent of settler—Consideration—Charge, validity of—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Minor—Compromise of suit*

TRUSTS ACT- -1882—contd.

—*Consent of Court, necessity of—Practice—Mortgage without consent, validity of.*

One *R* executed a deed of voluntary settlement whereby he conveyed and assigned all his property, subject to the payment of the debts which he then owed and to certain allowances to the members of his family including himself, in the favour of a minor and others. *R* appointed a trustee and a co-adjutor. To save the estate a large sum of money had to be borrowed at a moderate rate of interest, and negotiations were entered into between the trustee, the co-adjutor, and certain financiers in England. The intending lenders required that *R* should become a party to the deed and that the allowances specified in the voluntary deed should be expressly postponed to their security. In order to obtain the assent of *R* and the consent of the persons entitled to the payment of allowances, the trustee agreed to give a mortgage for 4 lakhs of rupees to *R* on the security of the estate. The charge promised to *R* was used to create a mortgage in favour of a creditor of *R* in pursuance of a compromise in a suit brought by the creditor to recover the amount due to him:

*Held*, that the trustee was not justified in placing a burden of Rs. 4 lakhs on the trust estate and that he had not acted properly and reasonably and in the interest of the trust estate when he undertook to give the mortgage-bond to that amount in favour of *R*.

*Held*, further, that the compromise and the mortgage were invalid and that an additional charge in favour of the creditor on the trust estate was not created as there was no evidence that the trustee or the co-adjutor had any intention to create such a charge apart from the agreement with *R* to create a charge, which failed.

The provision in the Civil Procedure Code making it necessary to obtain the leave of the Court before compromising a suit in which a minor is a party, is of great importance to protect the interests of the minor and it is not sufficient that the terms of the compromise are before the Court.

Therefore, a mortgage given by a trustee in pursuance of a compromise in a suit in which he was the guardian *ad litem* of a minor *without the sanction of the Court* is invalid though supportable on other grounds. P. C. SUBRAMANIAN CHITTIAR *v.* RAJESWARA DORAI, 29 M. L. J. 856; 20 C. W. N. 201; 3 L. W. 149; 19 M. L. T. 150; 14 A. L. J. 153; (1916) M. W. N. 100; 23 C. L. J. 337; 31 M. 115 **258**

———Ss. 44, 45, 71, 76—*Deed of trust vesting management of temple in five trustees—Resignation of one, effect of—Suit by four, whether maintainable—Death of one pending suit—Suit, whether can be continued by remaining three—Tender of mortgage-money not made—Interest, whether can be charged.*

A deed of trust vesting the management of a temple in five trustees provided that suits on behalf of the temple must be filed by them jointly, and laid down the procedure for filling vacancies caused by the death or resignation of any trustee. One of the trustees having resigned, the other four brought a suit on behalf of the temple and one other trustee died pending the appeal to the High Court:

*Held*, (1) that the resignation operated as a valid discharge of the trustee from his duties, and there being no contrary declaration in the instrument of trust, the trust property passed to the others;

(2) that the suit instituted by the remaining four trustees was maintainable, no one having been appointed in place of the trustee who resigned;

(3) that on the death of one of the trustees in the course of the suit, it could be validly continued by the other three.

Where there is no tender of the mortgage amount, interest is rightly chargeable. M. KRISHNA BHATTA *v.* UDAYAVAR SRINIVASA **97**

TRUSTS ACT—1882—concld.

——— Ss. 45, 71, 76 **97**

——— S. 84—*Fraudulent transfer—Creditors delayed—Right of transferor to have transfer set aside, effect of.*

In order to disentitle a person from having set aside a transfer made by him for an illegal purpose, *e.g.*, with a view to screen his property from his creditors, it is not necessary that the whole fraud contemplated should have been carried into effect; but it is sufficient if the illegal purpose has been carried into effect in a material part, *e.g.*, by delaying the creditors for a long time. S. HIRJI TOKARSI *v.* GORDHANDAS, 9 S. L. R. 108 **530**

———S. 90 **102**

U. P. LAND REVENUE ACT (III OF 1901), S. 4—*Estoppel*—Sir, *sale of—Land ceasing to be* sir *—Land recorded as* sir*—Co-sharer, no objection by—Co-sharer becoming tenant—Estoppel.*

One *S* purchased a certain *sir* land in 1873 but by mistake it continued to be recorded as *sir* in the papers including the Settlement papers and was so recorded at a partition to which one *P* was a party. Since then *P* became a tenant of the land and claimed occupancy rights on the ground that the land was not *sir*:

*Held*, that *P* was estopped from asserting that the land was not *sir*. U. P. B. R. PUNCHAM DUBE *v.* SHAHZAD KOER **387**

——— S. 34—*Mutation—Contested case—Jurisdiction of Tahsildar to enquire—Tahsildar, power of, to refer to arbitration—Award, effect of—N. W. P. Rent Act (XII of 1881), s. 203.*

In a mutation case, a Tahsildar should at once refer the matter to the Sub-Divisional Officer, when the suit becomes contested, as the law does not contemplate his continuing to investigate the case thereafter.

Under section 203 of the Rent Act, no one but an Assistant Collector of the First Class or some higher Court can make a reference to arbitration. Therefore, if a Tahsildar makes such a reference the award made is void *ab initio*. U. P. B. R. SATAROHAN PANDE *v.* RAM UGRAH PANDE **573**

———Ss. 40, 44, 203, 207—*Mutation—Arbitration—Award—Subsequent suit in Civil Court, maintainability of*—Res judicata.

An award given by arbitrators in a mutation proceeding is no bar to a subsequent suit for possession in a Civil Court. A. GIRDHARI CHAUBE *v.* RAM BARAN MISIR, 14 A. L. J. 85 **761**

——— S. 44 **761**

U. P. LAND REVENUE ACT—1901—contd.

——S. 87 1001

—— S. 103—*Possession of reversioner, if transfer.*

A reversioner coming into proprietary possession of certain land on the death of a widow is not a transfer of proprietary possession as is contemplated by section 103 of the Revenue Act and upon such land, revenue cannot be assessed till the next Settlement. U. P. B. R. RAGHUBAR SINGH v. BINDRA BUX SINGH 550

——S. 109 (2)—*Partition of under-proprietary mahal—Compactness impossible, if bar to partition.*

The partition of an under-proprietary *mahal* cannot be refused on the ground that the partition cannot be made compact. The only conditions that must be fulfilled are laid down in section 109 (2) of the Land Revenue Act, which applies to under-proprietary *mahals* as well. U. P. B. R. GUR PRASAD v. RAM GOBIND 773

—— S. 112—*Partition proceedings—Objection taken by plaintiff on ground of previous private partition—Question of proprietary title—Revenue Court, jurisdiction of, to refer question to Civil Court for trial.*

An objection, in a partition proceeding carried on in a Revenue Court, to the effect that the village has already been privately partitioned and that a definite portion of it has been allotted to the objector's share and that that portion cannot be partitioned again, raises a question of proprietary title, and the Revenue Court is competent under the provisions of section 112 of the Land Revenue Act to refer the parties to a Civil Court. A. RAM NARAIN v. JAGANNATH PRASAD, 14 A. L. J. 23; 38 A. 115 184

—— S. 133 (3)—*Partition—No appeal from partition proceedings—Mistake in partition proceedings, correction of—Appeal from confirmation of partition.*

In an appeal against the final confirmation of a partition, the Court can correct a mistake in the partition proceedings though no appeal was preferred against the partition proceedings, when a party had suffered a serious wrong by the mistake and when the incorrect entry was in no way justified by the *wajib-ul-arz*. U. P. B. R. SARJU PRASAD v. KHUSHAL CHAUDHRI 832

——Ss. 203, 207 761

——Ss. 219, 87—*Rent, determination of—Settlement Officer, duty of—Substantial irregularity—Revision—Agra Tenancy Act (II of 1901), s. 10.*

In fixing rent of an ex-proprietary tenant under section 87 of the U. P. Land Revenue Act a Settlement Officer commits substantial irregularity justifying interference in revision if he disregards the provisions of section 10 of the Agra Tenancy Act. U. P. B. R. HIRA SINGH v. JODHA SINGH 1001

—— S. 219—*Revision—Jamabandi, application for correction of—Summary disposal*—Res judicata—Sir, *entry of, in partition proceedings, if binds tenant who is no party.*

Where an application for correction of *jamabandi* is disposed of in a summary manner without fixation of issues, the decision does not operate as *res judicata*.

U. P. LAND REVENUE ACT—1901—concld.

An entry of a land as *sir* in partition proceedings does not bind a tenant who was no party to the partition, and to hold him so bound is a gross and palpable error of law justifying interference in revision. U. P. B. R. ILAHI KHAN v. RAJAB ALI 851

UNLAWFUL ASSEMBLY. *See* PENAL CODE, S. 141.

VAKALATANAMA, *acceptance of, if endorsement necessary—Civil Procedure Code (Act V of 1908), O. III, r. 4—Calcutta High Court Rules and Circulars of 1910, r. 45 (e)—Pleader, appearance by, without endorsing acceptance on vakalatnama, effect of—Affidavit in qualified form, value of—Special power-of-attorney, presumption of genuineness of—Evidence Act (I of 1872), s. 85—Registration of special power-of-attorney, if necessary.*

Per *D. Chatterjee, J.*—Though there is no provision in the Registration Act which makes registration of a special power-of-attorney compulsory, a Court is not bound to presume its genuineness unless it is registered.

Order III, rule 4, of the Civil Procedure Code, 1908, does not require that the acceptance of a *vakalatnama* should be in writing.

Therefore, an appearance or act by a Pleader named in the *vakalatnama*, if allowed by the Court expressly or by implication, is valid and operative.

Rule 45 (*e*) of the Calcutta High Court Rules and Circulars published in 1910 should be fully complied with by a Pleader in the Mofussil who first accepts a *vakalatnama*, and all subsequent acceptances must be made by endorsements made in the presence of the Court or the *sheristadar* or the Bench Officer and dated, provided, all the Pleaders so accepting a *vakalatnama* are named in it.

Per *Beachcroft, J.*—Rule 45 (*e*) of the High Court Rules and Circulars published in 1910 has not the effect of making acceptance in writing obligatory by a Pleader accepting a *vakalatnama*.

There may be an acceptance, as between party and Pleader, other than in writing, but the Court before which the Pleader practises ought to insist on the rule 45 (*e*) being observed, before it allows him to plead.

An affidavit in the qualified form "the facts stated are true to the best of my knowledge" without any information as to the source of the knowledge, is useless as evidence of any particular fact stated. C. MOHESH CHANDRA ADDY v. PANCHU MUDALI, 20 C. W. N. 287; 23 C. L. J. 297 395

VENDOR AND PURCHASER—*Bona fide* purchaser without notice, right of—Notice—Test 41

——Contract—Specific performance 47

——*Contract to sell—Specific performance, suit for—Registered transfer, necessity of—Transfer of Property Act (IV of 1882), s. 54—Limitation Act (IX of 1908), Sch. I, Art. 113.*

A vendor is bound to do all things necessary to complete the title of his vendee and where section 54 of the Transfer of Property Act applies, the sale must be by a registered document.

Article 113 of the First Schedule of the Limitation Act applies to suits to compel the execution of registered documents by way of specific performance

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of the contract of sale, and time runs from the date of the plaintiff's knowledge of refusal to execute such documents where no specific date is fixed. L. B. MAUNG NE DUN *v.* MA LE 573

——— Contract to sell—Suit for specific performance of contract--Return of purchase-money 49

——— Delivery of goods—Vendor, duty of—Vendee, right of, to refuse to accept, after drawing samples 720

——— *Specific performance of contract—Terms uncertain—Contract, if concluded before stipulated writing—Earnest money, payment of, whether conclusive evidence of completion of contract—Purchaser, right of, to vacant possession.*

Where it is the essential term of a bargain between the parties that there should be a written contract, there is no enforceable contract in the absence of a written agreement.

Per *Jenkins, C. J.*—Where parties to a contract contemplated an agreement in writing, the provision for a written agreement is not negligible in determining the question whether there was a concluded contract between the parties in the absence of writing.

In a contract for the sale of land, the substantial agreement of the parties upon the main features of the transaction, *i.e.*, the sale, the identity of the property, the price, the imposition of restrictions in some form or another, does not necessarily create a concluded contract between the parties.

In a suit for the specific performance of a contract for the sale of land, the defendant (purchaser) is not precluded from pleading that there was no concluded contract, merely because he paid earnest money.

Per *Woodroffe, J.*--A Court will not enforce specific performance of a contract the terms of which are uncertain.

The question whether a contract is uncertain in the sense that the Court cannot know what the contract is which the parties entered into, is a question of fact

In a contract for the sale of immoveable property, an exclusively written record is not required by the law of the country.

An Appellate Court is not bound to accept the first Court's appreciation of the facts. But the appellant has to satisfy the Appellate Court that the judgment appealed against is erroneous.

The fact that the parties to a contract refer to the preparation of an agreement by which the terms agreed upon are to be put into a more formal state, does not prevent the existence of a binding contract, unless the reference to a future formal contract is made in such terms as to show that the parties did not intend to be bound until a formal contract was signed.

Per *Mookerjee, J.*—The fact that the parties intended to embody the terms of their contract in a formal written agreement, is strong evidence that the negotiations prior to the drawing up of such writing were merely preliminary and not understood or intended to be binding.

If an oral agreement or written memorandum is complete in itself and embodies all the terms to be inserted in the intended formal writing a binding

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obligation is fixed upon the parties, unless it is understood and intended that such contract shall not become operative until reduced to writing.

A purchaser of land is not bound to take it subject to leases, but is entitled to vacant possession unless there is an agreement to the contrary. C. HYAM *v.* GUBBAY, 20 C. W. N. 66 53

VIZIGAPATAM AGENCY RULES. *See* DECLARATORY SUIT.

WAJIB-UL-ARZ, interpretation of 291

——— , *interpretation of*—'Farar', *meaning of—Construction of document.*

Where a clause in a *wajib-ul-arz* ran, "when an owner of the grove *'gaon se farar ho jata hai'* his grove becomes *'nazul'*":

*Held*, that the word *'farar'* could not apply to a man who left the village *openly, and not in a clandestine or irregular manner*, in order to take up his residence in an adjoining village, but to an absconder or a deserter. O. GAURI SHANKAR SINGH *v.* BHAGWAN DIN, 2 O. L. J. 485 337

——— , *interpretation of*—"Malik kamila," *meaning of—Tribal custom—Daughters, exclusion of, from inheritance—Custom as regards family in question to be proved—Court, discretion of—Gift by Hindu widow to her married daughter—Declaration that plaintiff's reversionary rights not affected, relief as to, if entertainable.*

Where a *wajib-ul-arz* stated that a Hindu widow who succeeds her husband in absence of male offspring succeeds as "*malik kamila*":

*Held*, that the words "*malik kamila*" meant an absolute owner.

Where there is evidence that in certain families of a tribe residing in a district daughters are excluded from succession, it cannot be held on the basis of this evidence that there is such a tribal custom which has force in every family in the district; the custom must be proved with regard to the particular family in question.

A Court should, in the case of a gift by a Hindu widow to her married daughter, refuse to grant a declaration that the deed of gift does not prejudice the plaintiff's reversionary rights. O. THAKURDIN SINGH *v.* BHAGWANT KUAR, 2 O. L. J. 629 734

WAKF. *See* MUHAMMADAN LAW.

WARRANT, search. *See* CRIMINAL PROCEDURE CODE, S. 96.

WATER-CESS—*Madras Irrigation Cess Act (VII of 1865)—'River belonging to Government'—Bed and banks belonging to* zemindar—*Cess, if leviable—Forfeiture of* zemindari—Zemindar *under obligation to supply water free—Right of Government to levy water-cess.*

Where both the banks and the bed of a portion of a river belong to a *zemindar*, that portion of the river does not belong to the Government so as to warrant the levy of water-cess under Act VII of 1865.

The Government succeeding to the rights and obligations of a *zemindar* on forfeiture is not precluded from levying water-cess by reason only of the

WATER-CESS—concld.

fact that the *zemindar* was under an obligation to supply water free of charge. M. SECRETARY OF STATE *v.* MAHARAJA OF BOBBILI, 19 M. L. T. 6; 3 L. W. 119; 30 M. L. J. 163; (1915) M. W. N. 1025 **279**

WIDOW. *See* HINDU LAW.

WITHDRAWAL OF SUIT. *See* CIVIL PROCEDURE CODE, O. XXIII, R. 1.

WIIL. *See* AGRA TENANCY ACT, S. 10; HINDU LAW.

WILL—*Certified copy given by Court under ordinary copyist rules—Presumption—Evidence Act (I of 1872), s. 114—Compromise between widow and next reversioner, whether binding on later reversioners—Party accepting conveyance from legatee, whether can contest Will—Estoppel by conduct.*

Certified copies of a Will made and given under the authority of a Court, while the Will was in the custody of the Court, and signed under the ordinary copyist rules, not only by the copyist but also by the examiner, whose duty it is to compare the copy with the original, may be presumed under section 114 of the Evidence Act to be correct copies of the original Will.

A compromise between the next reversioners to a widow's estate at the time and the widow as to their claim to be the next reversioners is not binding on the subsequent reversioners.

Where in a suit to recover certain property as the next reversioner of the last male owner, one of the defendants claimed to succeed to the property as legatee under a Will of the last male owner and it appeared that the plaintiff accepted for himself and his wife a certain portion of the property on the footing that the Will was genuine and that the said defendant was entitled to all the properties of the deceased under it and that the plaintiff's father compromised a suit which he had brought to contest the Will:

*Held*, (1) that the plaintiff was estopped from claiming the lands in the possession of the defendant as he had by his conduct led him to believe that his title was recognized by the plaintiff;

(2) that the fact that the plaintiff's father withdrew his suit indicated that he was satisfied as to the genuineness of the Will and the plaintiff not having contested during his father's lifetime could not do so now. M. DORAISAMI REDDI *v.* MUTHULINGA REDDY, 19 M. L. T. 1. **50**

———, construction of **459**

———, *construction of—Duty of Court to ascertain intention of testator—Devise of absolute estate—Condition in restraint of alienation, validity of—Pre-emption suit—Plaintiffs proprietors at time of sale and at date of suit—Suit, whether maintainable—Punjab Pre-emption Act (II of 1905), s. 11 proviso.*

The duty of a Court in interpreting a testament is to ascertain the intention of the testator from all the clauses of the document and to give full effect to it.

Where a testator, having conferred an absolute estate, attaches a condition in restraint of alienation, such a condition is void in law.

Where, therefore, a testator bequeathed his entire property to his two widows and expressly conferred upon them full powers of alienation by sale, mortgage, etc., and there was a clause in a subsequent part of the Will providing that on the death of one

WILL—contd.

widow, the other would succeed to her estate and that on the death of both certain specified collaterals would inherit the property:

*Held*, that what the testator intended was that the widows should have unrestricted powers of alienation, whether during their lives or to take effect after their deaths, and that the later clause did not justify a distinction between gifts *inter vivos* and Wills.

Where plaintiffs in a pre-emption suit were proved to have been proprietors in the village at the time of the sale as well as on the date of the suit and the defendants produced no evidence in rebuttal:

*Held*, that they had complied with the requirements of the proviso to section 11 of the Pre-emption Act and were entitled to pre-empt. P. NEK MUHAMMAD *v.* MAYA RAM, 35 P. W. R. 1916 **605**

———, *construction of—Trust.*

A Will executed by a Hindu in favour of his two nephews contained the following provisions:—

"In the other dwelling house consisting of three sections of *thakurdwara* including the staircase both the executors aforesaid should reside, put up pilgrims and attend on them jointly and from the income thereof to daily perform the usual worship of the gods Murlidhar, Raj Rajeshwari and Mahadeo and the worship on Basant Panchmi, etc., and to look after its repairs. After this is done both the executors should make a receipt and disbursement account of the income annually and after deducting the above expenses should divide the profits between them in half and half.....None of the executors shall in any way be entitled to transfer mortgage or sell this house and if they do so it will be utterly null and void":

*Held*, that the Will created a trust in favour of the two nephews and did not confer an absolute interest upon them. A. MURLIDHAR *v.* DEWAN CHAND, 14 A. L. J. 249 **945**

———, *interpretation of—Construction of document—Court, duty of—Hindu Will by widow, legality of—Reversioner, affirmation by, when validates Will by Hindu widow.*

A Court is bound to give effect to every word of a Will without change or rejection, provided effect can be given to it not inconsistent with the general intent of the whole Will taken together, but if that cannot be done, the general intent has to be pursued, though it may involve the rejection or transposition of a particular superfluous or misplaced word.

Where a Will, after reciting the property of which the testator was the owner, declared that the legatee should be in possession and occupation of the former's entire property, "moveable and immoveable aforementioned, which is or may hereafter be in my possession":

*Held*, that the Will covered the property in which the testator had a reversionary interest on the date of the bequest and which he afterwards inherited, although in his lifetime he did not take any steps to acquire its possession.

A Will by a Hindu widow is absolutely void, and no affirmation by a reversioner, unless it amounts to a renunciation by him of his reversionary interest, can validate it. O. DHAMSA BAKHSH SINGH *v.* JAGMOHAN SINGH, 2 O. L. J. 491 **209**

WILL—contd.

———*Prima facie* proof—Sub-Registrar's endorsement—Revenue Court, if can give effect to Will **368**

———*Suit for administration—Two successive executors—Second executor, whether liable for his predecessor's accounts—Sale of property in order to pay off liabilitics—Executor, whether liable for dereliction of duty—Appointment of debtor as executor, effect of—Testator, whether can give directions about marriage of grandchildren—Costs to be paid out of estate*—Benami *transaction—Motive and subsequent conduct of parties—Previous statements, when can be based against witness—Evidence Act (I of* 1872), *s.* 145.

Where a testator appoints two persons successive executors of his Will, the second executor as such is not liable for the accounts of his predecessor or for his wrongful acts, but it is incumbent upon him to call upon the representatives of his predecessor to render an account and respond in damages for *devastavit*, mismanagement or breach of duty whereby any property of the deceased testator is diverted from a due course of administration.

In order to determine whether a person in whose name a conveyance is taken is intended to be the beneficial owner or a mere name-lender, reliance must be placed not only upon the surrounding circumstances and the position of the parties and their relations to one another, but also upon the motives which could govern their actions and their subsequent conduct.

Where, therefore, a certain house belonging to a testator was mortgaged by him and having been sold in execution of the mortgagee's decree, the purchaser gave out leases to the testator's family who continued to live there and sometime afterwards conveyed the house to the testator's daughter-in-law for consideration which was not proved to be her separate property:

*Held*, (1) that applying the two principal tests of *benami*, namely, the source of the purchase-money and possession of the property the inference could legitimately be drawn that the house was purchased for the benefit of the estate in the name of the daughter-in-law;

(2) that the subsequent conduct of the parties also showed that the purchase in the name of the daughter-in-law was not for her benefit and that the house was allowed to form part of the estate of the testator.

Previous statements, unless used to contradict or discount the evidence of a witness given in a suit cannot be legitimately used and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered.

Where an executor, on coming into possession of the estate of a testator, finds it in a condition of considerable embarrassment and has to sell a portion of it in order to meet certain liabilities, his failure to raise money on interest with a view to save the property from sale does not necessarily amount to a dereliction of duty, unless it is proved that damage has actually resulted to the estate from the sale.

Where a debtor of a testator is appointed executor, the debt due from him is considered to have been paid to him by himself and he is accountable for the amount of his debt as assets.

Directions given by a testator in respect of the marriage expenses of his grandchildren are valid in law.

In a suit for the construction of a Will and for administration of the estate of a testator, the costs of all Courts must be paid out of the estate. C. UPENDRA NATH NAG *v.* BHUPENDRA NATH NAG **267**

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